

CASE NOTE

SUDITA KEITA v HUNGARY — EUROPEAN COURT OF HUMAN RIGHTS DECISION ON THE RIGHT TO PRIVATE LIFE OF STATELESS PERSONS

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I INTRODUCTION

In the recent case of *Sudita Keita v Hungary* ('*Sudita Keita*'),¹ the European Court of Human Rights ('the Court') found a violation of art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'),² which protects the right to private and family life. The case concerned Mr Sudita Keita, a stateless person whose legal status in Hungary had been uncertain for a period of almost 15 years, with adverse repercussions on his access to healthcare, employment and on the enjoyment of his right to private life in general.

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¹ *Sudita Keita v Hungary* (European Court of Human Rights, Fourth Section, Application No 42321/15, 12 May 2020) ('*Sudita Keita*').

² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No.005 (entered into force 3 September 1953) art 8 ('*ECHR*'), which reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The case had already been significantly relevant at the national level in Hungary. In 2015, the Constitutional Court of Hungary ruled that the domestic provision allowing only lawfully resident persons to apply for stateless status was unconstitutional and contravened international law.³ The judgment concluded that the lawful stay requirement was a material provision that modified the definition of a stateless person and unduly narrowed the scope of art 1 of the 1954 *Convention Relating to the Status of Stateless Persons* ('1954 Convention').⁴ The Constitutional Court quashed the lawful stay requirement and Mr Sudita Keita was ultimately granted stateless status by the Hungarian authorities in October 2017. The complaints made by Mr Keita before the European Court of Human Rights refer to the difficulties in regularising his stay in Hungary in the period between 2002 and 2017.

The *Sudita Keita v Hungary* judgment is noteworthy because it follows and reinforces the Court's principles set out in the other landmark case of *Hoti v Croatia* ('*Hoti*'),⁵ providing consistency to a line of jurisprudence that addresses statelessness as a core issue and aims to extend protection to persons without a nationality. It reiterates that art 8 imposes a positive obligation on states to provide an effective and accessible procedure — or a combination of procedures — enabling the individual concerned to have the issue of their status determined, with due regard to private-life interests.⁶ It particularly values the aim of the 1954 *Convention*, which is the main international treaty dealing with the status and rights of stateless persons.⁷

II FACTS

Mr Keita is of Somali and Nigerian descent. He was born in 1985 and arrived in Hungary in 2002 without any valid travel documents. Mr Keita submitted a request for refugee status upon his arrival in Hungary.⁸ His request was rejected and Mr Keita was issued with an expulsion order in April 2003.⁹

Between 2003 and 2006, Mr Keita had no regular legal status in Hungary and was subject to an expulsion order, without entitlement to healthcare or employment. The Nigerian embassy in Budapest refused to recognise him as a national and the Hungarian authorities were unable to return him to Somalia during

³ *Case No. III/01664/2014* [2015] Constitutional Court of Hungary.

⁴ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('1954 Convention'). Article 1 of the 1954 *Convention*, which provides the definition of stateless person, does not admit reservations or modifications. The Constitutional Court concluded that this approach was further supported by the fact that the 1954 *Convention* distinguishes between rights that are accorded only to lawfully staying persons (eg right of association, right to work and housing) and rights that are accorded to all stateless persons, demonstrating that the lawful stay condition should not be applied in general.

⁵ *Hoti v Croatia* (European Court of Human Rights, First Section, Application No 63311/14, 26 April 2018) ('*Hoti*'). For further comment see Katja Swider, '*Hoti v Croatia*: European Court of Human Rights Landmark Decision on Statelessness' (2019) 1(1) *Statelessness & Citizenship Review* 184.

⁶ *Sudita Keita* (n 1) [41]–[42].

⁷ 1954 *Convention* (n 4).

⁸ *Sudita Keita* (n 1) [1], [5]. Hungary only introduced a statelessness determination procedure and protection status in 2007. For further details, see Gábor Gyulai, *Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness* (Hungarian Helsinki Committee 2010).

⁹ *Sudita Keita* (n 1) [7]–[8].

the civil war. Thus, in 2006, he was admitted with a tolerated status (*befogadott*) and then granted a humanitarian residence permit for two years.¹⁰ It did not seem that the authorities had informed him about the possibility of applying for stateless status, as required by national legislation.¹¹

In 2008, the Hungarian Immigration Authority reviewed his situation and left Mr Keita once again without a recognised status or valid documents and issued him with a deportation order.¹² In 2010, Mr Keita applied for stateless status. However, the national courts considered that his request should be refused on the grounds that the law required applicants to be ‘lawful[ly]’ staying in the country.¹³ After lengthy proceedings, the Constitutional Court of Hungary declared in 2015 that the ‘lawful stay’ requirement was unconstitutional and contrary to Hungary’s international obligations in light of the *1954 Convention*. The requirement was removed and Mr Keita was finally granted stateless status in October 2017, regaining his entitlement to basic healthcare and employment.¹⁴

A Issues

The applicant submitted that the Hungarian authorities’ refusal to regularise his situation had resulted in a violation of arts 3, 5, 8, 13 and 14 of the *ECHR*.¹⁵ The applicant argued that the Hungarian legal framework was incompatible with international law and prevented him from being recognised as stateless and regularising his situation, resulting in a period of 15 years during which he was deprived of the means of providing for himself and was unable to marry.¹⁶

The Government submitted that the applicant’s situation had been resolved following the Constitutional Court’s ruling and, even before such ruling, the difficulties faced by the applicant did not amount to a violation of art 8. In the Government’s view, art 8 cannot be interpreted as requiring a state to grant stateless status to a person.¹⁷

The Court considered that the complaint was to be examined under art 8 alone.¹⁸ Rejecting the Government’s arguments, the Court considered that the question was not whether Mr Keita should have been granted stateless status but rather whether he had had an effective opportunity to regularise his status.¹⁹ The main question was similar to that in *Hoti*:

¹⁰ *ibid* [8]–[13].

¹¹ *ibid* [11]. See further details under Part II(B)(2) below.

¹² *Sudita Keita* (n 1) [14]–[15].

¹³ *ibid* [16]–[17].

¹⁴ *ibid* [18]–[21]. See Gábor Gyulai, ‘Hungarian Constitutional Court Declares That Lawful Stay Requirement in Statelessness Determination Breaches International Law’ *European Network on Statelessness* (Blog Post, 2 March 2015) <<https://www.statelessness.eu/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness-determination>>.

¹⁵ These provisions protect the prohibition of torture and inhuman or degrading treatment or punishment (art 3), the right to liberty and security (art 5), the right to respect for private and family life (art 8), the right to an effective remedy (art 13) and the prohibition of discrimination (art 14).

¹⁶ *Sudita Keita* (n 1) [24], [26]–[27].

¹⁷ *ibid* [28]–[29].

¹⁸ *ibid* [24]. Regrettably, the judgment does not address the Court’s reasoning in deciding to examine the complaint under art 8 alone and departing from the applicant’s characterisation under *ECHR* (n 2) arts 3, 5, 13, 14.

¹⁹ *Sudita Keita* (n 1) [36].

Whether, having regard to the circumstances as a whole, the Hungarian authorities, pursuant to Article 8, provided an effective and accessible procedure or a combination of procedures enabling the applicant to have the issues of his further stay and status in Hungary determined with due regard to his private-life interests.²⁰

B *Holding*

1 *The Right to Private and Family Life and the Repercussions of an Uncertain Legal Status*

In its reasoning, the Court reiterated the principles outlined in *Hoti*. It stated that art 8 protects the right to establish and develop relationships as well as certain aspects of a person's social identity, thus the social ties between a person and the community in which they live are included in the concept of private life.²¹ The Court confirmed that the *ECHR* cannot be interpreted as guaranteeing a right to reside or a particular type of residence permit, nor can the Court decide which status should be granted. However, the national authorities must offer a solution for stateless people in order for them to enjoy their right to private and family life without obstacles.²² In some cases, art 8 may therefore impose on states a positive obligation 'to provide an effective and accessible means of protecting the right to respect for private and/or family life',²³ including a domestic remedy allowing the competent authority to deal with the substance of a complaint under the *ECHR* and grant adequate relief.

Taking into consideration that the applicant had been living in Hungary since 2002, where he undertook training and established a relationship, and that he did not have a recognised status in any other country, the Court accepted that Mr Keita had the right to enjoy private life in Hungary as protected by art 8. The uncertainty of his residence and migration status for about 15 years resulted in long periods without entitlement to healthcare and employment and caused adverse repercussions on his private life.²⁴

2 *Statelessness as a Juridically Relevant Factor*

Of particular interest is that the Court considered the applicant's statelessness to be an 'important element' of the case.²⁵ Although the Government did not contest that the Nigerian embassy had refused to recognise Mr Keita as a national, the Court observed that the authorities failed to inform the applicant about the possibility of applying for stateless status after they became aware of Nigeria's refusal. According to national legislation, when there is a possibility that a person may be declared stateless, the immigration authority has a duty to inform them

²⁰ *Sudita Keita* (n 1) [32]. See the similarities in *Hoti* (n 5) [124].

²¹ *Sudita Keita* (n 1) [31], citing *Hoti* (n 5) [119].

²² *Sudita Keita* (n 1) [31], citing *Hoti* (n 5) [121].

²³ *Sudita Keita* (n 1) [31], citing *Hoti* (n 5) [122]–[123]. See also *Abuhmaid v Ukraine* (European Court of Human Rights, Fifth Section, Application No 31183/13, 12 January 2017) ('*Abuhmaid*') [118]–[119], which further explores the overlap between the protection afforded by *ECHR* art 8 and the guarantees under art 13.

²⁴ *Sudita Keita* (n 1) [34], [37].

²⁵ *ibid* [35].

about the possibility of requesting stateless status and about the procedures involved, a duty that the authorities disregarded in this case.²⁶

3 *States' Obligations to Provide Effective and Accessible Procedures*

The Court recognised that the requirements imposed by Hungarian law on Mr Keita made it practically impossible for him to be recognised as stateless and perpetuated a situation of uncertainty, contravening the principles of the *1954 Convention* according to which stateless persons should not be imposed requirements that they are unable to fulfil by virtue of their status.²⁷ The *1954 Convention* includes an exhaustive list of exclusion grounds and, in light of its aim, it does not allow states to establish further material conditions or limitations for stateless persons to access protection — for instance, requiring applicants to be lawfully staying in the territory or establish time-limits for individuals to claim stateless status.²⁸

The Court further noted that the domestic authorities took over 19 months to reach a final decision in the applicant's case after the Constitutional Court issued its ruling.²⁹

The combined effect of the aforementioned arguments led the Court to conclude that Hungary had failed to comply with its positive obligation to provide an effective and accessible procedure, or a combination of procedures, enabling the applicant to have the issue of his status determined with due regard to his private-life interests, resulting in a violation of art 8.³⁰

III ANALYSIS

The Court has been progressively developing its case law and embracing the international legal framework for the protection of stateless people, analysing new cases that take into account stateless persons' point of view and their rights. The Court considered that the applicants' statelessness was an important element in the cases and integrated the principles of the *1954 Convention* in its analysis.³¹ However, the *Sudita Keita* judgment contains an unfortunate reference to de facto statelessness, as the Court asserts that when the Nigerian embassy refused to recognise the applicant's Nigerian nationality he was rendered 'de facto stateless' from that point in time.³² The analysis of whether a person is stateless should follow the definition established in art 1(1) of the *1954 Convention*, which requires

²⁶ *Government Decree 114/2007 (V 24) Korm. on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals* (Hungary), cited in *Sudita Keita* (n 1) [11], [38].

²⁷ *Sudita Keita* (n 1) [39].

²⁸ Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 130–31; *Handbook on Protection of Stateless Persons* (UNHCR 2014) [69]–[70] ('*Handbook on Protection of Stateless Persons*').

²⁹ *Sudita Keita* (n 1) [40].

³⁰ *ibid* [41]–[42].

³¹ *ibid* [35]; *Hoti* (n 5) [128].

³² *Sudita Keita* (n 1) [38].

an examination of how the law operates and is a mixed question of fact and law.³³ When Nigeria confirmed that, according to the operation of its law, Mr Keita was not a national, the applicant should have been recognised as stateless without any further qualification. The term *de facto* statelessness is absent from the *1954 Convention* and not defined anywhere in international law.³⁴ Its application may lead to the exclusion from protection of persons who should fall within the scope of the *1954 Convention*, a dangerous approach that the Court should clarify in future jurisprudence. In using the words ‘rendering the applicant *de facto* stateless’, the Court also disregarded the declaratory nature of the recognition of statelessness, as an individual is considered stateless from the moment that the conditions under art 1(1) of the *1954 Convention* are met.³⁵

In the examination of whether the domestic authorities complied with their positive obligations under art 8, the Court followed the same principles in *Sudita Keita* and *Hoti*,³⁶ suggesting a consistent reasoning for similar cases: assessing the applicant’s social ties to the country,³⁷ establishing that the uncertainty had adverse repercussions on private life,³⁸ examining whether there was an effective possibility of regularising legal status³⁹ and, finally, whether any requirements were imposed that the applicant was unable to fulfil by virtue of his status.⁴⁰

In the assessment of the repercussions on the private life of the applicant, although Mr Keita had complained of the impact on his access to healthcare, employment and inability to marry, the Court focused only on the first two items and did not address the relevance of the right to marry in this context.

IV CONCLUSION

The judgment reinforces that the rights protected under the *ECHR* are not merely theoretical, but must be practical and effective.⁴¹ Although Hungary had an established statelessness determination procedure, until 2015 it was only accessible to those lawfully staying in the country and, thus, prevented stateless people from effectively accessing protection. The Constitutional Court of Hungary’s decision of February 2015 brought the Hungarian procedure into compliance with international norms, and the Court’s judgment in *Sudita Keita* reiterated that it is contrary to the principles of the *1954 Convention* to impose on stateless individuals requirements that they are unable to fulfil.⁴² Such

³³ *Handbook on Protection of Stateless Persons* (n 28) [7], [23]–[24]. *1954 Convention* (n 4) art 1(1) states that, for the purposes of the Convention, the term ‘stateless person’ means a person who is not considered as a national by any state under the operation of its law. The UNHCR *Handbook on Protection of Stateless Persons* explains that the determination of a person’s statelessness requires an analysis of how nationality laws are applied in practice by the state in relation to the individual, ie how the law operates.

³⁴ *Handbook on Protection of Stateless Persons* (n 28) [7]. For a discussion on this point, see *Expert Meeting - The Concept of Stateless Persons under International Law* (“*Prato Conclusions*”) (UNHCR 2010) <<https://www.refworld.org/docid/4ca1ae002.html>>

³⁵ *Handbook on Protection of Stateless Persons* (n 28) [16]; *Sudita Keita* (n 1) [38].

³⁶ Although with a different outcome, see also the similarities with *Abuhmaid* (n 23).

³⁷ *Sudita Keita* (n 1) [33]; *Hoti* (n 5) [125].

³⁸ *Sudita Keita* (n 1) [34]; *Hoti* (n 5) [126].

³⁹ *Sudita Keita* (n 1) [36]; *Hoti* (n 5) [131].

⁴⁰ *Sudita Keita* (n 1) [39]; *Hoti* (n 5) [137].

⁴¹ *Airey v Ireland* (European Court of Human Rights, Chamber, Application No 6289/73, 9 October 1979) [24]; *Artico v Italy* (European Court of Human Rights, Chamber, Application No 6694/74, 13 May 1980) [33].

⁴² *Sudita Keita* (n 1) [39].

requirements result in long periods of legal limbo and uncertainty in the absence of effective routes to regularisation for stateless people. This is particularly relevant for stateless people who typically face obstacles in accessing documentation, providing evidence and demonstrating ties to a country, as most of them have been living on the margins of a society that refuses to acknowledge their identity.

The Court has once again shown that states' obligations towards stateless persons flow from an integrated approach to international law and human rights with due consideration to the *EHCR* and international legal instruments.⁴³ The relationship between the judgments in *Hoti* and *Sudita Keita* indicates that the Court may be constructing a consistent line of jurisprudence that has the potential to promote a harmonised and human rights-based interpretation of the core statelessness conventions.

The judgment further emphasises that statelessness is a relevant factor and that states share the responsibility in identifying statelessness and facilitating access to protection for stateless persons. The Court specifically noted that the authorities should have informed the applicant of the possibility of applying for stateless status. As *Sudita Keita* and *Hoti* demonstrate, the Court is well positioned to develop regional case law on the fundamental rights of stateless persons, demanding states to establish mechanisms and procedures to adequately identify statelessness and provide stateless persons with access to the protection afforded by the *1954 Convention*, as well as preventing interference with art 8 and other *ECHR* rights. This includes issues related with access to the procedure, information and legal assistance, due process safeguards, evidence assessment, length of the proceedings, protection throughout the procedure and further questions that have scarcely been examined by international courts. The need for further jurisprudence is magnified by the wide impact and enforceability of the Court's judgments on national law and practice.

⁴³ In *Sudita Keita* (n 1) the Court only referred to the *1954 Convention* (n 4), but in recent statelessness cases the Court has also referred to the *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); *European Convention on Nationality*, opened for signature 6 November 1997, ETS 166 (entered into force 1 March 2000); *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession*, opened for signature 19 May 2006, CETS 200 (entered into force 1 May 2009). It also refers to mapping studies on statelessness conducted by UNHCR and other publications made by the International Law Commission and international and regional bodies. See, eg, *Ramadan v Malta* (European Court of Human Rights, Fourth Section, Application No 76136/12, 21 June 2016); *Kurić v Slovenia* (European Court of Human Rights, Grand Chamber, Application No 26828/06, 26 June 2012).