



On the Protection of Stateless Persons in Germany

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Abstract

This article analyses the legal framework for the protection of stateless persons in Germany. In particular, it explains the definition of a stateless person under German law, the availability of protection outside the context of asylum procedures, access to travel documents and naturalization. This work identifies the following major problems: gaps in the applicable laws, differences of treatment and implementation due to the decentralized system of adjudication, application of readmission agreements to stateless persons, restrictive naturalization requirements. As a consequence, stateless persons' chances of obtaining protection and a long-term solution are reduced. It is argued that the adoption of specific determination procedures and recognition of stateless status as a protection ground at the Federal level are essential safeguards in this context and the German government should take additional steps in this regard.

Keywords

statelessness – 1954 Convention relating to the Status of Stateless Persons – protection of stateless persons in Germany

1 Introduction

This article explores the implementation of the 1954 Convention relating to the Status of Stateless Persons (the '1954 Convention') in Germany, with particular emphasis of its judicial interpretation. The 1954 Convention is the main human rights treaty dealing with the protections and freedoms of stateless persons, but the majority of European States that have ratified it have not

adopted specific statelessness determination procedures and do not recognize stateless status as a specific protection ground.¹ Germany is among these States. Due to the complexity of the Federal system, the little awareness that exists in the country on the topic and the lack of sources in the English language, very little is known on how Germany deals with claims arising out of the 1954 Convention.² This article's aim is to partially address this gap.

1 Gabor Gyulai, 'Statelessness in the EU Framework for International Protection' (2012) 14(3) EJML 279, 287.

2 Very little is also known on the stateless population in Germany. As of 2010, the Central Aliens Register reports 13,317 stateless people living in Germany. Federal Ministry of the Interior, 'Migration and Integration' (2011) 38; Statistisches Bundesamt, 'Bevölkerung und Erwerbstätigkeit. Ausländische Bevölkerung Ergebnisse des Ausländerzentralregisters' (31 March 2011, rectified on 4 April 2011) 28, 29, 32, 33. Of those stateless people, 4,553 belong to a subgroup of displaced persons (*Haimatlose Ausländer* – these are refugees and displaced persons as a result of the Second World War) admitted under the Law on the Status of Displaced Foreigners in Germany (Gesetz über die Rechtsstellung heimatloser Ausländer im Bundesgebiet (BGBl III, 243-1), das zuletzt durch Artikel 7 des Gesetzes vom 30. Juli 2004 (BGBl 2004 I, 1950) geändert worden ist). Federal Ministry of the Interior, 'Migration and Integration' (2011) 26. Moreover, nearly 30% of stateless persons in Germany were born in the country and one quarter of them have lived there for more than 30 years. Statistisches Bundesamt, *ibid* 28, 29, 32, 33, 59, 64, 65; Gyulai (n 1) 280. UNHCR's estimates on stateless persons differ from those of the Federal Office for Migration and Refugees. According to UNHCR, in 2010, there were 7,920 stateless persons. However, this figure does not represent the total of the people registered as stateless in Germany, and stateless persons holding a humanitarian residence title and stateless asylum seekers are not included. UNHCR, 'Stateless Persons – 2010' (2011) excel tables <<http://www.unhcr/pages/4a0174156.html>> accessed 19 October 2011. The largest groups of stateless persons in Germany are reported to be those of Roma, Palestinians, and Syrian Kurds. The International Observatory on Statelessness, 'Germany' <<http://www.nationalityforall.org/germany>> accessed 10 October 2013. Precise estimates of these groups are impossible for three reasons: (1) Germany does not collect statistic or socio-economic data based on ethnic origin; (2) there are no non-governmental sources; and (3) an administrative representative census is impossible. In fact, several legal reasons would arise in connection with data collection on ethnic basis. First, a person's view of belonging to a certain national minority is voluntary according to Article 3 of the Framework Convention for the Protection of National Minorities. Such a view is a personal decision which is not recorded or controlled by the State. Furthermore, the Bonn-Copenhagen Declarations of 1955, the Act on the Rights of Sorbs in the Free State of Saxony and the Act on the Embodiment of the Rights of the Sorbs in the State of Brandenburg conflict with the collection of data on ethnical basis. Bundesministerium des Innern, Bericht der Bundesrepublik Deutschland an die Europäische Kommission, 'EU-Rahmen für Nationale Strategien zur Integration der Roma bis 2020. Integrierte Maßnahmenpakete zur Integration und Teilhabe der Sinti und Roma in Deutschland' (2011) 12 <http://www.bmi.bund.de/SharedDocs/Downloads/DE/Kurzmeldungen/pstb_roma.pdf?__blob=publicationFile> accessed 9 October 2012.

After providing an overview of the legal framework and the legal status typically granted to stateless persons, the implementation of the definition of statelessness and two of the core provisions of the 1954 Convention will be analyzed, which take into account the ‘special needs’ of the stateless:³ the issuance of travel documents, and access to naturalization.

2 Overview of International Obligations for the Protection of Stateless Persons and Relevant National Legal Framework in Germany

Germany has ratified several international treaties relevant to reducing and avoiding statelessness and protecting stateless persons: the 1954 Convention on the Status of Stateless Persons;⁴ Convention number 13 for the Reduction of Cases of Statelessness of 13 September 1973;⁵ the 1961 Convention on the Reduction of Statelessness.⁶ In compliance with Convention number 13 and the 1961 Convention, Germany adopted the law on the Reduction of Statelessness (*Gesetz zur Verminderung der Staatenlosigkeit*),⁷ which entered into force on 29 June 1977.⁸ In addition, other international instruments that

3 These special measures have also been described, in the context of the Refugee Convention, as ‘standards applicable to refugees as refugees’ or ‘refugee specific concerns’. Laura van Waas, *Statelessness Matters. Statelessness under International Law* (Intersentia 2008) 359-388. To keep this work within boundaries, I focus only on two of these provisions.

4 Bundesgesetzblatt (BGBl, Federal Law Gazette) II 1976, 473. Germany entered reservations to Article 23 on public relief and assistance, and Article 27 on identity papers; 360 UNTS 117 <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en> accessed 11 May 2012.

5 This Convention was ratified in 1976. The aim of this Convention is to provide that a child, whose mother has the nationality of a contracting State, shall acquire her nationality, if he would otherwise be stateless. Kay Hailbronner, Günter Brenner, Hans-Georg Maaßen, *Staatsangehörigkeitsrecht* (5th edn, CH Beck 2010) I.G.10.

6 BGBl II 1977, 597.

7 Gesetz zur Verminderung der Staatenlosigkeit – Ausführungsgesetz (StaatenMindÜbkAG, Law on the Reduction of Statelessness – Law on Implementation) (BGBl I 1977, 1101), das durch Artikel 3 § 4 des Gesetzes vom 15.07.1999 (BGBl I 1999, 1618) geändert worden ist (Law on the Reduction of Statelessness – Law on Implementation (BGBl I 1977, 1101), lastly amended by art 3 §4 of the Law on 15.07.1999, BGBl I 1999, 1618, 1622).

8 StaatenMindÜbkAG (BGBl I 1977, 1101), das durch Artikel 3 § 4 des Gesetzes vom 15.07.1999 (BGBl I 1999, 1618) geändert worden ist (Law on the Reduction of Statelessness – Law on Implementation (BGBl I 1977, 1101), lastly amended by art 3 §4 of the Law on 15.07.1999, BGBl I 1999, 1618, 1622).

Germany ratified and which are relevant for the protection of stateless persons include: the European Convention on Human Rights,⁹ the European Convention on Nationality,¹⁰ the Covenant on Civil and Political Rights,¹¹ the Covenant on Economic Social and Cultural Rights,¹² and the Convention on the Rights of the Child.¹³

Despite its international commitments, Germany has no specific statelessness determination procedures and does not recognize statelessness as a protection ground in itself.¹⁴ However, stateless persons may fall under the scope of other protection categories and residence permits. The matter of statelessness usually becomes relevant when an asylum claim is rejected and the question of permission to remain on other grounds arises. It also becomes relevant when a person applies for a travel document pursuant to Article 28 of the 1954 Convention,¹⁵ or for naturalization.¹⁶ Thus, the local Aliens Offices in each of the 16 German States, which are the competent authorities dealing with these matters, may be required to examine whether a person is stateless. Not much is known on the local Aliens Offices' practices in this regard; there are no published guidelines on how the authorities establish whether a person is stateless. According to experts, the tendency of these proceedings is to avoid making findings on statelessness whenever possible. An appeal is therefore the only available solution left for a person that seeks recognition as a stateless

9 BGI 1952 II, 685 and BGI 2002, II, 1054.

10 BGI II 2004, 578.

11 BGI II 1973, 1533-1534.

12 UNHCR, 'Status of ratification: International Covenant on Economic, Social and Cultural Rights' <<http://www2.ohchr.org/english/law/cescr-ratify.htm>> accessed 18 May 2012.

13 BGI II 1992, 121.

14 Statelessness is a relevant legal fact under international law. Statelessness means that a person does not enjoy diplomatic protection and has no right to enter and reside in any State. In addition, statelessness has practical negative consequences on a number of other rights. Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Kluwer Academic Publisher Group, Dordrecht 1979) 6, 43, 46. UNHCR's position is that statelessness determination procedures can assist States in providing protection to stateless persons in line with their obligations under the 1954 Convention. In fact, it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions to provide them with adequate treatment. In countries, such as Germany, where statelessness mainly arises in the migration context, statelessness determination procedures also help the government to assess the size of the stateless population. UNHCR, *Guidelines on Statelessness No. 2, Procedures for Determining whether an Individual is a Stateless Person* (2002).

15 Holger Hoffmann, 'Welche Rechte haben Staatenlose?' (2004) 10 Asylmagazin 5.

16 Interview with German Immigration Lawyer number 1 (22 July 2013).

person.¹⁷ On these matters, there is discrepancy between the approach of the local Aliens Offices and that of the courts, which are more open to making such findings.¹⁸

3 Definition of Statelessness in International Law and Application in Germany

In Germany, the concept of 'stateless person' is in line with that of the 1954 Convention. In fact, Article 1 of the law on the Reduction of Statelessness refers to the definition of statelessness in Article 1(1) of the 1954 Convention: the term 'stateless person means a person who is not considered as a national by any State under the operation of its law'.¹⁹

The majority of the case law has found Palestinians without another nationality to be *de jure* stateless according to Article 1(1) the 1954 Convention.²⁰ In this context, the Federal Administrative Court did not clarify the politically and legally controversial issue on the existence of a Palestinian nationality.²¹ However, according to some lower administrative courts there is neither a Palestinian State under international law nor a Palestinian nationality.²² Although the political situation in Palestine might indeed be 'unclear', the

17 Interview with German Immigration Lawyer number 1 (22 July 2013); interview with German Immigration Lawyer number 2 (9 August 2013).

18 Interview with German Immigration Lawyer number 1 (22 July 2013). See, for instance, Bundesverwaltungsgericht (BVerwG, Federal Administrative Court), 23.02.1993, Entscheidungen des Bundesverwaltungsgerichtes (BVerwGE, decisions of the Federal Administrative Court) 2, 116, 119-120 mit weiteren Nachweisen (mwN, with further reference); Oberverwaltungsgericht (OVG, Higher Administrative Court) Berlin, Urteil (judgment) von (v, of) 18.04.1991 - 5 B 41.90; BVerwG, Beschluss v 17.07.1987 - 1 B 23.87.

19 Convention Relating to the Status of Stateless Persons, Article 1; see Hailbronner, Brenner, Maaßen (n 5) I.G.L1.

20 Bundesverwaltungsgericht (BVerwG, Federal Administrative Court), 23.02.1993, Entscheidungen des Bundesverwaltungsgerichtes (BVerwGE, decisions of the Federal Administrative Court) 2, 116, 119-120 mit weiteren Nachweisen (mwN, with further reference); Oberverwaltungsgericht (OVG, Higher Administrative Court) Berlin, Urteil (judgment) von (v, of) 18.04.1991 - 5 B 41.90; BVerwG, Beschluss v 17.07.1987 - 1 B 23.87.

21 BVerwG 23.02.1993, BVerwGE 92, 116, 119-120 mwN; BVerwG, Urteil v 23.02.1993 - 1 C 7.91, 9-10.

22 Verwaltungsgericht (VG, Administrative Court) Aachen, Urteil v 1.03.2001 - 4 K 3022/99, Informationsbrief Ausländerrecht (InfAuslR, Information Letter Aliens Law) 2001, 338; VG Saarland, Urteil v 24.11.2006 - 5 K 97/05; OVG Niedersachsen, Beschluss v 21.04.2004 - 11 LA 61/04.

Federal Administrative Court and the High Administrative Court in Berlin held that an ‘unclear nationality’ in legal terms is not possible.²³ If the investigation on the existence of a nationality cannot be concluded, they made clear that the person in question is stateless.²⁴ A permanent status of ‘unclear’ nationality’ is contrary to international law.²⁵

Regarding the Kurds from Syria, the courts have usually found them to be stateless according to the 1954 Convention and their return has been found impossible if they left the country illegally.²⁶ However, the status of Kurds from Lebanon is more controversial. In fact, the courts have found them to be stateless only if they did not fall under the naturalization program that Lebanon had adopted in 1994.²⁷ In a few cases, the courts have required the concerned

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- 23 BVerwG, 12.02.1985, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ, *New Journal on Administrative Law*) 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759; OVG Berlin, Urteil v 18.04.1991 - OVG 5 B 41.90; VG Berlin, Urteil v 12.06.1985 - 11 A 655.84, *InfAusLR* 1985, 237-238; VG Berlin, Urteil v 24.02.1988 - 23 A 341.87, *InfAusLR* 1988, 174, 176. However, a recent decision of the Administrative Court in Berlin contradicted the case-law here cited and held that the claimants of Kurdish origins had ‘unclear nationality’. VG Berlin, Urteil v 1.03.2012 - 13 K 12.12.
- 24 BVerwG, 12.02.1985, NVwZ 1985, 589; BVerwG, 15.10.1985, NVwZ 1986, 759.
- 25 OVG Berlin, Urteil v 18.04.1991 - 5 B 41.90. It should be noted that, despite these judgments, the administration keeps using the category of persons with ‘unclear’ nationality.
- 26 OVG Saarland, Beschluss v 13.09.2002 - 3 R 3/02; OVG Saarland, Urteil v 19.01.2001 - 3 Q 151/99; OVG Saarland, Beschluss v 21.01.2000 - 3 Q 142/98; Verwaltungsgerichtshof (VGH, High Administrative Court) Baden-Württemberg, Beschluss v 13.09.2001 - A 2 S 26/98; OVG Lüneburg, Urteil v 27.03.2001 - 2 L 2505/98; VG Braunschweig, Urteil v 20.02.2003 - 6 A 811/02; BVerwG, Urteil v 24.10.1995 - 9 C 3/95; *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report* (NVwZ-RR, *New Journal on Administrative Law – Jurisdiction Report*) 1996, 602; BVerwG, 24.10.1995, *Deutsches Verwaltungsblatt* (DVBl, *German Administrative Gazette*) 1996, 205.
- 27 Lebanon issued a naturalization decree on June 21, 1994 to settle the legal status of Kurds living on Lebanese territories. The decree allowed the majority of the non-naturalized Kurds to acquire citizenship (estimates of the number of naturalized Kurds range between 10,000 and 18,000). However, between 3,000 and 5,000 Kurds missed out that opportunity because they were unable to afford the cost of the application, were abroad and could not travel to Lebanon to file it, or because they did not believe that the granting of citizenship would materialize. Lokman I Meho, ‘The Kurds in Lebanon: a Social and Historical Overview’ (2002) 16(12) *IJKS* 59. Since 1996, it is believed that around 60% of Kurds in Lebanon hold Lebanese citizenship. David McDowall, *A Modern History of the Kurds* (3rd edn, I.B. Tauris & Co. Ltd 2004) 488. At present, there are approximately 75,000-100,000 Kurds living in Lebanon. Michael M Gunter, *Historical Dictionary of the Kurds* (2nd edn, Scarecrow Press 2011) 199.

person to take steps to obtain Lebanese citizenship,²⁸ despite the majority of them holding that generally a person is not required to remove his statelessness to receive protection under the 1954 Convention.²⁹

Even if a person meets the requirements of the definition of stateless person, according to Article 1(2)(i) of the 1954 Convention, he may be excluded from protection on the grounds that he receives protection and assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).³⁰ Several cases have interpreted this provision,³¹ and it appears that their approach is in line with those of UNHCR³² and the Court of Justice of the European Union in *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*.³³ According to the Federal Administrative Court, the concerned person does not need to actually receive such protection and assistance at the time of the decision on his claim based on the 1954 Convention. What is decisive is that the person belongs to the category of people whose support falls under UNRWA.³⁴ This includes those

28 VGH Baden-Württemberg, Urteil v 17.12.2003 - 13S 2113/01 holding that the nationality of the claimant's father was unclear as he only attempted to naturalize at the Lebanese at the Embassy in Bonn and not in Lebanon. Accordingly the nationality of the claimant was still unclear and could not be found to be *de jure* stateless). VG Berlin, Urteil v 1.03.2012 - 13 K 12.12 (the court expected that the Claimant could 're-register' and being recognized as a citizen of Lebanon).

29 BVerwG, 16.07.1996, InfAusIR 1997, 58, 60. This is further discussed in section 5 of this Article.

30 Article 1(iii) also provides exclusion for persons that have committed a crime against peace, a war crime, or a crime against humanity; or a serious non-political crime outside the country of their residence prior to their admission to that country; or have been guilty of acts contrary to the purposes and principles of the United Nations. However to keep this Article within boundaries, I only deal with the exclusion clause concerning Palestinians falling under UNRWA's mandate. The exclusion clause applicable to Palestinians deserves special attention because it has the potential of excluding several stateless Palestinians from protection. Furthermore, States have divergent understandings regarding its meaning. Gyulai (n 1) 286.

31 BVerwG, 21.01.1992, BVerwGE 89, 296, 302-304; BVerwG, 21.01.1992, InfAusIR 1992, 161, 163-164; BVerwG, 23.02.1993, BVerwGE 92, 166, 120; BVerwG, 23.02.1993, InfAusIR 1994, 35.

32 An identical exclusion clause is found in the Refugee Convention. See UNHCR, 'Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection' (2013).

33 Case C-341/11 *El Kott and Others v Hungary* [2012] OJ C46/8.

34 BVerwG, Urteil v 21.01.1992 - 1 C 18.90. UNRWA's area of activity is geographically limited to the Gaza Strip, the West Bank, Lebanon, Syria and Jordan. Persons outside the Middle East are therefore not protected by UNRWA. UNRWA's protection depends on the

who are still registered as Palestinian refugees with UNRWA and have left the country where UNRWA operates.³⁵ It also includes those that cannot return or lose the authorization to return due to lapse of time. The fact that the other State delays, complicates or even explicitly prohibits the return is irrelevant.³⁶ However, it does not include those forced to leave or whose return is affected by unforeseeable circumstances that have arisen during the stay abroad.³⁷ In these cases, a person may even qualify for protection on asylum or humanitarian grounds.³⁸

4 Status Granted to Stateless Persons: Toleration Certificate and Temporary Residence Permit for Impossibility to Leave the Country

Among the most relevant resident permits which may apply to stateless persons are the suspension of deportation or so called 'toleration' (*Duldung*) certificate and the temporary residence permits for obstacles to leaving the country (*Aufenthaltserlaubnis*), as they may be issued in circumstances where a stateless person has no other grounds to remain.

Toleration is mainly issued to failed asylum seekers who are unwilling or unable to leave the country.³⁹ Pursuant to section 60a of the Residence Act,

agreement of the State in which it operates and on whether the Palestine refugee still has the right to return to and reside in that State. However, the departure itself does not automatically make a person qualify for protection.

35 BVerwG, Urteil v 21.01.1992 - 1 C 18.90.

36 BVerwG, Urteil v 21.01.1992 - 1 C 18.90. The Federal Administrative Court noted that in this case the claimant was, according to her registration card, registered as a refugee with UNRWA and received the protection of an agency of the United Nations in the sense of Article 1(2)(i) of the 1954 Convention. Whether she actually receives concrete help from UNRWA is irrelevant. When she came to Germany, UNRWA could not provide protection for her anymore. However the claimant had the chance to return to Lebanon until 8 October 1988 and to resume UNRWA's protection. She did not use that opportunity. By staying in Germany beyond this date she accepted losing UNRWA's protection. The return to Lebanon and therefore the return UNRWA's protection and assistance were not barred when she had the right to return. UNRWA's protection and assistance did not fall away, and therefore the court found that the 1954 Convention was not applicable and dismissed the claim.

37 BVerwG, Urteil v 21.01.1992, InfAusIR 1992, 161.

38 BVerwG, Urteil v 21.01.1992 - 1 C 18.90.

39 Jürgen Bast, 'The Legal Position of Migrants - German Report' in Eibe Riedel and Rüdiger Wolfrum (eds), *Recent Trends in German and European Constitutional Law* (Springer 2006) 63-105.

the local Aliens Office can grant a toleration certificate if the deportation of an individual is impossible for legal or factual grounds.⁴⁰ *Legal grounds* may include the danger of political prosecution and of inhuman treatment, the application of human rights law in cases of illness, a serious risk of suicide, or a compelling need to take care for a family member.⁴¹ *Factual grounds* include undetermined nationality, unclear identity, lack of travel documents, or non-cooperation of the country of origin.⁴² Non-cooperation on the part of the alien is not a bar from obtaining a toleration certificate, although it will likely prevent a residence permit from being issued.⁴³ A tolerated person may be granted access to the labor market after his deportation has been suspended for one year, subject to approval of the Federal Agency for Labor.⁴⁴

The toleration is not a residence title of its own. In fact, it must be renewed frequently,⁴⁵ does not confer any right of residence and the obligation to leave the country without delay continues to apply.⁴⁶ The obligation to leave the country implies taking any necessary and reasonable steps to make the departure possible.⁴⁷ The *Duldung* cannot be considered as an actual protection

40 In addition, there is another way for issuing a toleration certificate: the Ministers of the Interior of the Länder can order a temporary suspension of deportation with regard to a group of foreigners for 'reasons of international law or humanitarian reasons' or for pressing humanitarian or personal reasons. For a toleration order exceeding six months, the consent of the Federal Minister is needed. Such 'deportation stoppages' are a matter of political decisions and they are subject to judicial review only in exceptional cases. Bernd Parusel, 'The Granting of Non-EU Harmonised Statuses in Germany. Research Study II/2009 in the framework of the European Migration Network (EMN)' (2010) Federal Office for Migration and Refugees and EMN (Working Paper 30), 35.

41 Bast (n 39) 63, 89.

42 Bast (n 39) 89.

43 Ibid.

44 §32 Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung, BeschV, Regulation on employment of aliens (Employment Regulation)) vom 6.06.2013 (BGBl I 2013, 1499); Bast, (n 39) 89; Parusel (n 40) 36.

45 Claude Cahn, 'Minorities, Citizenship and Statelessness in Europe' (2012) 14 *European Journal of Migration and Law*, 297, 310.

46 Bast (n 39).

47 79§ Aufenthaltsgesetz (AufentG, Residence Act) neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162); zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154). See also: §60a(1) AufentG neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162); zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154). Necessary and reasonable steps include providing travel documents or making applications for travel documents or cooperating for clarifying his identity. However, if the reason for the toleration is a legal barrier, a voluntary departure

status, and the years on *Duldung* do not normally count towards the time required to naturalize.⁴⁸

According to section 25 of the Residence Act, a person is eligible to obtain a temporary residence permit when his departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future. The residence permit should be issued if deportation has been suspended for 18 months. A residence permit may only be granted if the person is prevented from leaving through no fault of his own.⁴⁹

According to section 26 of the Residence Act, a residence permit may be issued and extended in each instance for a maximum period of three years, but for no longer than six months where it has been issued due to the impossibility of deportation, and if the foreigner has not been legally resident in the Federal territory for at least 18 months. The residence permit must not be extended if the obstacle to departure ceases to apply. The authorities may also withdraw or refuse to grant a toleration certificate or a temporary residence permit when a readmission agreement between Germany and a country of former residence or even of simple transit applies.⁵⁰

is always unreasonable. §48, 49 AufenthG neugefasst durch Beschluss vom 25.02.2008 (BGBl I 2008, 162); zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154).

- 48 Toleration prevents a person to breach the law, but it does not make the presence lawful. BVerwG, 16.10.1990, BVwerGE 87, 11, 18; VGH Baden-Württemberg, 31.03.1993, Verwaltungsblätter für Baden-Württemberg (VBIBW, Administrative Gazette for Baden-Württemberg) 1993, 482, 483; OVG Niedersachsen, 30.09.1998, DVBl 1999, 1219-1221. In light of these cases, it seems that a person with *Duldung* is only considered 'lawfully in' the country for purposes of the rights of the 1954 Convention (the protections offered under the 1954 Convention depend on the nature of the attachment of the stateless person and the host State. There are 'five levels of attachment', which starting from the weakest are: *being subject to the State's jurisdiction, physical presence, lawful presence, lawful stay, and durable residence*). Van Waas (n 3) 229, 230).
- 49 Fault applies in particular if he provides false information, deceives the authorities with regard to his identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure.
- 50 Germany has entered into readmission agreements with a number of countries. Claudia Finotelli, *Illegale Einwanderung, Flüchtlingsmigration und das Ende des Nord-Süd-Mythos* (LIT Verlag 2006) n 381, 120; Simone Grimm, *Die Rückführung von Flüchtlingen in Deutschland* (BWW Berliner Wissenschafts-Verlag 2007) 49-146. Some of these readmission agreements are applicable also to stateless persons. The readmission agreements that also concern stateless persons are those with Bulgaria, Armenia, Estonia, Latvia, Lithuania, Slovakia, Macedonia, Kazakhstan, Georgia, Macedonia, Yugoslavia, Syria, Kosovo, Romania, Montenegro and France. Bundesministerium des Innern, 'Abkommen zur Erleichterung der Rückkehr ausreisepflichtiger Ausländer' (June 2013).

Both the toleration and temporary residence permit provisions are frequently applied in practice: at the end of 2009, toleration was granted to 549 stateless persons and 7,689 persons with unclear nationality.⁵¹ The residence permit for impossibility to leave the country was granted to 144 stateless persons and 558 persons with unclear nationality.⁵² There is no public data on the number of stateless persons removed under the readmission agreements, and there is little information in general regarding their application.

The toleration and temporary residence permit may be evaluated positively in order to avoid the legal limbo in which stateless persons may find themselves and for allowing, although only after five years of a temporary permit, to apply for a settlement permit (*Niederlassungserlaubnis*).⁵³ However, the main negative aspects of the current provisions are that: (1) statelessness is not identified as a protection ground and remains a hidden issue, causing lack of awareness both of decision-makers and stateless persons;⁵⁴ (2) due to the highly decentralized administrative system and lack of public available information (including internal guidelines and policies), it is difficult to have a clear understanding on how the immigration authorities of different offices deal with issues of statelessness when they arise in connection with the right to stay, travel documents or naturalization; (3) the protection given under the temporary residence permit is much less favourable than that of refugees in Germany or recognized stateless persons in countries with a statelessness-specific protection mechanism (such as the United Kingdom, Italy or Spain);⁵⁵

<http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/MigrationIntegration/AsylZuwanderung/RueckkehrFluechtlinge.pdf?__blob=publicationFile> accessed 2 August 2013.

51 The administration uses the category of persons with status of 'unclear' nationality, despite a number of judgments have declared this contrary to the law.

52 Statistisches Bundesamt, 'Bevölkerung und Erwerbstätigkeit. Ausländische Bevölkerung Ergebnisse des Ausländerzentralregisters' (2010) 86, 87.

53 §9 AufenthG neugefasst durch Bekanntmachung vom 25.02.2008 (BGBl I 2008, 162); zuletzt geändert durch Artikel 2 Abs 59 Gesetz vom 07.08.2013 (BGBl I 2013, 3154).

The settlement permit can be considered a meaningful protection status as it allows to sponsor family members and to live in the country without time limits. However, there are several requirements to meet, including having secured livelihood for himself and his family, and an adequate knowledge of the German language.

54 Gyulai (n 1) 289.

55 For instance, in Germany persons granted a residence permit due to a persisting obstacle to leaving the country are not entitled to family reunification. *ibid* 279. In addition, when a stateless person obtains a residence permit for impossibility to leave the country he must still establish his statelessness for obtaining a travel document under Article 28 of the 1954 Convention or to apply for facilitated naturalization.

(4) they are much slower in providing a long term solution than stateless-specific protection regimes;⁵⁶ and (5) the readmission agreements do not ensure: (a) respect for human rights during and upon return (some of them generally recognize the need to respect human rights, but fail to provide concrete protection); (b) issuance of travel documents, identity documents and inclusion in civil registries; (c) recognition of a right to lawful residence.⁵⁷

5 Travel Documents for Stateless Persons

The first sentence of Article 28 of the 1954 Convention grants stateless persons 'lawfully staying' in the territory the right to obtain travel documents from the country of residence for the purpose of international travel, unless compelling reasons of national security or public order require otherwise. These provisions of the Convention are sufficiently precise and can be immediately applied without the need of implementing legislation.⁵⁸

The Federal Administrative Court clarified that the cause of a person's statelessness is not important for his claim under the first sentence of Article 28 of the 1954 Convention.⁵⁹ For example, a voluntary renunciation of nationality causing statelessness does not exclude application of the first sentence of

⁵⁶ Ibid 289.

⁵⁷ According to UNHCR, readmission agreements should not be applicable to stateless persons unless they ensure these conditions. UNHCR, 'Action to Address Statelessness. A Strategy Note' (Report) (2010) 16. It should be noted that, according to UNHCR, a stateless person can be considered to receive protection in another country when: (a) he is able to acquire a nationality through a simple and non-discretionary procedure; or (b) has permanent residence status in a country of previous habitual residence. UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level* (2012) (hereafter *Guidelines on Statelessness No. 3*) para 35.

⁵⁸ BVerwG 16.10.1990, BVerwGE 87, 11, 13; BVerwG, 16.07.1996, DVBl 1997, 177; Hailbronner, Brenner, Maaßen, (n 5) I.G.IV.2.27.

⁵⁹ BVerwG, 16.07.1996, InfAusLR 1997, 58-60. This decision states that (1) statelessness itself is not affected by the way it came into existence (so the cause of a person's statelessness is irrelevant for the general application of the Convention); (2) a stateless person has no obligation to eliminate his statelessness; (3) the cause of a person's statelessness is not important for an entitlement based on the first sentence of Art. 28. However, different principles apply if the travel document is claimed under the second sentence of Article 28, as that is a discretionary clause and the authorities can take the causes of a persons' statelessness into account when making their decision.

Article 28 since the 1954 Convention does not contain any such reservation in this regard.⁶⁰

A 'lawful stay' within the sovereign territory of a contracting State must be given for claiming the right according to the first sentence of Article 28 of the 1954 Convention.⁶¹ The Federal Administrative Court clarified that, due to the absence of specific guidance in the 1954 Convention, national law determines what lawful stay is.⁶² It reasoned that even if this leads to a different treatment of stateless persons in different contracting States, this inequality shall be accepted, as States reserved to themselves the right to determine this matter. However, it added that the only limitation is that States should not 'dodge' their obligations under the Convention by misusing national law.⁶³

According to the Federal Administrative Court, 'lawful' stay' implies a special relationship between the person in question and the State through a consolidation of the right to stay. A *de facto* presence is not sufficient, even if the State accepts it.⁶⁴ Thus, neither the toleration nor the permission to stay pending an asylum application are sufficient to meet this requirement.⁶⁵ However, an exception applies if the authorities grant toleration and deportation is not

60 VGH Baden-Württemberg, 21.04.1993, InfAuslR 1993, 379; furthermore: BVerwG, 16.07.1996, InfAuslR 1997, 58, 60 (the administrative act which requires an alien to eliminate statelessness through repatriation/ naturalization is void).

61 BVerwG, 17.03.2004, BVerwGE 120, 206-218; Hailbronner, Brenner, Maaßen, (n 5) I.G.IV.2.28.

62 VGH Bayern, Beschluss v 7.10.2008 - 10 C 08.1640, 10 C 08.1641. This is confirmed by paragraph 14 of the Schedule of the Convention according to which the law that regulates the authorization, transit, settlement and departure in the sovereign territory of the contracting States remain unaffected. BVerwG, 16.10.1996, BVerwGE 87, 11, 17. UNHCR takes the position that 'lawful stay' requires a duration of presence in the territory and usually a residence permit would fall under this category (without taking the form of permanent residence). UNHCR, *Guidelines No. 3* (n 57) para 18.

63 BVerwG, 16.10.1996, BVerwGE 87, 11, 15; ; Hailbronner, Brenner, Maaßen, (n 5) I.G.IV.2.28.

64 BVerwG, 16.10.1990, Buchholz (Sammel- und Nachschlagewerk der Rechtsprechung des Bundesverwaltungsgerichts, Collection and reference book of the judiciary of the Federal Administrative Court) 402.22 Art 1 Gerichtskosten (GK, Court costs) Nr 21, 13. On this point, the German case law is in line with UNHCR' s. *UNHCR Guidelines no 3* (n 58) paras 16.

65 When toleration is granted, the deportation of a person is temporarily suspended but he is still obliged to leave the country. BVerwG, 16.10.1990, BVerwGE 87, 11, 18; VGH Baden-Württemberg, 31.03.1993, Verwaltungsblätter für Baden-Württemberg (VBIBW, Administrative Gazette for Baden-Württemberg) 1993, 482, 483; OVG Niedersachsen, 30.09.1998, DVBl 1999, 1219-1221.

possible in the foreseeable future.⁶⁶ The courts have stressed that the residence of a person who cannot be deported in a foreseeable time has to be regulated by the German authorities. The toleration is not an adequate instrument in such a situation. If the toleration is granted for the purpose of a long-term stay, the stay may be 'lawful' because toleration here is actually a residence document in disguise.⁶⁷

In the absence of 'lawful stay', a stateless person present in the territory has no right to travel documents, although his request to obtain them must be given sympathetic consideration under the second sentence of Article 28 of the 1954 Convention.⁶⁸ The authorities can take into account whether the stateless person has applied for travel documents from the country of origin, whether future return to the country of origin could become in fact more difficult by issuing travel documents, and whether the possibility that he will be granted a passport can be excluded.⁶⁹ In the case of travel documents under the second sentence of Article 28 of the 1954 Convention, the authorities can consider the inaction of the concerned person.⁷⁰ The refusal of travel documents in such a situation does not constitute an inadmissible sanction for the applicant's behavior when it has caused a deportation obstacle. The applicant is only denied a benefit to which he is not entitled.⁷¹

6 German Naturalization Laws in Respect to Stateless Persons

Article 32 of the 1954 Convention provides that State Parties shall facilitate the naturalization of stateless persons.⁷² Despite some important reforms on the

66 Hailbronner, Brenner, Maaßen (n 5) I.G.IV.2.30; Kay Hailbronner, *Ausländerrecht: Ein Handbuch* (2nd edn, C.F. Müller 1989) Randnummer (Rn, recital) 193; BVerwG 16.10.1990, BVwerGE 87, 11, 19.

67 BVerwG, Beschluss v 1.10.1979 - 1 C 97.76; Buchholz 402.22 Art 26 Gerichtskostengesetz (GKG, Court Fees Act) Nr 1; ; Hailbronner, Brenner, Maaßen (n 5) I.G.IV.2.30.

68 Furthermore: VGH Bayern, Beschluss v 2.04.2007 - 19 ZB 06.2317; BVerwG, 16.10.1990, DVBl 1991, 270; Buchholz 402.27 Art 28 StlÜbk Nr 2; VGH Baden-Württemberg, 31.03.1993, VBIBW 1993, 482 mwN; Hailbronner, Brenner, Maaßen (n 5) I.G.IV.2.33.

69 VGH Bayern, 7.04.1992, Bayerische Verwaltungsblätter Beschluss (BayVBl, Bavarian Administrative Gazette decision) 1992, 535, 536; VGH Baden-Württemberg, 31.03.1993, VBIBW 1993, 482, 484.

70 Hailbronner, Brenner, Maaßen (n 5) I.G.IV.2.34.

71 VGH Baden-Württemberg, 31.03.1993, VBIBW 1993, 482, 484; OVG Niedersachsen, 30.09.1998, DVBl 1999, 1219, 1220; Hailbronner, Brenner, Maaßen (n 5) I.G.IV.2.34.

72 Article 32 states: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to

acquisition of German nationality that were introduced in 2000,⁷³ in general, it is questionable whether Germany actively implements Article 32. The Federal Administrative Court has interpreted Article 32 merely as a 'goodwill' provision. Whereas it has to be taken into consideration in the context of naturalization of stateless persons, it does not authorize the authorities to decide in favour of a stateless person by ignoring or violating binding national law.⁷⁴ The law provides that a stateless person has to meet burdensome requirements to have a right⁷⁵ to German citizenship, which include⁷⁶ (1) possession of permanent right to stay; (2) legal and regular residence in Germany for at least 8 years; (3) no recourse to public funds for the applicant and/or his dependents; (4) possession of adequate knowledge of the German language and of the legal system, the society and living conditions in Germany; (5) no other citizenship;⁷⁷ (6) not being guilty of any serious crime.⁷⁸

If a person does not meet these requirements, the Nationality Act provides that he may apply for *discretionary* naturalization (*Ermessenseinbürgerung*) on

expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings'.

73 See Kay Hailbronner, 'Germany' s Citizenship Law Under Immigration Pressure', in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (Berghahn Books 2002) 121-135.

74 BVerwG, Beschluss v 10.07.1997 - 1 B 141.97; BVerwG, Urteil v 29.10.1996 - 1 C 37.93; BVerwG, Beschluss v 23.12.1993 - 1 B 61.93. The Federal Court decisions were followed by a number of other lower courts cases. See, for instance, OVG Bremen, Urteil v 18.05.1999 - 1 HB 497/98.

75 The legal claim of the applicant is defined as a right if all the conditions are met. However, the authorities can still exercise discretion at different stages of the process.

76 §10 Staatsangehörigkeitsgesetz (StAG, Nationality Act) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 2 des Gesetzes vom 1.06.2012 (BGBl I 2012, 1224) geändert worden ist.

77 Generally, German law demands renunciation of prior citizenship. In order to avoid statelessness, renunciation will take place after the German administration has assured the applicant in writing that he will be granted German citizenship. Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht (StAR-VwV), GMBL 2001, 122 § 8.1.2.6.1. All nationals of EU Member States are entitled to acquire German nationality without having to renounce their previous nationality. In addition, there are exceptions in case the applicant is not, or only under great difficulties, able to renounce his or her former citizenship. §12 (1) StA.G. Today, dual nationality is accepted in more than 50% of all naturalizations. Kay Hailbronner, *Country Report: Germany* (EUDO Citizenship Observatory 2012) 16.

78 This last requirement means that minor criminal offences up to six months' imprisonment are irrelevant. Holger Hoffmann, 'The Reform of the Law on Citizenship in Germany: Political Aims, Legal Concepts and Provisional Results' (2004) 6(3) EJML 195, 202.

condition that he: (1) has not been sentenced for an unlawful act and is not subject to any court order; (2) has accommodation and can support himself and his dependents.⁷⁹

The only preferential conditions for stateless persons consist in qualifying for discretionary naturalization after a period of six years of lawful residence, and in having the administration considering difficulties in obtaining documents.⁸⁰

The exact meaning of the requirements to naturalize has been object of frequent litigation. Regarding the condition of 'legal residence', the principle most commonly applied by the courts is that it is *not* necessary to be in possession of an unlimited residence permit, although the *Duldung* will not normally be sufficient.⁸¹ Another common problem appears to be the 'sufficient knowledge of the German language'.⁸² In fact, this involves being able to pass the oral and written language examinations leading to the *Zertifikat Deutsch* (equivalent of level B1 in the Common European Framework of Reference for Languages).⁸³ For stateless persons, it may also be

79 §8 StAG in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 2 des Gesetzes vom 1.06.2012 (BGBl I 2012, 1224) geändert worden ist. Whether requirements corresponding to section 10 are also applicable with respect to a discretionary naturalization under section 8 of the nationality law is unclear since there is no explicit provision to that extent in the law. Hailbronner (n 78) 11. However, it seems obvious that the more the requirements of section 10 are met, the more likely the authorities will exercise discretion in favor of an application.

80 StAR-VwV § 8.1.3. Die Bundesregierung, 'Die Ermessenseinbürgerung' <<http://www.bundesregierung.de/Content/DE/StatischeSeiten/Breg/IB/Einbuengerung/ee-ermessen-seinbuengerung.html>; jsessionid=360DA78CE09B21A90B96A481F8FD4F17.s4t1?nn=400132> accessed 29 July 2013. It should be noted that for children of stateless people, who were born in Germany, there exists a special entitlement to citizenship. §2 StaatenlMindÜbkAG vom 29.06.1977 (BGBl I 1977, 1101), das durch Artikel 3 § 4 des Gesetzes vom 15.07.1999 (BGBl I 1999, 1618) geändert worden ist. When a stateless person makes an application after 6 years of lawful residence instead of 8, he does not have a right to naturalize but can ask the authorities to exercise discretion and deviate from the general rule.

81 VG Berlin, 9.05.1988, InfAuslR 1988, 225; OVG Berlin, 18.04.1991, InfAuslR 1991, 228. See also BVerwG, 28.09.1993, InfAuslR 1994, 35; BVerwG, 29.09.1995, InfAuslR 1996, 19; BVerwG, Urteil v 19.10.2011 - 5 C 28.10; BVerwG, 16.07.1996, DVBl 1997, 177.

82 Holger Hoffmann (n 79) 202.

83 §10(4) StAG in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 2 des Gesetzes vom 1.06.2012 (BGBl I 2012, 1224) geändert worden ist. The requirement of adequate knowledge of life in

a problem proving that they have no nationality, if it had not been established before.⁸⁴

7 Conclusion

Statelessness is not a protection ground in Germany, but complementary forms of protection may be available, usually with reference to the practical impossibility of expulsion or return. However, there is a need for further legal developments to ensure that stateless persons can be properly identified and protected in line with the international commitments and UNHCR Guidelines. A common policy for the whole country specifically addressing the actual protection needs of the stateless should be adopted. This would include establishing a statelessness determination procedure and recognizing statelessness as a protection ground; reviewing readmission agreements in order to guarantee that they take into account the rights of stateless persons, both in Germany as well as in the country of removal; addressing the long-term needs of stateless persons by facilitating their access to naturalization.

Germany is fulfilled if the foreigner passes the naturalization test. §10(5) StAG in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 2 des Gesetzes vom 1.06.2012 (BGBl I 2012, 1224) geändert worden ist. An exception to the German test requirement applies to persons who are illiterate or unable to learn for health reasons. §10(6) StAG in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 2 des Gesetzes vom 1.06.2012 (BGBl I 2012, 1224) geändert worden ist. In this regard, the Federal Administrative Court clarified that generally illiteracy itself is not an illness or disability. BVerwG, Urteil v 27.05.2010 - 5 C 8.09 (In this case, the claimant was illiterate only because he did not go to school in Turkey). There are some forms of illiteracy that are based on an illness or disability, and in these cases the exception applies. In all the other cases, the authorities can take into consideration the fact that a person is illiterate and make a discretionary decision in his favour. §8 StAG in der im Bundesgesetzblatt Teil III, Gliederungsnummer 102-1, veröffentlichten bereinigten Fassung, das durch Artikel 1 des Gesetzes vom 28.08.2013 (BGBl I 2013, 3458) geändert worden ist.

84 Interview with Immigration Lawyer number 1 (22 July 2013); interview with German Immigration Lawyer number 2 (9 August 2013).