

# Prevention of statelessness

## *Introduction*

It is a human rights principle that everyone has the right to a nationality. The corollary is the principle of avoidance of statelessness: a great evil which creates so many problems for states and imposes so much hardship and suffering on innocent beings (Córdova, 1953). The principle of avoidance of statelessness is probably the oldest and most commonly recognised principle of nationality law, and today, the obligation to avoid statelessness is considered part of customary international law. Even so, statelessness seems to be a persistent phenomenon.

Courageous attempts to solve the problem of statelessness have been made. In 1953, the special rapporteur of the International Law Commission, Roberto Córdova, urged the Commission to adopt a draft Convention on the Elimination of Statelessness - an instrument that was designed to deal completely with the question, leaving no lacunae whatsoever. The draft convention identified three main sources of statelessness: 1) statelessness at birth, 2) statelessness by deprivation of nationality and 3) statelessness in cases of territorial changes. However, the sources were not drained; the draft convention on the elimination of statelessness were not agreed upon; instead, a less ambitious convention on the reduction of statelessness was adopted (1961).

Thus, today we are still to be confronted with these sources of statelessness and have to discuss how the European Union Member States and the Union can avoid the occurrence of statelessness. First, however, we must have an idea about to what extent the principle of avoidance of statelessness is reflected in the Member States' nationality laws and practice?

In order to know, we might have a look at the empirical evidence provided by a recently published comprehensive study of the rules for acquisition and loss of nationality in the 15 old EU Member States (EU15 states), the NATAC project, funded by the 6<sup>th</sup> EU Research Framework Programme and a follow-up project on citizenship in the 10 new EU Member States (EU10 states) and Turkey.

## *1. Prevention of statelessness at birth*

According to international conventions, contracting states shall provide in their internal law for their nationality to be acquired *ex lege* by foundlings found in their territory who would otherwise be stateless. Likewise states shall provide for their nationality to be acquired by other children born on their territory who do not acquire at birth another nationality; however, in these cases states may chose whether to grant nationality at birth *ex lege*, or subsequently upon an application and - if desired - subjected to certain conditions.

Among the EU15 states, 14 have provisions that explicitly target foundlings or persons born in the state's territory to unknown parents and provide for their automatic acquisition of nationality. The only exception is Greece, but here foundlings will nevertheless most likely acquire nationality according to rules providing for persons born in the country with unknown or unclear nationality to become Greek nationals *ex lege*.

In contrast to what applies to foundlings, five EU15 states (Denmark, Germany, The Netherlands, Sweden and the UK) do not have special rules for the acquisition of nationality at birth by 1) children born in the state's territory with unclear or unknown nationality and 2) native-born children who would end up stateless for some other reason - but these states have special provisions for the acquisition of nationality after birth by stateless persons born on the state's territory. Among the rest of the 15 states, eight (Belgium, Finland, France, Greece, Ireland, Italy and Spain) provide for automatic acquisition of nationality at birth by children born to stateless persons or persons who would otherwise be stateless; in Luxembourg, automatic acquisition is reserved for children of stateless parents.

The new Member States that apply *ius soli* often apply a qualified *ius soli* principle (with a requirement of permanent residence).

In some Member States, children born abroad do not acquire nationality automatically if born out of wedlock and if only the father is a national (Denmark, Finland and Sweden); special procedures for acquisition of nationality exist in Finland and Sweden, while Danish children have to undergo a process of naturalization, and there is no guarantee against statelessness.

## 2. Loss of nationality leading to statelessness

Among the EU15 Member States, the most important requirement for renouncing nationality is that the person does not end up stateless.

However, when it comes to loss of nationality due to permanent residence abroad, some countries provide for withdrawal without being under a legal obligation to avoid statelessness (Ireland: naturalized spouses of nationals after seven years without interruption) (France: French descendants, if their parents have resided abroad for at least half a century and neither the descendant nor the parent have been considered French nationals) (Greece: persons acting against Greek interests while residing abroad).

The European Convention on Nationality (ECN) from 1997 accepts that states may provide for loss of nationality due to false information or other types of fraud in a procedure of acquisition of nationality even in case the person concerned will thereby become stateless. Among the EU15 states' nationality laws, 12 include provisions on loss on the ground of fraud, and avoidance of statelessness is not prescribed by law in 10 of these states; Finland is the only state that explicitly limit the loss of nationality due to fraud to dual nationals.

In seven EU15 states, persons who violate the state's basic interests or endanger its security by committing crimes against the state may be deprived of their nationality (Belgium, Denmark, France,

Greece, Ireland, Luxembourg and the UK) and in four of these states (Belgium, Greece, Ireland and Luxembourg), the withdrawal of nationality is in principle possible even if the person concerned does not hold a second nationality; however, the provisions providing for withdrawal is of little relevance in practice in these states where they have already been in force for some time – with the exception of Greece.)

Two states, France and Luxembourg provide for loss of nationality on the ground of other crimes than those harming the state's vital interests; in Luxembourg, persons who are not nationals by descent can be deprived of their nationality, even if they end up stateless. However, this mode of deprivation of nationality is rarely, if ever, applied in practice.

There is one mode for which all states with appropriate rules explicitly prohibits the occurrence of statelessness: children's loss of nationality as a result of a parent's loss of nationality; besides this, statelessness is avoided in almost all countries only in cases of renunciation of nationality.

To sum up: The prevention of statelessness is still a long way from being prescribed explicitly in all states for all modes of loss of nationality. The only states where the loss of nationality can never leave a person stateless are Finland (according to the nationality Act) and Sweden (according to the Constitution).

### *3. State succession*

Statelessness as a result of state succession must be avoided. Some criteria to be taken into account is specified in the ECN, but the convention is rather cautious in prescribing principles for conferring nationality in cases of state succession.

The new Council of Europe Convention on the avoidance of statelessness in relation to State succession (2006) has, however, contributed to solving problems of statelessness, building upon, but without prejudice to, the general principles established in other international instruments and documents, by adding specific rules applicable to the particular situation of statelessness in relation to State succession.

However, there is still a need to take into account the practical experience gained in recent years with regard to State succession and statelessness; the history of four states illustrate different problems.

In Estonia, the restoration of the pre-1940 nationality caused mass statelessness of non-Estonians and even at the end of 2005, 136 thousand permanent residents of Estonia were without a nationality. The persistent contingent of stateless residents was not anticipated.

Also the case of Latvia demonstrates that the principle of awarding nationality to all residents by successor states that emerged from dissolution of a predecessor state is not an established rule of international law. Also Latvian nationality policy is based on the concept of state continuity and the policy led to the situation that a large group of people who settled in Latvia during occupation remained stateless. Latvia has introduced the status of non-citizens, but non-citizens are denied political

rights and the right to hold certain posts, and the question of the fate of non-citizens in the framework of EU law remains unsettled.

The Czech Republic and the Slovak Republic established the initial overall determination of citizenship by stipulating that natural persons, who were citizens of the Republic as of 31 December 1992, were citizens of the Republic as of 1 January 1993. This prevented *de jure* statelessness, but the consequences were that some former Czechoslovak citizens ended up with the citizenship of a successor state in which they did not live and to which they were only formally attached. Czech and Slovak nationals could choose their citizenship for a period of one year after the dissolution of the Czechoslovak Federative Republic, but thousands of Roma living in the Czech Republic became stateless due to improper documentation, permanent residence in Slovakia, lack of information about the procedure (and the need to apply), a criminal record or other reasons.

#### *4. Other situations leading to statelessness*

There are of course other situations than the three mentioned above, in which statelessness may arise. In its advisory opinion on the proposed amendments to the naturalization provisions of the constitution of Costa Rica (1984), the Inter-American Court of Human Rights touched upon the question of the meaning of the right to a nationality; a foreigner entering into marriage with a national would lose his or her nationality, but could only qualify for acquisition of the nationality of Costa Rica after two years' marriage and residence in Costa Rica. The Court pointed out that statelessness could result from such provision.

In the Netherlands, for instance, a father can only pass on his Dutch nationality to his child by declaration after legitimation when he has taken care of the child for three years. In few cases, involving Dutch fathers with a spouse from an Islamic country, the restriction of the father's right to pass on his nationality to his child has resulted in statelessness of the child.

Slovenian rules requiring applicants to present proof of expatriation before he or she can be naturalized may also lead to temporary statelessness which can become permanent if after release from the previous citizenship an applicant is no longer eligible for naturalization.

#### *IV Recommendations*

The practice of member States has demonstrated that states without major problems can adopt nationality law that prevent statelessness; states membership of the European Union add considerable weight to a call for common minimum standards, mutual adaptation and learning across borders. Certain principles should be adopted:

As to acquisition of nationality at birth, Member States should ensure that every child acquires a nationality, either *ius sanguinis* or *ius soli*.

Even though some European states object to the application of the *ius soli* principle on the ground that birth at a state's territory does not necessarily reflect a link between the individual and the state concerned, this argument should not be considered valid insofar statelessness is at stake. Thus, Member

States that otherwise do not apply *ius soli* should transmit their nationality to all children born on their territory who do not acquire at birth another nationality (not just foundlings – as today in all EU15 states - but also children born to stateless parents or parents of unknown nationality).

Member States that provide for an exception from the principle of acquisition of nationality by descent as to children born abroad, if born out of wedlock, should ensure that such exceptions do not lead to statelessness.

As to the loss of nationality Member States should not provide in their internal law for the loss of their nationality if the person concerned would thereby become stateless. The Finnish Nationality Act, section 4 on preventing statelessness is an example of best practice; it states as follows:

The provisions of this Act on the loss and release from citizenship must not be applied if, as a consequence of the application of these provisions, a person were to become stateless.

As to state succession, there is a need for a more coherent set of guidelines for the acquisition and loss of nationality, both inside and outside a state territory – taken into consideration that in several states, nationality laws and policies directly affect historic minorities with strong cultural and political affinities to neighboring states.

In general, Member States should accede to ECN and other conventions on the prevention of nationality and revise their nationality law accordingly. Such conventions have influenced the nationality law of many European states, for example caused Denmark and Sweden to limit the applicability of their rules on loss of nationality due to residence abroad to persons who also hold another nationality, and Greece to abolish a heavily criticized rule that nationals of non-Greek orthodox descent could be deprived of their nationality once they abandoned Greek territory “with no intention of returning” – even if this made them stateless.

## References:

The results of the NATAC projects have been published in two volumes:

*Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch: The Acquisition and Loss of Nationality, vol. 1: Comparative Analyses, vol. 2: Country Analyses. Amsterdam University Press, Sept. 2006.*

Additional material is available at: <http://www.imiscoe.org/natac/index.html>. On this site extended versions of several book chapters, the questionnaires, comparative tables with data on modes of acquisition and loss of nationality and a collection of relevant national statistics are accessible.

A third volume on citizenship in the ten new Member States and Turkey has been published in April 2007:

*Rainer Bauböck, Bernhard Perchinig and Wiebke Sievers (eds.) Citizenship Policies in the new Europe. Amsterdam University Press, May 2007.*