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HUMAN RIGHTS AND THE PROTECTION OF STATELESS PERSONS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This article analyses the protection of stateless persons under the most recent case law of the European Court of Human Rights (i.e. Hoti v. Croatia and Sudita Keita v. Hungary). The article briefly discusses the phenomenon of statelessness and the basic mechanisms governing it, as well as the general standard for the application of Art. 8 of the European Convention on Human Rights in cases involving foreigners who are stateless. This is followed by a discussion of the aforementioned ECtHR judgments, highlighting their principal findings. Thereafter the impact of UN standards concerning stateless persons on the ECtHR's reasoning is assessed (based on the UNHCR's third-party intervention in Hoti), as well as the differences between the approaches taken by the Strasbourg Court and the UN Refugee Agency. Finally, the treatment of foreigners in the Polish legal system is examined, and the importance of the Hoti and Sudita Keita judgments to the potential improvement of the situation of stateless persons in Poland is assessed.*

Keywords: ECHR, foreigners, migration, statelessness, UNHCR

INTRODUCTION

Statelessness is the condition of a "person who is not considered as a national by any State under the operation of its law."[1] This is an area chiefly regulated by UN conventions. Lately however, the European Court of Human Rights (ECtHR or the Court) has issued its first rulings touching on the special situation of those foreigners who do

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[1] Art. 1(1) of the Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, 360 UNTS 117.

not hold the citizenship of any state, viewed from the perspective of their rights protected by Art. 8 of the European Convention on Human Rights (ECHR or the Convention). These were the judgments of 26 April 2018 in *Hoti v. Croatia*[2] and 12 August 2020 in *Sudita Keita v. Hungary*.[3] In both cases the Strasbourg Court underscored as an important factual element the circumstance that the applicants were stateless, with their condition having a bearing on the evaluation of the so-called positive obligations of the state as regards regularizing their residence status.

In this article we first identify what statelessness is (Section 1) and then what the basic mechanisms governing it are (Section 2). Subsequently we focus on the general standard concerning the application of Art. 8 of the Convention in cases relating to foreigners (Section 3). This is followed by the analysis of the ECtHR judgments in the *Hoti* and *Sudita Keita* cases (Section 4), and their significance to the status of stateless persons in the state (Section 5). Based on the example of the United Nations High Commissioner for Refugees' (UNHCR) third-party intervention in *Hoti*, we highlight the differences in the ECtHR's approach from the prevailing UN position regarding the protection of stateless persons (Section 6). In the final part we discuss the relevance of the *Hoti* and *Sudita Keita* judgments for the situation of stateless persons in Poland (Section 7).

1. STATELESSNESS: THE PHENOMENON

The number of stateless persons worldwide is estimated at more than 10 million. The plurality, constituting as many as 40%, live in the Asia-Pacific Region. Europe's stateless population is around 600 thousand. Among these, the majority have been made stateless in connection with the respective collapses of the Soviet Union and Yugoslavia in the 1990s. The vast majority of stateless persons living in Europe (80%) inhabit a scarce four countries (Latvia, Russia, Ukraine and Estonia).[4] According to UNHCR data, European countries with the largest stateless population also include Sweden, Germany and Poland.[5] However, the UNHCR estimates might not be reliable because they are based on disparate methodologies. For example, the size of the stateless population in Poland is set at *circa* 10,000, but it is based on the Polish universal census of 2011 which not only relied on declarations but also confounded the categories of "stateless" and "undefined nationality."[6] Whilst the precise size of the constituency does

[2] ECtHR, *Hoti v. Croatia* (App. No. 63311/14), 26 April 2018.

[3] ECtHR, *Sudita Keita v. Hungary* (App. No. 42321/15), 12 May 2020.

[4] *The World's 2017. Stateless and children*, Institute on Statelessness and Inclusion, January 2017, pp. 73–75.

[5] UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, p. 59.

[6] All told, 2,020 persons declared themselves as stateless and 8,805 persons were declared as being of undefined nationality by the social services, D. Pudzianowska, M. Szczepanik, *Ending childhood statelessness: A study on Poland*, ENS Working Paper 3/15, p. 3, available at: https://bit.ly/3frljsj (accessed 30 April 2021).

not negate the importance of the issue, it should be noted that "[t]he inadequacy of empirical data remains a pertinent and crucial challenge to the protection of stateless persons globally."[7]

The causes of statelessness are complex. Here, it will only be apt to state, by way of a summary, that it can arise from the negative concurrence of citizenship legislation, *i.e.,* lack of synchronization of citizenship law among the various states concerned. It can also be the result of loss of citizenship owing to renunciation by the individual by making the appropriate declaration to this effect before the public authorities. Statelessness can also result from the involuntary loss of citizenship. This may involve loss by operation of the law (*ex lege*) or by a decision of the competent authority (deprivation of citizenship) when legally prescribed grounds are met. In contrast to the above identified grounds relating to individuals, statelessness can also be a collective phenomenon. For example, legislative gaps in provisions adopted to regulate the citizenship situation of persons in relation to state succession is a driver of statelessness on an enormous scale.[8]

The situation of stateless people is unique when viewed against the backdrop of other foreigners, primarily due to the potential for violations of their basic rights. Their access to a lion's share of rights is rendered difficult; including even rights regarded as human rights and thus theoretically not linked to holding the citizenship of any state whatsoever. The stateless person usually has no documents and no practical avenue to regularize residence status, as a result of which access to a number of rights is cut off. Stateless persons usually encounter difficulties moving around, pursuing their private and family lives (e.g. marrying, registering child births), or accessing the courts. There is also a risk of unjustified loss of personal freedom due to a detention order,[9] even when the person concerned comes out before the public authorities on his or her own initiative with the intention of regularizing one's situation.[10] The stateless person often avoids contact with the various institutions and thus becomes particularly vulnerable to all sorts of abuses, such as discrimination or even human trafficking. Stateless persons have no access to diplomatic or consular protection when their rights are being violated.

2. STATELESSNESS AS A REGULATORY PROBLEM

Regulatory issues relating to stateless persons can be addressed on two basic planes. We can distinguish on the one hand treaties against statelessness, such as the 1961

[7] M. Foster, H. Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28(4) International Journal of Refugee Law 564 (2016), p. 569.

[8] For a more extensive treatment of the causes of statelessness see: D. Pudzianowska, *Bezpaństwowość w prawie publicznym* [Statelessness in public law], Wolters Kluwer, Warszawa: 2019, pp. 37–45.

[9] The ECtHR highlighted the extreme exposure of stateless persons in *Kim v. Russia* (App. No. 44260/13), 17 July 2014, para. 54.

[10] Centrum Pomocy Prawnej im. Haliny Nieć, *Ochrona bezpaństwowców przed arbitralną detencją w Polsce* [Protection of stateless persons from arbitrary detention in Poland], 2015.

Convention on the Reduction of Statelessness[11] and – on the regional level – the European Convention on Nationality (ECN).[12] The goal in these treaties is, in a gist, to avert the emergence of new cases of statelessness (prevention) and to bestow citizenship on the stateless persons (reduction). On the other hand, there are instruments for the protection of stateless persons, such as the 1954 Statelessness Convention.[13]

There is a marked tendency in international law to prioritize the instruments of prevention and reduction over those of protection. Since the beginning of the previous century the goal of the international community has remained first and foremost to eliminate statelessness. This is what is happening in the UN system, even though the two mechanisms (counteraction and protection) are regarded as complementary to each other. In turn, the Council of Europe's two basic instruments on statelessness mentioned above, i.e. the ECN and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession[14] do not deal with the protection of stateless persons, but only with the counteraction (*viz.* prevention and reduction) of statelessness. In this connection, the ECtHR's recent case law is all the more interesting as it concerns strengthening the protection of stateless persons.

3. THE ECtHR'S APPLICATION OF ART. 8 ECHR IN CASES OF FOREIGNERS

The ECtHR's case law standard for the protection of stateless persons has been developed as a result of the application of Art. 8 of the Convention to them. This provision has long been applied to cases involving foreigners' residence status. According to ECtHR case law, the Convention does not guarantee to the foreigner a right to reside in any specific state, and the authorities of the latter have a right to regulate foreigners' entry and residence in their territory. Furthermore, the Court has always underscored the principle that states have a wide margin of appreciation in the establishment of rules for foreigners' entry and residence in their territory.[15] Moreover, neither Art. 8 of

[11] Convention on the Reduction of Statelessness, adopted on 30 August 1961 by a Conference of Plenipotentiaries in pursuance of General Assembly resolution no. 896 (IX) of 4 December 1954, 989 UNTS 175.

[12] European Convention on Nationality, signed in Strasbourg on 6 November 1997, Council of Europe, ETS No. 166.

[13] For a more extensive treatment of the regulatory challenges surrounding statelessness, *see* G. Gyulai, *The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime*, in: A. Edwards, L. van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge: 2014; Pudzianowska, *supra* note 8, Chapters 3 and 4.

[14] Strasbourg, 19 May 2006, Council of Europe, ETS No. 200.

[15] ECtHR, *Chahal v. United Kingdom* (App. No. 22414/93), 15 November 1996, para. 73; Üner *p. Holandii* (App. No. 46410/99), 18 October 2006, para. 54; *Slivenko v. Latvia* (App. No. 48321/99), 9 October 2003, para. 115; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 355; *Abuhmaid v. Ukraine* (App. No. 31183/13), 12 January 2017, para. 101.

the Convention nor any other provision therein guarantees a right to be granted any specific status with regard to one's residence in the territory of a state, provided the solution offered by the state allows the individual to exercise the right to private and family life without hindrance.[16] In other words, it would be *ultra vires* for the ECtHR to rule on whether the individual ought to receive this or that type of residence permit, as the latter decision is left to the discretion of state authorities.[17]

At the same time, the ECtHR's case law stresses that restrictions on a foreigner's residence can in some cases entail a violation of Art. 8 of the Convention. This refers to situations when such restrictions have disproportionate repercussions on the individual's private or family life.[18] The protection stemming from Art. 8 ECHR has undergone a gradual expansion, involving a shift of focus from the protection of family life towards the private life. Particularly in the latter respect the foreigner's links to the respective state's society are given a broad examination. It is already settled case law that this provision also protects the right to form and develop relationships with other persons and the external world, and can sometimes include elements of the individual's social identity. This is of special importance to settled (integrated) migrants.[19] The Court found that the entirety of social links between settled migrants and the societies they live in forms part of the concept of "private life" within the meaning of Art. 8 of the Convention, and accordingly is protected.[20]

Thus, a positive obligation for the state to guarantee the effective enjoyment of private or family life also follows from Art. 8 ECHR. While the concept of negative obligations puts the accent on the state's obligation to refrain from interfering with a right, the essence of a positive obligation – a tradition of long standing with the ECtHR – is to require state authorities to provide effective and accessible means with which to protect the right. This concept of positive obligations of a state under Art. 8 ECHR has supplied the ECtHR with a point of reference for two cases relating to the protection of stateless persons, which are discussed below.

4. RECENT ECtHR CASES INVOLVING THE PROTECTION OF STATELESS PERSONS

In two aforementioned recent cases – *Hoti v. Croatia* and *Sudita Keita v. Hungary* – the ECtHR dealt with the special situation of foreigners not holding the citizenship of

[16] ECtHR, *Aristimuño Mendizabal v. France* (App. No. 51431/99), 17 January 2006, para. 66; *B.A.C. v. Greece* (App. No. 11981/15), 13 October 2016, para. 35.

[17] ECtHR, *Ramadan v. Malta* (App. No. 76136/12), 21 June 2016, para. 91.

[18] ECtHR, *Maslov v. Austria* (App. No. 1638/03), 23 June 2008, para. 100; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 355.

[19] For this category of foreigners, see: D. Pudzianowska, *Obywatelstwo w procesie zmian* [Citizenship in a process of change], Wolters Kluwer, Warszawa: 2013, p. 256.

[20] *See e.g. Maslov v. Austria*, para. 63; *Abuhmaid v. Ukraine*, para. 102.

any state, looking at it from the perspective of their rights under Art. 8 ECHR. In both the judgments the Court stressed that the circumstance of being stateless, giving rise to specific difficulties for the applicants and special obligations owed by the state to them, is an important element of the facts of the case.[21]

4.1. The facts in both cases

4.1.1. *Hoti v. Croatia*

Bedri Hoti was born in Kosovo in 1962 to Albanian parents who had left their home country of Albania and had become recognized as refugees in Yugoslavia. At the time Kosovo was an autonomous province of Serbia within Yugoslavia. In 1979, as a 17-year-old, the applicant left Kosovo to settle in Croatia, which at that time was still part of Yugoslavia. There he received a temporary residence permit (due to the validity of his refugee status throughout Yugoslavia), but his application for permanent residence was refused in 1989 by the minister competent for the interior because of the government's policy of expecting Albanian refugees to apply for Yugoslavian citizenship. The applicant was not interested in becoming a Yugoslavian citizen; he only wanted a permanent residence permit.

Although he had resided in the same town (Novska) ever since arriving in Croatia, his status became complicated after the disintegration of Yugoslavia. In June 1991, after Croatia declared independence, war broke out and the applicant was obliged to render compulsory civil service to the local authority. At that time, he received another temporary residence permit. In June 1992 he applied to become a Croatian citizen, but was unsuccessful as he failed to meet the condition requiring him to resign from his Albanian citizenship.[22] He re-applied in 1995 but was refused again, on that occasion because of his failure to meet the condition of uninterrupted legal residence in Croatia over a period of five years. In May 1996, the administrative court upheld the decision.

In November 2001, the applicant applied to the minister competent for the interior for a permanent residence permit. In July 2003, the minister refused, citing Mr Hoti's failure to meet the statutory grounds and the absence of any state interest, in the minister's view, in granting the permit. The decision was upheld by the administrative court. In October 2008, the Constitutional Court rejected the applicant's constitutional complaint.

Subsequently, from July 2011 to 2013 the applicant's lawful residence was enabled by temporary humanitarian permits (valid for one year). In June 2014, however, upon applying for another such permit he was requested to produce a valid travel document, and because he could not produce one the police authority issued a negative decision. Mr Hoti appealed, but neither the minister, nor the administrative court found any grounds on which to modify or reverse the decision. Nonetheless shortly thereafter, in September 2015, the police in Novska granted him such a permit with the justification

[21] *Hoti v. Croatia*, paras. 24, 110; *Sudita Keita v. Hungary*, paras. 21, 35.

[22] For the sake of brevity, we will not recount the details of Croatian law of citizenship and provisions on foreigners. The ECtHR quotes them on pp. 10–15 in *Hoti*.

that even though Mr Hoti had not produced a travel document the minister had approved the permit. The police issued another such permit in October 2016, also citing ministerial approval.

4.1.2. *Sudita Keita v. Hungary*

The applicant in this case was Michael Sudita Keita, a stateless person (of Somali-Nigerian origin) born in 1985. He entered Hungary illegally in 2002. Thereafter he applied for refugee status, which the Hungarian authorities rejected in the same year. Between 2002 and 2017 he experienced difficulties regularizing his residence in Hungary, except for a period of two years during which he was given a humanitarian permit. Twice (in April 2003 and November 2009) he received decisions ordering his return; decisions which were not enforced. Over several years (2010 to 2017) administrative procedures took place to recognize him as a stateless person. Only in 2017 was he recognized as such.[23] In his application he alleged a violation of the Convention on account of the circumstance that the Hungarian authorities had failed to regularize his residence situation for fifteen years, which violated his dignity and amounted to discrimination. He also asserted that during the period when his residence was irregular, he had no access to unpaid healthcare and could not work legally or marry.

4.2. The pivotal rationale in both cases

In both of the cases the ECtHR first found the applicants' situation to fall within the scope of private life protected under Art. 8 ECHR. The Court noted that Bedri Hoti had resided in Novska for 40 years, worked a variety of jobs there and bonded with the local community. As of the time of the ruling he was 55, had no connection with any other state, nor any contact with relatives residing abroad.[24] Michael Sudita Keita, in turn, had resided in Hungary since 2002, not having residence status in any other state. Since 2009 he had lived with his partner and completed vocational training in Hungary.[25]

Having found the applicants' respective situations to fall within the concept of private life protected under Art. 8 ECHR, the Strasbourg Court went on to consider whether their residence was uncertain and whether such uncertainty in their residential status had a negative bearing on their private lives. In other words, the ECtHR pondered whether an interference with the applicants' respective private lives took place. In *Hoti* the Court stressed that the applicant's residence was indeed uncertain, for it hinged on whether the authorities would grant him a humanitarian permit for yet another

[23] Initially he was refused as not meeting the requirement of legal residence in the country, although the Hungarian Constitutional Court found that requirement to be unconstitutional as a result of the reference made by the court of first instance in the case of Michael Sudita Keital; *see* Hungarian Constitutional Court (6/2015), judgment of 25 February 2015, in English: http://www.refworld.org/cases,HUN_CC,5542301a4.html (accessed 30 April 2021).

[24] *Hoti v. Croatia*, para. 125.

[25] *Sudita Keita v. Hungary*, para. 33.

year. That, in turn, depended on his being able to either produce a travel document – a condition which he was unable to meet because of his statelessness – or receiving the consent of the minister competent for the interior, the nature of which was discretionary. Though the applicant was formally allowed to work, finding employment was difficult on account of his irregular residence situation. The fact of being unemployed and engaged only in off-and-on work negatively reflected on his ability to obtain health insurance and pension rights. In the end, the Court concluded: "(…) particularly in view of the applicant's advanced age and fact that he has lived in Croatia for almost forty years without having any formal or *de facto* link with any other country, (…) the uncertainty of his residence status has adverse repercussions on his private life."[26] It reached the same conclusion in *Sudita Keita*. The ECtHR stressed that the applicant's residence status in Hungary had been uncertain for a period of approximately 15 years. During the time of his entire residence in Hungary, only from 2006 to 2008 did he have a residence permit. That left him without healthcare or employment in Hungary for extended periods of time.[27]

The last step in the analysis of both the cases was for the ECtHR to fit the problems of the regularization of the residence status of stateless persons under the umbrella of positive obligations of the state under Art. 8 ECtHR. The Court held that the states' failure to regularize the applicants' respective residence situations amounted to a violation of Art. 8 of the Convention by virtue of the State's failure to comply with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the regularization of residence status in a manner respectful of the right to private life.[28]

In *Hoti* the Court emphasized that the state authorities, in rendering their decisions as to residence permits. made no reference whatsoever to matters of the applicant's private life, particularly in the context of his statelessness. Though Croatian authorities had been well familiar with the applicant's situation, and the applicable legislation provided grounds for according him the right of permanent residence on account of his unique personal circumstances, such a permit was never granted. Instead, the lack of any state interest in granting him such a permit was invoked.[29] Similarly, special circumstances relating to the right to private life were not considered by the administrative court. As regards the temporary residence permits on humanitarian grounds, the ECtHR found that they required the applicant to fulfil a condition that he, as a stateless person, was in no position to meet, *viz.* to produce a valid travel document. Moreover, the ECtHR noted that the discretionary nature of the minister's powers with regard to such type of permits reflected negatively on the applicant's situation. Interruption of the continuity of legal residence, owing to the fact that in one year (2014) the minister refused to grant the applicant a residence permit and in subsequent years (2015 and 2016) did grant

[26] *Hoti v. Croatia*, para. 126.
[27] *Sudita Keita v. Hungary*, para. 34.
[28] *Hoti v. Croatia*, para. 141; *Sudita Keita v. Hungary*, para. 41.
[29] *Hoti v. Croatia*, para. 134.

it, frustrated his ability to meet the condition of uninterrupted legal residence in the procedure for a permanent residence permit.[30]

In *Sudita* the ECtHR emphasized that the application considered not the applicant's inability to obtain the status of a stateless person in Hungary,[31] but the inability to have the applicant's residence status regularized over fifteen years. Accordingly, it was not for the Court to decide whether the applicant ought to have been accorded stateless status (as he ultimately was in 2017), but instead to examine whether he had had access to an effective avenue for regularizing his residence in such manner as would have allowed him to live a stable private life in Hungary. The Court found that access to any such procedure had not been available to the applicant, even though the authorities had been aware of the special circumstances of his personal situation. In particular, they were aware of his statelessness, as the Nigerian Embassy in Budapest had in 2006 denied that he was a Nigerian citizen.[32]

5. NEW ELEMENTS IN EACH CASE AND REFERENCE TO UN'S CONVENTION STANDARD

It is of extraordinary significance that in both cases the ECtHR emphasizes that the applicant foreigners are stateless persons.[33] Thus the Court noted the existence of a special category of immigrants who are stateless, and – as it follows later in the Court's rationale – can accordingly be entitled to special rights. In outlining the standard for the protection of stateless persons, the ECtHR referred to the standards of protection of stateless persons set forth in the 1954 Convention relating to the Protection of Stateless Persons.[34] This is understandable given that the protection of stateless persons is not the subject matter of any of the Council of Europe's conventions. Accordingly, the ECtHR filled the gap in the Council of Europe system with its own case law referencing the general provisions of the European Convention on Human Rights (Art. 8) and the 1954 Convention relating to the Protection of Stateless Persons.

5.1. Prohibition of impossible conditions

The Court invoked Art. 6 of the 1954 Convention, which mandates that stateless persons cannot be faced with requirements that they, because of their statelessness, cannot

[30] *Ibidem*, paras. 81, 139–140.

[31] Hungary implemented a procedure to determine stateless status in 2007 (UNCHR, *Establishing Statelessness Determination Procedures for the Protection of Stateless Persons*, Good Practice Papers, July 2020, p. 29).

[32] *Sudita Keita v. Hungary*, paras. 36, 38.

[33] *Hoti v. Croatia*, para. 127; *Sudita Keita v. Hungary*, para. 35.

[34] The Office of the United Nations High Commissioner for Refugees, whose mandate also includes the protection of stateless persons, filed an *amicus* brief in Hoti, recounting UN standards in this matter.

meet.[35] In *Hoti* the Court pointed out that the main obstacles on the applicant's path to citizenship or a residence permit came from being required to renounce his previous citizenship and to produce a valid travel document, each of which (but especially the former) is a condition which stateless persons are not in a position to meet. In *Sudita Keita* the ECtHR also emphasized that the condition of legal residence – required until 2017 for the recognition of the status of a stateless person – was impossible to meet, thus violating the provisions of the 1954 Convention.[36]

This last element of the judgment may be seen as an indication that the ECtHR is now going to take a negative view of any regulations demanding stateless persons to produce a valid travel document, even where such an obligation is not expressly imposed by the provisions of the law but follows indirectly from how prior legal residence must be demonstrated in order to receive a residence permit and how in turn a travel document may be required for that.

5.2. No impact of the voluntary nature of statelessness on entitlement to protection

Another interesting angle in *Hoti* is the voluntary nature of the applicant's statelessness. The ECtHR considered the significance of Bedri Hoti's refusal in 1989 to apply for Yugoslavian citizenship to the evaluation of the authorities' conduct.[37] In the context of this discussion it will be expedient to distinguish the different categories of stateless persons,[38] putting us in a better position to discuss the ECtHR's views expounded in this case.

The category of "voluntary stateless persons" includes two basic categories of statelessness. The former consists of people who have become stateless by their own actions. The source of their statelessness is of crucial importance here. The category of voluntary stateless persons, however, will not always necessarily involve a common "voluntary" source of statelessness. Thus, secondly one has to regard as voluntary stateless persons those who have become so for other reasons, independently of any action on their part (e.g. territorial changes, conflicting legislation) but who subsequently do not wish to obtain (regain) the citizenship of a state with which they have a bond, despite being entitled to do so. The statelessness of such persons – due to their existing ability to regain citizenship – is not a compulsory situation but a result of their informed choice. With

[35] Art. 6 provides: "For the purpose of this Convention, the term 'in the same circumstances' implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling."

[36] Both Croatia and Hungary are parties to this Treaty — Croatia since 12 October 1992 and Hungary since 21 November 2011; see: https://www.unhcr.org/protection/statelessness/3bbb0abc7/states-parties-1954-convention-relating-status-stateless-persons.html (accessed 30 April 2021).

[37] In 1989 he was encouraged to take Yugoslavian citizenship but was not interested; *Hoti v. Croatia*, paras. 12, 13.

[38] *See* more broadly Pudzianowska, *supra* note 8, Chapter 8.

regard to this group, one could speak of "voluntary statelessness by one's own conduct" (active voluntary statelessness); while with regard to the other group one may speak of "voluntary stateless by inactivity" (passive voluntary statelessness).[39]

B. Hoti's situation could thus be described as one of a "passive voluntary stateless person" (having lost citizenship through no initiative of his own but subsequently preferring to remain stateless). In this context the Court decided that a stateless person, just as any other foreigner, may wish to continue to reside in the territory of a state without becoming its citizen. The ECtHR emphasized that the application did not concern the inability to obtain the citizenship of a given state, but the lack of options to regularize the residence status of the applicant. The principal question up for ruling before the Court therefore came down to whether the applicant, having decided against applying for Yugoslavian citizenship (or not having obtained it), had a right to regularize his residence status so as to "enjoy private life" in Croatia.[40] Thus the Court drew no adverse inference from the applicant's statelessness being attributable to his own conduct.[41]

Interestingly, the UNHCR's soft law[42] formulates a more complex (and more detailed) standard for voluntary statelessness. Albeit the voluntary renunciation of citizenship must not affect the recognition of an individual's stateless status in the light of Art. 1(1) of the 1954 Convention, states are entitled to introduce different rules for the protection of such persons. UNHCR documents include a legal qualification of voluntary statelessness along with specification of the scope in which such persons may receive different (i.e., worse) treatment with regard to protection. According to the UNHCR Handbook, having become stateless voluntarily may affect one's treatment by a state. However, the limitations on the protection of voluntary stateless persons provided for in the UNHCR Handbook apply only to active voluntary stateless persons, especially those having lost their citizenship "for convenience or by choice" (who could thus be regarded as being stateless "in bad faith")[43] and do not extend to passive voluntary stateless persons, i.e. people in a similar situation to Mr B. Hoti. As the ECtHR did not elaborate further on this matter, it is not known whether the Court would have regarded the issue of voluntary statelessness as irrelevant also in the case of loss of citizenship effected through one's own "bad-faith" conduct.

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[39] The terms "active voluntary statelessness" and "passive voluntary statelessness" were first proposed by K. Swider, *A Rights-Based Approach to Statelessness*, unpublished Ph.D. thesis defended at the University of Amsterdam, 2018, p. 160.

[40] *Hoti v. Croatia*, para. 131.

[41] Swider also notes this; see: K. Swider, *Hoti v. Croatia: A Landmark Decision by the European Court of Human Rights on Residence Rights of a Stateless Person*, Statelessness, 3 May 2018, available at: https://bit.ly/3uvYLLk (accessed 30 April 2021).

[42] *See* UNHCR, *Handbook on Protection of Stateless Persons*, Geneva 2014 and UNHCR, *Expert Meeting: The Concept of Stateless Persons under International Law*, May 2010.

[43] According to the UNHCR Handbook, this means persons who: "voluntarily renounce a nationality because they do not wish to be nationals of a particular State or in the belief that this will lead to grant of a protection status in another country," UNHCR (*Handbook*), *supra* note 42, para. 161.

5.3. Liberal standard of proof

Hoti also has an interesting evidentiary aspect with regard to the determination of statelessness. The Court found it "striking"[44] that despite being aware of the applicant's statelessness (as indicated by his birth certificate issued by Kosovar authorities in the procedure for the extension of his residence permit on humanitarian grounds), Croatian authorities held him out be a Kosovar citizen. In this respect the ECtHR invoked the principle of Art. 25(1) of the 1954 Convention concerning administrative support: "When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities." The Court took a negative view of how, despite the applicant's statelessness being obvious from documents known to Croatian authorities, the administration never assisted the applicant to contact the authorities of the other state to resolve his situation.[45] The Court also pointed out that there had been no basis on which to doubt the applicant's assertions that Albanian authorities did not regard him as a citizen (despite the absence of evidence of any such contact with the Albanian administration).[46]

The above line of argument from the ECtHR demonstrates a liberal approach to the standard of proof in determining the status of a stateless person. K. Swider is correct in observing that the ECtHR does not concur with state authorities' view that the applicant bears the burden of proof to demonstrate his statelessness, but rather the Court expects the state to co-operate in the determination of the statelessness of foreigners.[47]

This split burden of proof between the applicant and the administration is also consistent with the recommendations of the UNHCR that the procedures should impose the burden on both the applicant and the authorities. The UNHCR regards it as a sufficient evidentiary threshold if the statelessness is established to a reasonable degree. It is noted that the evidence-gathering and fact-finding requires collaboration between the applicant and the authority. Applicants have a duty to speak the truth and present their personal situation with as much accuracy as possible and submit all the available evidence. The decision-making authority, on the other hand, has a duty to gather and adduce all available evidence (such as it may be reasonably expected to) in order for it to be able to make an objective determination of the applicant's status. It is regarded as a sufficient evidentiary threshold if the statelessness is established to a reasonable degree.

This splitting of the burden of proof, and its moderate weight on the stateless person (essentially required only to demonstrate the probability of being stateless), is of profound importance in this type of cases due to "the difficulties inherent in proving

[44] *Hoti v. Croatia*, para. 138.
[45] *Ibidem*, para. 138.
[46] *Ibidem*, para. 110.
[47] Swider, *supra* note 41.

statelessness (…)."[48] In this type of procedure the subject-matter of the evidentiary efforts is a negative circumstance (*viz.* the lack of citizenship of any state), which in practice is difficult for applicants to prove. Due to the essence of statelessness, individuals are often unable to support their claim with documentary evidence. Many are not in a position to, or do not know they need to, embark on a review of the citizenship legislation of the states they have links with due to having been born in their territory, or the fact of their parents being citizens, or marriage, or habitual residence. Furthermore, liaising with the authorities of other states in order to obtain information about the individual's case or about the citizenship law of a given state and the implementation of that law is of fundamental importance to drawing the ultimate conclusion as to the individual's statelessness. In many cases the authorities of other states only respond to such inquiries from representatives of authorities of other states, and not from individuals.[49]

6. DIFFERENCES BETWEEN THE ECtHR'S AND THE UNHCR'S APPROACHES TO STATELESS ON THE EXAMPLE OF THE THIRD-PARTY INTERVENTION

The ECtHR's approach to statelessness in *Hoti* differs from the position proposed by the UNHCR in its third-party intervention (*amicus* brief) filed in the case.[50] While the ECtHR's judgment took account of the standard developed under the 1954 Convention, a position which doubtless may have been prompted by this *amicus* brief, nevertheless the Court's approach shows significant differences from the UNHCR's position expounded therein. The Office of the UNHCR puts emphasis on stateless persons' right to citizenship and on the Convention provisions referring to the limitations imposed on the states' powers by international law in the area of regulating the acquisition, change, or loss of citizenship.[51] The ECtHR's analysis in *Hoti* was conducted from a different perspective. In that perspective the stateless person ought to have guaranteed access to procedures enabling the regularization of his or her residence status, but not necessarily the acquisition of citizenship.

The UNHCR's position voiced in its third-party intervention, conceding priority to counteracting mechanisms, is also visible more generally in UN documents on statelessness. The UNHCR Handbook notes that the drafters of the 1954 Convention:

[48] UNHCR (*Handbook*), *supra* note 42, para. 91.

[49] UNHCR, *supra* note 31, pp. 5–6.

[50] Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Bedri Hoti v. Croatia* (App. No. 63311/14). Third-party interventions (also referred to as *amicus curiae*) are pleadings filed under Art. 36(2) ECHR: "The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceeding or any person concerned who is not the applicant to submit written comments or take part in hearings."

[51] *See* paras. 2.3.2 and 2.3.3 of the third-party intervention, available at: https://bit.ly/3fMuYIU (accessed 30 April 2021).

"intended to improve the position of stateless persons by regulating their status. That said, as a general rule, possession of a nationality is preferable to recognition and protection as a stateless person."[52] A different UNHCR document states that the protection of stateless persons does not substitute for citizenship and the 1954 Convention requires the state to facilitate the naturalization of stateless persons.[53] This approach is also manifested in the UNHCR's #IBelong Campaign to End Statelessness campaign, conducted since 2014 with the goal of eradication of statelessness by 2024.[54]

This is a long-standing tradition within the United Nations, as since the time of World War II statelessness has been viewed in its forum as an "evil" that must be eradicated, while the instruments of protection have been presented as transitional solutions until such time as the individual concerned may obtain citizenship from some state.[55] The view of statelessness as an evil to be eliminated has been closely linked to the negative impact of statelessness on the international order, with the latter fact having been the core motivation for the attempts to regulate this problem in international law in the 1920s, and subsequently just after World War II. In the 1990s, with the disintegration of such states as Yugoslavia, Czechoslovakia and the USSR, the potential of statelessness to be a source of regional tensions came to the surface again.[56] It is noteworthy that the potential of statelessness to trigger tensions leading to conflicts between communities provides the basis for the OSCE's mandate in the area.[57]

The ECtHR's position reflects a different outlook – more realistic in our opinion – on statelessness, whereby in some specific situations the unwillingness to become a citizen may be understandable and should not preclude the ability to regularize one's residence status. The ECtHR's position voices a pragmatic approach, according to which the basic rights of stateless persons gain the necessary minimum of protection from safe, i.e. regularized, residence, however non-ideal the situation may be (at least for some stateless persons). The ECtHR does not concern itself with whether statelessness is something to be eliminated. The Court's approach is not inspired by the logic of a global international order, which is closer to the UN, but by the logic of human-rights protection. The Court's position must, of course, have been influenced by the fact that the applicants in *Hoti* and *Sudita* did not allege a lack of access to citizenship.

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[52] UNHCR (*Handbook*), *supra* note 42, para. 14.

[53] UNHCR, *Introductory Note by the Office of the UNHCR to the 1954 Convention*, Geneva 2014.

[54] *See* https://www.unhcr.org/ibelong-campaign-to-end-statelessness.html (accessed 30 April 2021).

[55] *See* United Nations, *A Study of Statelessness*, Lake Success – New York, August 1949, E/1112; E/1112/Add.1, p. 10: "The two problems — the improvement of the status of stateless persons and the elimination of statelessness — though quite distinct, are complementary. However necessary and urgent, the improvement of the status of the stateless person is only a temporary solution designed to attenuate the evils resulting from statelessness. The elimination of statelessness, on the contrary, would have the advantage of abolishing the evil itself, and is therefore the final goal."

[56] UNHCR, *Citizenship and prevention of statelessness linked to the disintegration of the Socialist Federal Republic of Yugoslavia*, European Series 3(1), Geneva, June 1997.

[57] OSCE & UNHCR, *Handbook on statelessness in the OSCE Area. International standards and good practices*, 28 February 2017, p. 6.

The judgments in *Hoti* and *Sudita Keita* were made with reference to state parties of the 1954 Convention. Nonetheless, the ECtHR's guidelines on the status of stateless persons, contained in both of the cases, are relevant not only to those states and even not only to Council of Europe member states having ratified the Convention. The interpretation of Art. 8 of the Convention in the Court's judgment – in which it expounds on states' positive obligations owed to stateless persons – is pertinent to all Council of Europe member states (the *res interpretata* effect).[58]

7. EXAMPLES OF PROBLEMS WITH THE REGULATION OF STATELESSNESS IN POLAND FROM THE PERSPECTIVE OF ECtHR JUDGMENTS

Poland is a good example by which to illustrate the importance of the ECtHR judgments in question, given that Poland has not ratified the UN conventions on statelessness and the country's legislation on the protection of stateless persons is adventitious and inconsistent.[59]

Poland's legal order does not contain a separate definition of a stateless person. According to the definition in the Act on Foreigners,[60] a foreigner is anyone without Polish citizenship (Art. 3(2)). This is a negative definition that makes it possible to distinguish between Polish citizens and foreigners. The lack of any distinction for stateless persons as a separate category among foreigners results in a sort of "invisibility" of that category, fraught – as highlighted at the beginning of this article – with its own highly specific problems.

There is no effective and accessible procedure or combination of procedures in Poland's legal system to enable stateless persons to regularize their residence situation in the way that the ECtHR demands in *Hoti* and *Sudita Keita*. The obstacle usually lies in not having the appropriate identity documents[61], with the resulting irregularity of residence in Poland. At the same time, there is no provision clearly stipulating statelessness as grounds for a residence permit. Exceptionally, provisions governing residence permits issued in special circumstances, even to foreigners residing in Poland illegally, can apply to stateless persons. This includes the necessity to respect family life (Art. 187(6) of the Foreigners

[58] *See* more broadly A. Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar instytucjonalny* [Implementation of the European Court of Human Rights rulings in Poland. Institutional dimension], Wolters Kluwer, Warszawa: 2018, pp. 139–143.

[59] More broadly on this topic see: D. Pudzianowska, *„Opatrzność" czy „nieopatrzność" ustawodawcy? O ochronie bezpaństwowców w prawie polskim* ["Carefulness" or "carelessness" of the legislator? About the protection of stateless persons in Polish law], in: J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne dziś i jutro*, Wolters Kluwer, Warszawa: 2018, pp. 683-692.

[60] *Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach* [Act of 12 December 2013 on Foreigners], Official Journal 2013, item 1650.

[61] A stateless person may apply for a "Polish identity document for a foreigner"; however, not every stateless person can obtain such a document – adult stateless persons can obtain it only if "the interests of the Republic of Poland warrants it" (Art. 260.1 (3) of the Foreigners Act).

Act) and protect children's rights (Art. 187(7) of the Act). A discretionary decision with a wide margin of appreciation is enabled by Art. 187(8) of the Act, which provides that a demonstration of circumstances other than those set out in the provisions on temporary residence may justify temporary residence. Temporary permits allow residence in Poland for a period up to 3 years (Art. 98(3)) and offer the hope of a permanent residence permit over a longer time horizon upon the fulfilment of additional conditions. However, for the majority of stateless persons the availability of this avenue is theoretical only.[62]

Another example of problematic legislation from the perspective of the above-described ECtHR standard, where the Strasbourg Court points out the prohibition against creating impossible conditions for stateless persons to meet, is Art. 30 of the Act on Polish Citizenship, providing for a simplified naturalization procedure (recognition of Polish citizenship) for persons with no citizenship whatsoever. In line with this provision, stateless persons having resided in Poland for at least two years without interruption based on one of the types of permanent residence permits may apply to the voivode (provincial governor) to be recognized as Polish citizens. Formally, their acquisition of Polish nationality is facilitated in comparison to the regular category of foreigners,[63] as the required duration of residence under the aforementioned residence permits is shortened by one year and there is no need to demonstrate a stable and regular source of income and legal title to one's dwelling.[64] However, this provision needs to be regarded as another one that confers a right "on paper" only due to the fact that – as mentioned above – stateless persons have very limited options to apply for a residence permit.[65]

The above examples illustrate that the legislation on statelessness in Poland's legal order is not well-thought-out, and that it often confers "rights on paper" that cannot be exercised in practical terms. In this regard the ECtHR's recent case law on stateless persons sends a clear signal as to the direction in which this legislation should be re-ordered and developed so as to provide stateless persons with the required level of protection.

CONCLUSIONS

The protection of stateless persons has for many years remained in the shadows of the problems of counteraction (i.e. prevention and reduction) of statelessness. For this

[62] Centrum Pomocy Prawnej im. Haliny Nieć, *Niewidzialni bezpaństwowcy w Polsce* [Invisible stateless persons in Poland], 2013, pp. 18-19.

[63] Art. 30(1)(1) of *Ustawa z 2 kwietnia 2009 r. o obywatelstwie polskim* [Act of 2 April 2009 on Polish Citizenship], Official Journal 2012, item 161.

[64] *Ibidem*, Art. 30(1)(2b).

[65] Both these problems (limited options to apply for a residence permit and – in consequence – the impossibility to make use of facilitated naturalisation) are illustrated by the case of a 16-year-old stateless girl who was born in Poland and whose foster parents were unable, for over 16 years, to obtain a residence permit for her because the Voivode required them to present her identity documents. They were unable to apply for nationality in the procedure before the Voivode (on the basis of Art. 30 of the Act on Polish Citizenship) due to the lack of a permanent residence permit. For a detailed description of this case see: Pudzianowska, Szczepanik, *supra* note 6.

reason, one should welcome the fact that the ECtHR recognizes in its case law the existence of a special category of migrants who are stateless and the existence of positive obligations on the part of the state with respect to the necessity to create legal mechanisms to regularize their residence situations in a way that is respectful of their private lives. Thus the Court fills the gap left in the Council of Europe's legal system, in which the protection of stateless persons is not the subject-matter of the relevant conventions.

In its formulation of the requirements with respect to an effective and accessible procedure (or combination of procedures) to regularize residence status, the Strasbourg Court took recourse to the standards expressed in the UN system. In doing so the Court took a selective approach to that standard, adapting it to the needs of the Court's own judicial activities, which prioritize the protection of stateless persons and not the safeguarding of avenues to citizenship. Hence, the Court referenced the 1954 Convention relating to the Protection of Stateless Persons but not the 1961 Convention on the Reduction of Statelessness (or the ECN).

In reference to the 1954 Convention the ECtHR stressed the importance of such principles as (1) the prohibition of requirements which are impossible for stateless persons to meet, such as the need to renounce citizenship or produce a travel document; (2) the lack of impact of the voluntary nature of statelessness on the entitlement to protection; and (3) splitting burden of proof and a moderate evidentiary threshold in procedures for the determination of stateless status.

The path taken by the Court should be regarded as praiseworthy, spurring the hope that it may lead Council of Europe member states, including Poland, to realize the unique situation of stateless persons among other foreigners and strengthen the mechanisms for their protection. In addition, a diligent analysis of the judgments in *Hoti* and *Sudita Keita* leads to the conclusion that they may be received as a breath of fresh air in cases relating to foreigners, and an argument in favour of alleviating the complaint of judicial stagnation in cases relating to foreigners.[66]

[66] Jean-Paul Costa, ECtHR President in 2007–2011, had this to say in one of his interviews: "Dans celui du droit des étrangers, et en particulier des migrations, la jurisprudence n'est sans doute pas à la hauteur de ce qu'on pourrait espérer" [In the field of the law of foreigners, and in particular of migration, the jurisprudence is undoubtedly not up to what one would expect], N. Hervieu, *Entretien avec Jean-Paul Costa, juge à la Cour européenne des droits de l'homme*, 18 La Revue des droits de l'homme (2020).