Citizens of nowhere: the case for a statutory appeal right as part of the UK Statelessness Determination Procedure

1. Since the 1950s, the political and academic discourse on issues of displacement has been eclipsed by a global focus on refugees. This has resulted in limited attention on the plight, predicament, and protection needs of often forgotten stateless people.[1] Statelessness is a technically challenging human rights issue, and one which has profound consequences because it deprives a person of the fundamental right to a nationality.[2] Statelessness on the UK territory is primarily an issue of immigration, with stateless people either arriving in the UK lacking any citizenship and therefore, formal immigration status, or after migrating are subsequently deprived of their nationality by their country of former residence.[3] As a result, stateless persons face serious discrimination, no legal residence, no right to return to their country of origin and are at risk of serious of human rights abuses such as trafficking.[4] [5] The United Nations High Commissioner for Refugees (UNHCR) firmly asserts that stateless persons should enjoy international protection.[6]

[1] Michelle Foster and Helene Lambert "Statelessness as a Human Rights Issue: A Concept whose Time has come" Int J Refugee Law (2016) 28 (4): 564, p.565

[2] Article 15 of the Universal Declaration of Human Rights

[3] UN High Commissioner for Refugees (UNHCR),"Mapping Statelessness in the United Kingdom", November 2011, available from: http://www.refworld.org/docid/4ecb6a192.html p. 132

[4] Ibid. p.6

[5] Foster and Lamber, see note 1, p. 566

[6] UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons" 2014, available at: www.unhcr.org/uk/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html p. 1

2. The 1954 Convention relating to the Status of Stateless Persons (herein '1954 Convention') is the foundation for the legal framework under consideration in this essay. The UK was one of the first countries to ratify the 1954 Convention and an implicit obligation contained within this Convention is that states must identify stateless persons within their jurisdiction.[7] [8] In the UK this obligation is fulfilled by the Home Office's establishment of a Statelessness Determination Procedure (herein referred to as an 'SDP'). This procedure enables stateless people to apply for recognition of their status, a form of leave to remain called 'stateless leave' providing the right to work and access to public funds.

3. Crucially, however, there is no right of appeal for cases refused under the UK SDP. Those left without leave to remain face several human rights challenges, such as the risk of prolonged or repeated detention[9], destitution and homelessness[10] and lack of personal safety[11] all the while being unable to leave the UK. An effective review mechanism is therefore necessary to avoid the risk of stateless people going unrecognised by mistakes in decision making on their cases.

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[7] Ibid. para. 8

[8] UN High Commissioner for Refugees (UNHCR), *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, 11 July 2016, available at: https://www.refworld.org/docid/57836cff4.html p. 2

[9] "Mapping Stateless in the United Kingdom", see note 3, p. 10

[10] Ibid. p. 6

[11] Catherine Blanchard and Sarah Joy, "Can't Stay. Can't Go. Refused asylum seekers who cannot be returned" British Red Cross (2017), pp. 21-23

4. This essay will argue that there should be a statutory appeal right as part of the Statelessness Determination Procedure and presents three broad limbs for this argument.

5. Firstly, the lack of an independent appeal process gives rise to issues of procedural fairness. Assessing statelessness requires consideration of complex and often disputed facts. These types of disputes are best resolved by specialist tribunals that allow for a review of both the facts and the law.

6. Secondly, an appeal right for stateless leave decisions aligns with current government policy. Appeal rights are available for all protection and human rights claims, and it is anomalous that statelessness is not included within this category.

7. Thirdly, the relatively small number of applications under the SDP means that this additional appeal right would have few cost implications. The existing immigration and asylum tribunal provides a system to deal with these appeals, requiring little new infrastructure to ensure the consideration of these cases can take place.

The legal framework

8. The 1954 Convention defines a stateless person as "*a person who is not considered as a national by any State under the operation of its law".*[12] This is the definition which is used in UK law to determine if an applicant is stateless.

9. The international legal framework makes clear that stateless persons are considered a vulnerable group, requiring protection comparable to that of refugees. The 1954 Convention shares many similarities to the 1951 Refugee Convention relating to the Status of Refugees, with in fact the two conventions originally intended to be drafted as a single treaty.[13] The preambles of these Conventions demonstrate the object and purpose of both is concerned with protecting and securing fundamental rights and freedoms for their respective groups.[14] Furthermore, both refugees and stateless person are considered a "*population of persons of concern*", which the UNHCR has a mandate to assist and protect.[15]

10. Part 14 of the UK Immigration Rules[16] translates the international obligations under the 1954 Convention into UK domestic law. The UK SDP was

[12] Article 1(1) 1954 Convention Relating to the Status of Stateless Persons

[13] See "Introductory note by the Office of the United Nation High Commissioner for Refugees (UNHCR)" (May 2014) to the 1954 Convention Relating to the Status of Stateless Persons, available at: https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf

[14] See: Preamble of the 1954 Convention Relating to the Status of Stateless Persons; Preamble of the 1951 Convention Relating to the Status of Refugees

[15] See note 13

[16] Immigration Rules Part 14: Stateless Persons, available at: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons

introduced in 2013 to "*provide a means for stateless persons … to access their basic human rights by granting them leave to remain in the UK."*[17] This is supplemented by guidance for decision makers.[18] The UK is unique in that it is one of about 20 countries worldwide to have established a formal SDP.[19]

11. Part 14 of the Immigration Rules requires Home Office decision makers to address three main questions in order to come to a decision on granting leave to remain as a stateless person. Firstly, the definition of a stateless person in Article 1(1) of the 1954 Convention must be applied as outlined in paragraph 401. Secondly, under paragraph 403(c), a decision-maker must determine whether an applicant is admissible to their country of former habitual residence. Finally, a decision maker must also consider whether an applicant is excluded for recognition under the 1954 Convention[20] or under the General Grounds for Refusal contained in paragraph 322 of the Immigration Rules[21].

12. There is no statutory right of appeal against a decision to refuse stateless leave. [22] Internationally this makes the UK an outlier amongst countries

[17] Home Office Policy Guidance "Stateless leave", 30 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leaveguidance-v3.0ext.pdf p.6

[18] Ibid.

[19] UN High Commissioner for Refugees (UNHCR), *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, July 2020, available at: https://www.refworld.org/docid/5f203d0e4.html p. 5

[20] Article 2, 1954 Convention Relating to the Status of Stateless Persons

[21] Immigration Rules paragraph 322

[22] Home Office Policy Guidance, see note 17, p. 26

operating an SDP.[23] The Immigration Act 2014 reduced rights of appeal to the First-tier Tribunal (Immigration and Asylum Chamber)(FTT) to cover only decisions concerning protection claims and human rights claims.[24] A protection claim is defined as one relating to the Refugee Convention or a claim for humanitarian protection. A human rights claim generally relates to cases where removal from the UK may interfere with Article 8 of the European Convention on Human Rights (ECHR). A claim to be recognised as a stateless person is notably absent from these definitions.

13. Those refused stateless leave may instead request an Administrative Review. This is an internal Home Office review that will only consider case working errors.[25] Notably, immigration rules on Administrative Review outline that the reviewer will generally not consider any new evidence.[26] This is a narrow exercise limited to technical errors and not an opportunity to review the substance of the decision.

14. In the absence of a statutory appeal right an applicant's sole recourse to independent scrutiny of the Home Office decision is Judicial Review.

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[23] UN High Commissioner for Refugees (UNHCR), *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, July 2020, available at: https://www.refworld.org/docid/5f203d0e4.html p. 18

[24] See s.82 of the Nationality, Immigration and Asylum Act 2002 (c41)

[25] Immigration Rules Appendix AR: administrative review, available at: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ar-administrative-review

[26] Immigration Rules Appendix AR2.4

The need for an appeal right to ensure procedural fairness

15. It is an established principle of natural justice that every government decision which has a significant impact should be subjected to the presumption of procedural fairness.[27] Home Office decisions on applications for stateless leave have profound impact since an incorrect decision can leave people at risk of multiple human rights violations.[28] In the immigration context Lady Hale stated that *"access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts."*[29] The Leggatt report on Tribunals accepted that administrative review could play a positive role if public bodies adopted the "*kind of independent-mindedness and impartiality which can be expected from tribunals."*[30] However, as examined below this has not been achieved and UNHCR recommends there should be a right of appeal as a procedural guarantee in any statelessness determination procedure.[31]

16. Administrative review in the Home Office lacks institutional independence and cannot be regarded as a replacement for a right of appeal. [32] This is best illustrated by statistics outlining that only 8% of in-country Administrative

[27] *Ridge v Baldwin [1964] AC 40*

[28] "Mapping Stateless in the United Kingdom", see note 3, pp. 94-96

[29] *Regina v Secretary of State for the Home Department, Ex parte Saleem [2001] 1 WLR 443* at 458 (Hale LJ)

[30] Robert Thomas and Joe Tomlinson, "A different tale of judicial power: administrative review as a problematic response to the judicalisation of tribunals" P.L. 2019, 537-562, p. 544

[31] UNHCR Handbook, see note 6, para. 76

[32] Thomas and Tomlinson, see note 30, p. 544

Reviews are successful[33]. This is despite an internal Home Office review which estimated that approximately 60% of the volume of appeals allowed are due to case working errors.[34] The Independent Chief Inspector of Borders and Immigration (ICIBI) found significant causes of concern during his inspection of the Administrative Review process, finding a lack of scrutiny whereby Administrative Review decisions often repeated incorrect reasoning from the initial decision.[35] The conclusion drawn by legal academics has been that "*administrative review has largely weakened the ability of people to secure redress"*.[36]

17. A refusal of stateless leave can be subject to Judicial Review. However, this alone is also not a suitable redress mechanism for statelessness cases. As Lord Diplock identifies, the grounds of Judicial Review are those of "illegality", "irrationality" and "procedural impropriety"[37]. Judicial Review therefore has limited scope, focused on whether a public authority has acted lawfully, and it is not a review of the merits of a decision. Lord Kerr further confirms that the nature of Judicial Review is "*not to be confused with a full merits review"* even

[33] Independent Chief Inspector of Borders and Immigration (ICIBI), "An inspection of the Administrative Review processes introduced following the 2014 Immigration Act (September-December 2015)", May 2016, para. 2.29

[34] Ibid. footnote 8

[35] Ibid. para. 2.10

[36] Thomas and Tomlinson, see note 30, p538

[37] *Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9 [1985] A.C. 374* at 410 (Diplock LJ)

in human rights cases where the proportionality of a decision may be under inquiry.[38]

18. Statelessness cases are complex, requiring a high level of scrutiny akin to asylum cases.[39] [40] The definition in Article 1(1) of the 1954 Convention requires 'proof of a negative' in that a stateless person must be able to demonstrate they have no nationality. Statelessness cases therefore present significant evidentiary and practical challenges requiring a full merits review.[41] The decision maker must consider the operation of foreign law, both in theory and in practice, whilst the absence of documentary evidence such as a passport or identity documents can pose significant challenges in determining how a country in which the applicant was born or previously resided, considers the citizenship status in question.[42] The truthfulness or credibility of the applicant is also paramount, and an area notably absent from the Home Office policy guidance[43]. Decision making is therefore complex, presenting many pitfalls for the decision maker.

[38] *Machalak v GMC [2017] UKSC 71* [20] (Kerr LJ)

[39] Independent Chief Inspector of Borders and Immigration (ICIBI), "An inspection of Administrative Reviews (May-December 2019)", May 2020, para 11.5

[40] Robert Thomas *Immigration Judicial Reviews: An Empirical Study* (2019), p. 127

[41] UNHCR Handbook, see note 6, para. 77

[42] Ibid. para. 95

[43] Home Office Policy Guidance, see note 17

19. The available statistics further suggest that Home Office decision making is flawed and prone to errors.[44] The Home Office does not publish regular statistics on statelessness, however, UNHCR reports that in 2017 there were 969 applications to the SDP with 98 grants of stateless leave between 2013 and 2017.[45] This is an unusually low grant rate, in some years as low as 5%.[46] In the comparable context of asylum cases the grant rate in 2017, was 22% with 41% of appeals being allowed.[47] The lack of judicial scrutiny may therefore, be part of the explanation for the low grant rate in statelessness cases.[48]

20. Evidence from practitioners also suggests there are significant shortcomings in the determination of facts by decision makers in the SDP. Country evidence is fundamental to statelessness determination[49], but the ICIBI found major limitations in Home Office Country of Origin Information (COI) reports. COI reports were found to be neither up to date, nor did they permit decision makers to reach objective judgements.[50] Given the potentially crucial

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[44] Johanna Bezzano and Judith Carter "Statelessness in practice: Implementation of the UK Statelessness Application Procedure", University of Liverpool Law Clinic (3 July 2018), p.14

[45] UN High Commissioner for Refugees (UNHCR), *UNHCR submission to the Post-Implementation Review Evidence Gathering Exercise of the Legal Aid, Sentencing andPunishment of Offenders Act 2012*, 28 September 2018, available at: https://www.unhcr.org/uk/5bb70cea4.pdf para. 31

[46] Immigration Law Practitioners Association (ILPA) and University of Liverpool Law Clinic "Statelessness and applications for leave to remain: a best practice guide" (2016), p. 7

[47] Georgina Sturge, "Asylum Statistic", House of Commons Library, (Number SN01403, 3 September 2020), pp. 9-10

[48] Bezzano and Carter, see note 43, p. 30

[49] UNHCR Handbook, see note 6, para. 86

[50] Independent Chief Inspector of Borders and Immigration (ICIBI), "An inspection of the Home Office's production and use of Country of Origin Information (April-August 2017)", January 2018, p. 2

importance of personal testimony, interviews are not conducted regularly, even when these could be used to resolve evidential issues.[51] This can potentially lead to findings on credibility based on incomplete evidence. Even where clear evidence of statelessness exists, decision makers can misinterpret the facts. This is reported to be the case with Palestinians who have never resided in the Occupied Palestinian Territories.[52] However, there is no mechanism to correct inevitable errors resulting from the complexity of these cases.

21. An appeal to a specialist tribunal is the most effective way to ensure procedural fairness in statelessness cases. The conventional meaning of an appeal "*entails a review of an original decision in all its aspects.*"[53] This means a tribunal can have jurisdiction over both facts and law. Unlike in the Administrative Review process an appellant can therefore submit new evidence, to aid with the interpretation of facts, or give oral evidence to clarify directly to the tribunal. Statelessness cases are characterised by disputed facts[54] thus an independent adjudicative body that can make findings of fact is fundamental to ensure fairness.

22. Crucially an appeal process is more likely to provide finality for statelessness cases than the current system. In an appeal a tribunal can substitute the

[51] Bezzano and Carter, see note 43, p. 18

[52] Ibid. p. 20

[53] *Machalak v GMC [2017] UKSC 71* [20] (Kerr LJ)

[54] Bezzano and Carter, see note 43, p. 2

decision under review with its own.[55] In the area of immigration the current lack of appeal rights and reliance on judicial review can result in significant delay and costs. If a Home Office decision is struck down in judicial review proceedings it is sent back to the Home Office to be remade. It is not uncommon for the Home Office at this stage to make new errors.[56] Whilst it is open to the Home Office to appeal a tribunal decision, this process is nevertheless more likely to bring finality to the case.[57] The timely conclusion of cases, reduces both uncertainty for the individual and costs for the public purse, through what could be a more efficient approach for the Home Office and the justice system.

Policy and costs arguments for a right of appeal

23. The absence of an appeal right under the SDP is a policy abnormality that should be corrected. The policy behind the Immigration Act 2014 purposefully maintained appeal rights for cases that fall for consideration under the Refugee Convention, for humanitarian protection or on human rights grounds.[58] However crucially, Parliament did not specifically consider the issue of withdrawing appeal rights for statelessness cases.[59] The Home

[55] *Machalak v GMC [2017] UKSC 71* [20] (Kerr LJ)

[56] Robert Thomas and Joe Tomlinson "A Design Problem for Judicial Review: What We Know and What We Need to Know about Immigration Judicial Reviews" UK Constitutional Law Association, https://ukconstitutionallaw.org/2017/03/16/robert-thomas-and-joe-tomlinson-a-design-problem-for-judicial-review-what-we-know-and-what-we-need-to-know-about-immigration-judicial-reviews/ accessed September 2020

[57] Thomas, see note 40, p. 23

[58] Ibid., p. 163

[59] Ibid., p. 163

Office's own policy guidance importantly recognises stateless persons are "*vulnerable to serious discrimination"*[60] and that the purpose of the SDP is to provide a means for stateless persons "*to access their basic human rights".*[61] This therefore presents a contradiction that needs to be resolved.

24. Statelessness should rightly be considered as an issue concerning fundamental human rights. The introduction to the 1954 Convention uses the language of protection.[62] The UNHCR Handbook on the protection of stateless persons further emphasises that the 1954 Convention is concerned with "*ensuring the protection of this vulnerable group".*[63] It should be highlighted however, that mere regularisation of immigration status is not sufficient to safeguard stateless persons, since the 1954 Convention provides a set of core rights attached to the specific recognition of Stateless Status.

25. A further policy rationale by Government for replacing appeal rights with Administrative Review was the expectation that it would reduce costs and delay.[64] After a re-inspection of Administrative Review, in his 2020 report ICIBI "*noted that the Home Office had yet to demonstrate it had delivered an efficient, effective and cost-saving replacement for appeals*."[65] Furthermore,

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[60] Home Office Policy Guidance, see note 18, p. 5

[61] Ibid., p. 6

[62] See note 13, "Introductory note by the Office of the United Nation High Commissioner for Refugees (UNHCR)"

[63] UNHCR Handbook, see note 6, para 3

[64] Independent Chief Inspector of Borders and Immigration (ICIBI), see note 33, p. 2

[65] Independent Chief Inspector of Borders and Immigration (ICIBI), see note 39, para 3.4

statelessness applications are relatively small in number, with less than a thousand per year.[66] This suggests that the cost implications for providing an appeal right would be outweighed by the need for effective redress in cases concerning fundamental rights.

26. A specialist immigration tribunal already exists in the form of the FTT (Immigration and Asylum Chamber). Given that a significant part of the FTT's caseload is asylum cases, the tribunal is accustomed to dealing with the evidentiary, credibility and legal issues arising in complex protection appeals. Case studies from reports by Asylum Aid, UNHCR and Liverpool Law Clinic further detail many instances where the FTT has made findings of fact on statelessness.[67] Therefore, to introduce an appeal right to the SDP would generate no costs otherwise associated with the need to create a new adjudicative body.

27. Given the reduction in appeals achieved by the Immigration Act 2014 the introduction of an appeal right under the SDP will not add significant extra pressure on the Tribunal. The number of appeals received by the FTT in 2018/19 was approximately 44, 000 cases, down from 105, 000 cases in 2013/14.[68] On average only about a third of asylum claimants in a year lodge an appeal.[69] Using this as a guide to estimate the number of appeals that

[66] UNHCR, See note 45

[67] "Mapping Stateless in the United Kingdom", see note 3; Bezzano and Carter, see note 43

[68] Marialuisa Taddia "Staying Powers" Law Gazette https://www.lawgazette.co.uk/features/staying-powers/5104294.article accessed September 2020

[69] Sturge, see note 47, p. 10

might be lodged against a refusal of stateless status, this would result in a mere 350 appeals per year. The cost impact of granting a right to appeal for SDP decisions is therefore likely to be negligible.

28. At the time of introduction in 1971, immigration appeals were regarded as a vital safeguard necessary for the rule of law.[70] With the Immigration Act 2014, the limitation on appeal rights was introduced hand in hand with the so-called 'hostile environment' aimed at making the UK a less welcoming place for migrants.[71] This policy was partly responsible for the so-called 'Windrush scandal', which led to Commonwealth Citizens being wrongly detained, deported and denied legal rights. [72] The Windrush Lessons Learned Review concluded that in the face of poor decision making, the reduced number of immigration appeal routes meant there were insufficient safeguards.[73]

29. The Windrush scandal was connected to complex nationality laws and the difficulties of proving citizenship for people in vulnerable situations who lacked documents.[74] The parallels with stateless claims is self-evident, the only difference being that decision makers were required to assess British nationality laws instead of those of a foreign country. Importantly, the Windrush scandal does not stand in isolation, with stateless people in the UK

[70] Thomas and Tomlinson, see note 30, p. 552

[71] Joint Committee on Human Rights *Legislative Scrutiny: Immigration Bill* (2013-14, HL 102, HC 935), p. 3

[72] "Windrush Scandal Explained" JCWI available at: https://www.jcwi.org.uk/windrush-scandal-explained

[73] Wendy Williams *Windrush Lessons Learned Review* (March 2020, HC 93) p.146

[74] Ibid., p. 82

currently facing a similar plight. The independent scrutiny and safeguard of a statutory appeal right would help ensure stateless people do not experience the same fate as those in the Windrush generation.

Conclusion

30. This essay views the absence of an appeal right as a first step to address access to justice for stateless persons. However, in considering the broader context, there is another key issue not considered by this essay. Due to its breadth, it has not been possible to discuss the lack of availability of legal aid for applications to the SDP. This has significant implications for the ability of people in vulnerable situations to effectively access Home Office procedures and the courts[75] and merits further attention.

31. This essay has made the argument that a statutory right of appeal should be introduced as part of the SDP. This is a desirable reform because it would provide an important procedural safeguard for a group of people facing significant human rights challenges. It is a useful reform because it brings coherence to UK Government policy whilst applying the lessons from past failures to provide for a more effective system of redress. Finally, it is practical as the infrastructure of a specialist tribunal and judges already exists, and the relatively small costs would be outweighed by the substantial benefits.

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[75] "Mapping Stateless in the United Kingdom", see note 3, p. 89