# A TELEOLOGICAL AND CHILD-SENSITIVE INTERPRETATION OF A COUNTRY OF FORMER HABITUAL RESIDENCE FOR STATELESS CHILDREN BORN OUTSIDE THEIR PARENTS' COUNTRY OF NATIONALITY OR FORMER HABITUAL RESIDENCE

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*The notion of a country of former habitual residence — as the functional equivalent of a country of nationality for stateless individuals and the reference point for the 'being persecuted' inquiry in art 1A(2) of the Convention relating to the Status of Refugees — is an ill fit for stateless children born outside the country of nationality or former habitual residence of their parent(s). On a plain, ordinary reading of the definition, stateless children born in the country of refuge have neither a nationality nor a former habitual residence and fall outside the ambit of the refugee definition. In a similar fashion, stateless children born prior to arrival in the country of refuge (but not in the country of nationality or designated country of former habitual residence of their parent(s)) are unable to establish the country of reference element, as read with all other indicia of refugeehood. In the context of concurrent family claims, this predicament exposes an obvious inequity of access to refugee status and a consequent risk of refoulement to serious harm, as such children may face return to the country of nationality or former habitual residence of their parent(s). While the dominant tide of jurisprudence supports a literal interpretation of the notion, Professors Michelle Foster and Hélène Lambert have identified a purposive pathway, better aligned with the humanitarian scope of the refugee definition. For applicants who are stateless children born outside of the country of nationality or former habitual residence of their parent(s), this interpretation allows for the determination of country of reference in combination with forward-looking considerations on their returnability and risk of persecution upon return. This article endorses such an interpretation and comprehensively charts a child-sensitive approach to applying the criteria for refugee status (historically formulated from an adult-oriented perspective), by exploring what child-specific interests might better inform the notion in the context of the individualised refugee assessment of concurrent family claims.*

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## I INTRODUCTION

On a strict, literal interpretation of the refugee definition, the vulnerability of a child born outside the country of nationality or former habitual residence of their parent(s) (denied the nationality of their parents at birth or where statelessness is transferred intergenerationally) is readily apparent. On the one hand, they may face obstacles to accessing a nationality and, on another, to accessing protection under the *Convention relating to the Status of Refugees* ('*Refugee Convention*').[1] This is because a child without a nationality, who has never before resided in a designated country of reference, cannot satisfy the plain, ordinary meaning of 'a country of *former* habitual residence' within the meaning of the refugee definition in art 1A(2) of the *Refugee Convention* (hereafter the 'refugee definition'). In the case of stateless persons, a country of former habitual residence serves as the reference or conduit through which the assessment of 'being persecuted' occurs.[2]

To recall, art 1A(2) provides that a 'refugee' is a person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, *not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it …*

Having acknowledged the dual obstacles to accessing a nationality and protection, it is necessary to emphasise that it is the second obstacle and protection gap under the *Refugee Convention* that this article addresses. Furthermore, because the category of stateless children is potentially amorphous (as there are varying degrees of statelessness),[3] it is necessary to emphasise that this article responds solely to the predicament of stateless children born outside the country of nationality or designated country of former habitual residence of their parent(s)[4] in the context of the refugee status inquiry where such children have lodged claims contemporaneously with their parent(s).

It is helpful to distinguish the refugee definition from that of a stateless person per se, and to appreciate the overlap in condition and statuses. According to the de jure approach to questions of nationality and statelessness, a stateless person is someone who is not considered a national by operation of law, or for whom it would be a mere formality to acquire such nationality.[5] While a person may be

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1 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1 ('*Refugee Convention*').

2 ibid. Pertinently, the definition of 'refugee' identifies a substitute reference state (as the functional equivalent to having a nationality) for stateless individuals, being their 'country of former habitual residence'.

3 See Susan Kneebone, Brandais York and Sayomi Ariyawansa, 'Degrees of Statelessness: Children of Returned Marriage Migrants in Can Tho, Vietnam' (2019) 1(1) *Statelessness & Citizenship Review* 69.

4 While stateless parent(s) may have more than one former habitual residence, this article is concerned with their designated country or countries of former habitual residence under consideration by refugee status determination bodies, in the context of which the risk of refoulement for the stateless child may emanate.

5 Whilst acknowledging that there is some divergence in state practice, a starting point for this article is that, where there are real obstacles to children acquiring a nationality (such as through obtaining birth registration or accessing necessary documentation to apply for birth registration or citizenship), such cases would not be characterised as inchoate nationality and would fall within the realm of statelessness. See *AC (Venezuela)* [2019] NZIPT 801438–439 18–21 [84]–[93].

stateless and a refugee, the reality that not all stateless persons (and children) can qualify for refugee status must be appreciated. Notably, two parallel protection regimes have been conceived under the *Refugee Convention* and the 1954 *Convention relating to the Status of Stateless Persons* (‘*1954 Statelessness Convention*’),[6] respectively. It is apparent from the drafting histories of these regimes that the drafters intended that stateless persons who feared persecution for a *Refugee Convention* reason would be protected as refugees, while other stateless persons would look to the 1954 *Statelessness Convention*. At the heart of the overlay and distinction between the regimes is the discrimination that refugees experience.

Of the many contributors to global statelessness, discrimination in nationality laws and practice — in particular, gender discrimination (as concerns that commonly ignite the refugee definition) — remains a significant problem.[7] The effects of such discrimination are compounded in instances of children born abroad,[8] a predicament exacerbated through ongoing conflict and political instability.[9] As may be anticipated, the question of access to the *Refugee Convention* for these children is a pressing one and as will be demonstrated, their inability to access such protection is principally unsound.

This denial in access to refugee status for stateless children born outside the country of nationality or former habitual residence of their parent(s) cuts across fundamental principles of equality of status amongst refugees, stateless persons and nationals, as expressed in the principle of non-discrimination, underpinning

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6 *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) (‘*1954 Statelessness Convention*’).

7 Hélène Lambert, ‘Comparative Perspectives of Arbitrary Deprivation of Nationality and Refugee Status’ (2015) 64(1) *International & Comparative Law Quarterly* 1.

8 By way of example, gender discrimination in Syrian nationality law (where the paternal *jus sanguinis* principle is operative) has dramatically increased the stateless population, where a quarter of refugee households are led by Syrian women: *Nationality Law, Legislative Decree 276* (1969) (Syrian Arab Republic) (‘*Syrian Nationality Law*’). In response to this predicament, art 3 of the *Syrian Nationality Law* was enacted, enabling the acquisition of a nationality by children born to Syrian mothers in Syria. However, this provision only addresses the plight of children born in Syria and not those born abroad, where some 1 million children have been born into exile: Malak Benslama-Dabdoub, ‘Colonial Legacies in Syrian Nationality Law and the Risks of Statelessness’ (2020) 3(1) *Statelessness & Citizenship Review* 6, 21–22. Further examples can be seen in Iraq’s 2006 nationality law, which limits the ability of Iraqi women to confer nationality on children born outside the country: *Iraqi Nationality Law No 26 of 7 March 2006*, Iraq Official Gazette 4019 art 4 (Iraq). In such cases, the child of an Iraqi mother can apply for nationality within a year of reaching majority if the child’s father is unknown or stateless and the child resides in Iraq at the time of the application. In Liberia, children born abroad to Liberian mothers are excluded from acquiring Liberian citizenship under the *Aliens and Nationality Law 1973* art 20.1(b) (Liberia). In the Bahamas, only children born abroad to Bahamian fathers can acquire Bahamian nationality: *Constitution of the Commonwealth of the Bahamas* art 6. In Barbados, only Barbadian fathers can confer nationality on their children born abroad: *Constitution of Barbados* art 5(1). As one final example, in Malaysia, children born to Malaysian mothers outside of the country may only acquire Malaysian citizenship through registration at an overseas Malaysian consulate or at the National Registration Department in Malaysia at the discretion of the Federal Government: *Constitution of Malaysia* art 4(1)(b). But note recent developments in the High Court in Malaya challenging these laws: *Suriani Kempe (President of the Association of Family Support & Welfare Selangor & KL (Family Frontiers)) & Ors v Government of Malaysia & Ors* [2021] MLJU 1864. See UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness 2021* (Report, 5 March 2021) 8–11; UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness 2019* (Report, 14 July 2020).

9 To again take the example of Syria, 1 million Syrian children have been born in exile as a result of ongoing conflict, which has dramatically increased the stateless population: see Benslama-Dabdoub (n 8) 7.

the *Refugee Convention*.[10] Here, it is necessary to recall the abiding commitment of the drafters of the *Refugee Convention* to ensure that refugees should not be prejudiced by the lack of a nationality.[11]

For some stateless children born outside the country of nationality or former habitual residence of their parent(s), there may well be some remedy under the statelessness regime, in particular, where state parties who have acceded to the 1954 *Statelessness Convention* and 1961 *Convention on the Reduction of Statelessness* ('*1961 Statelessness Convention*') have implemented statelessness determination procedures or otherwise.[12] However, the complex reality of nationality laws and customs means that even when state parties intend, in good faith, to honour their obligations under the *Statelessness Conventions*, many stateless children born outside their parent(s) country of nationality or former habitual residence remain in legal limbo, without access to either the statelessness or refugee protection regimes. Recalling, too, the principles of non-discrimination that underpin the *Refugee Convention*, it is imperative that a stateless child born outside the country of nationality or former habitual residence of their parent(s) and presenting with a claim to the discriminatory denial of a nationality, in effect, their right to have rights,[13] or some other discriminatory deprivation of human rights occasioning serious harm, should not be denied the opportunity to test a claim to refugee status.

Even where access to a statelessness regime is possible, having the ability to seek and enjoy refugee protection would enable access to a more comprehensive set of rights at the national level than would ensue from a statelessness determination procedure, and for this reason, the United Nations High Commissioner for Refugees ('UNHCR') recommend in cases where determinations may be made under both regimes that claims under the *Refugee Convention* proceed first.[14] As such, it is practically relevant to ensure that the criterion 'of being outside of the country of former habitual residence' included in the refugee definition is not interpreted literally in a way that automatically excludes all stateless children born outside the country of nationality or former habitual residence of their parent(s) from the scope of application of the *Refugee Convention*.

This predicament for stateless children born outside the country of nationality or former habitual residence of their parent(s) largely stems from their invisibility in the drafting of the refugee definition and in subsequent jurisprudence in the ensuing decades. They were, in effect, left at the doorstep of the *Refugee Convention*, where state parties commonly employed an 'adult-focused lens' to the interpretation of a country of former habitual residence. However, heightened awareness around child rights, precipitated by the 1989 *Convention on the Rights of the Child* ('*CRC*'),[15] has seen an expansion in age-sensitive jurisprudence — as

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10 Atle Grahl-Madsen, 'Protection of Refugees by Their Country of Origin' (1986) 11(2) *Yale Journal of International Law* 362, 390.

11 Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twenty-Fourth Meeting Held at Lake Success, New York, on Friday, 3 February 1950 at 2.30pm*, UN Doc E/AC.32/SR.24 (3 February 1950) 11.

12 *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (UNHCR 2014) 45–49 [126]–[139] ('*UNHCR Handbook*'). See, eg, *1954 Statelessness Convention* (n 6) arts 12–24; *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 1 ('*1961 Statelessness Convention*').

13 Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt 1973) 296–97.

14 *UNHCR Handbook* (n 12) 31–32.

15 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

conveyed for example, in the nuanced, child-specific forms of harm now articulated in the context of persecution.[16] Notwithstanding such developments, very little attention (other than the scholarly lead of Professors Michelle Foster and Hélène Lambert and a trickle of ensuing jurisprudence in several Commonwealth countries)[17] has been given to the meaning of a country of former habitual residence from the perspective of stateless children born outside the country of nationality or former habitual residence of their parent(s).

As pioneered by Foster and Lambert, this article posits that there are instances where stateless children born outside the country of nationality or former habitual residence of their parent(s) can be conceived, at the time of refugee status determination, as having a country of former habitual residence within the meaning of the refugee definition, notwithstanding that they have never before resided in that territory. This is possible in the context of forward-looking assessments of concurrent, yet individually assessed, family claims that hypothesise the child's presence in the country of former habitual residence of their parent(s), in tandem with considerations of potential returnability and risk of persecution upon return.

Having identified fundamental flaws in the application of the plain, ordinary meaning of 'a country of former habitual residence' to stateless children born outside the country of nationality or former habitual residence of their parent(s), this article explores a child-sensitive interpretation of that notion, as led by the trusty principles of interpretation espoused in art 31 of the 1969 *Vienna Convention on the Law of Treaties*.[18] A purposive interpretation of the phrase in its textural and historic context is pursued, having regard to subsequent state practice, including the outlier jurisprudence in Australia that finds it 'proper' and 'sensible' in the context of refugee status determination to imbue children with the same country of former habitual residence as their parent(s) and a recent iteration of New Zealand jurisprudence.[19]

This article begins with a brief overview of the origins of the notion of a country of former habitual residence in its historical setting and in state practice. The faceless anonymity of children in the drafting history of the *Refugee Convention* is then outlined, with consideration as to how this has impacted upon contemporary understandings of the notion in effect, an inequitable lacuna for stateless children born outside the country of nationality or former habitual residence of their parent(s). On a progressive path to discerning a child-sensitive rendition of the notion, the article next explores the utility and purpose of the country of reference notion, both as a standalone and as an interconnected segment of the refugee definition, teasing apart indicia unique to adult lived experiences as distinct to indicia integral to the notion. A precis of child-specific indicia to inform the notion follows. The shared parent–child aspect and the reality that a child's habituality and ties to a country territory are distinct to that of an adult are central to this assessment. Having regard to all of the aforementioned, it is concluded that,

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16 United Nations Committee on the Rights of the Child (UNCRC), *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6 (1 September 2005) 21 [74].

17 Michelle Foster and Hélène Lambert, 'International Refugee Law and the Protection of Stateless Persons' (Oxford University Press 2019) 136–37, whose position is elaborated upon in Parts III and IV of this article.

18 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

19 *BV (Malaysia)* [2021] NZIPT 801914–916.

in certain circumstances, stateless children born outside their parent(s) country of nationality or former habitual residence have a latent habitual residence (as informed by child-specific indicia) that activates in the forward-looking refugee status inquiry through their hypothesised presence with their parent(s) in the designated country.[20]

## II HISTORICAL OVERVIEW OF A 'COUNTRY OF FORMER HABITUAL RESIDENCE': THE INVISIBILITY OF CHILDREN IN THE DRAFTING OF THE REFUGEE DEFINITION

It is first necessary to conceive of the historical trajectory of the notion of a country of former habitual residence, to inform the lacuna in understanding from the perspective of stateless children born in a country of refuge.

The concept of 'habitual residence' was not novel at the time of crafting the refugee definition, as it had been in use as an international legal term from as early as the late 19th century, notably first depicted in the 1896 *Hague Convention on Civil Procedure*.[21] Whilst not lending itself to precise definition, broadly speaking, the notion was used as a special term by states in national and international discourse, legislation and binding treaties to reflect an individual's residence, with less strict indicia than traditional common law notions of domicile.[22]

There has long been an understanding in international law that habitual residence in a country territory gives rise to a bond between a stateless individual and a state, approximating in critical respects the relationship between a national and a state.[23] That the right to 'enter one's own country', espoused in art 12 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[24] is not limited to nationals and embraces individuals with 'special ties' to a country, has been interpreted and consolidated by the UN Human Rights Committee,[25] the General Assembly[26] and the International Law Commission.[27] States have obligations to afford civil and political protections and respect socio-economic rights,

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20 As discerned by John Tobin and Florence Seow, the meaning of 'parents', in light of contemporary family contexts, 'must not be confined to the dualist and heteronormative conception of parents that involves one mother and one father' and may extend to 'all those persons who play a gestational, biological, and/or social role in the creation and care of a child': 'Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and to Be Cared for by Parents' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 237, 241. However, in the context of the question posited, the meaning of parent will naturally be tempered by the nature of the harm that concerns the discriminatory denial of a nationality. Here, there must be capability for the child to inherit from such parent(s) a nationality (by operation of the nationality principle of *jus sanguinis)* but for the effect of discrimination.

21 See, eg, *Hague Convention on Civil Procedure*, opened for signature 14 November 1896, 88 British & Foreign State Papers 555 (entered into force 27 April 1899) art 32.

22 See, eg, *Whicker v Hume* (1858) 7 HL Cas 124, 159–60, 164.

23 James C Hathaway, and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd edn, 2014) 66–67.

24 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

25 UNHRC, *General Comment No 27: Freedom of Movement*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [20]; *Nystrom v Australia, Communication No 1557/2007*, UN Doc CCPR/C/102/1557/2007 (18 July 2011) 18 [7.5].

26 International Law Commission, *Nationality of Natural Persons in Relation to the Succession of States*, UN Doc A/RES/55/153 (30 January 2001) annex art 14.

27 International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Fourth Session*, UN Doc A/57/10 (29 April–7 June and 22 July–16 August 2002) 168.

irrespective of the status of persons on their territories, and can no longer 'rely exclusively on the link of nationality' to fulfil them.[28]

However, the specific character of children was not considered by the drafters. When fashioning a country of reference for stateless persons, the drafters of the *Refugee Convention* did not define the notion in the *Convention* text itself, but state delegates drew upon the term in common discourse when drafting a working refugee definition as 'the country in which [the claimant] had resided and where he had suffered or fears he would suffer persecution if he returned'.[29]

Notably, art 1A(2), while couched in age-neutral language, makes no specific reference to children and the *Refugee Convention* itself has only several subtle references.[30] This omission is not surprising in light of the *Refugee Convention*'s historical context. Samantha Arnold writes that international legal provisions targeting children in the period from the 1920s to 1950s, when refugee law was developing, were 'ad hoc, limited and infrequent' and related broadly to child welfare and protection needs.[31] The 1924 *Declaration of the Rights of the Child*,[32] expanded on in 1959,[33] was the first international treaty concerned with the rights of children, expounding the lofty aim that 'mankind owes to the child the best that it has to give'.[34] The *Declaration* delineated obligations towards children in five points: their wellbeing, development, assistance, relief and protection. The subsequent 1933 *Convention Relating to the International Status of Refugees* again referred to categories of refugees in need of protection, highlighting the welfare needs of children.[35] Special arrangements for the care of children were enforced and the *Kindertransport* (children's transport), for example, served as a British government initiative to enable children to enter the UK from Germany on temporary travel visas during wartime.[36] The United Nations Children's Fund ('UNICEF') was a child protection agency established later in 1946 to provide food, healthcare and clothing to children experiencing starvation and disease.[37] The 1949 *Geneva Conventions* are also notable for dealing with the protection needs of children.[38]

Other than identifying their broad welfare needs, the historical antecedents to the refugee definition depicted children as largely part of their family units, falling

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28 Foster and Lambert (n 1723) 87.

29 UN Economic and Social Council, *Report of the First Ad Hoc Committee on Statelessness and Related Problems*, UN Doc E/1618, E/AC.32.5 (17 February 1950) Annex II ('Comments on the Committee of the Draft Convention Relating to the Status of Refugees') 39.

30 See *Refugee Convention* (n 1) arts 4, 17(2)(c), 22.

31 Samantha Arnold, *Children's Rights and Refugee Law: Conceptualising Children Within the Refugee Convention* (Routledge 2018) 72. See also Stefanie Schmahl, 'Introduction into the Convention on the Rights of the Child: Historical Background, Motives, and Object and Purpose of the CRC in a Nutshell' in Stefanie Schmahl (ed), *United Nations Convention on the Rights of the Child, Article-by-Article Commentary* (Bloomsbury 2021) 1–30.

32 *Geneva Declaration of the Rights of the Child*, quoted in 'Resolutions and Recommendations Adopted on the Reports of the Fifth Committee' (1924) League of Nations OJ, Spec Supp 21, 43 ('*1924 Geneva Declaration*').

33 *Declaration on the Rights of the Child*, UNGA Res 1386 (XIV) (20 November 1959).

34 *1924 Geneva Declaration* (n 32) 43.

35 See, eg, *Convention Relating to the International Status of Refugees*, 159 LNTS 199 (signed 28 October 1933) art 9.

36 Arnold (n 31) 79.

37 *Establishment of an International Children's Emergency Fund*, UN Doc A/RES/57(I) (11 December 1946).

38 Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) ch 2; Arnold (n 31) chs 3, 4.

under the chapeau of the 'head of household' or within broader categories of refugees. It was common practice during the period for children to be included in the identity documents (akin to passports) of their parents. For example, the *Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements* provided that children under the age of 15 years should be included in the identity certificates of their parents.[39] The 1938 *Convention concerning the Status of Refugees Coming from Germany*[40] specified similar terms for children under 16 years of age.[41] Subject to regulations in the country of issue, the 1946 *Agreement relating to the Issue of a Travel Document to Refugees who are the Concern of the Inter-Governmental Committee on Refugees* specified that children may be included in the travel document of an adult refugee.[42]

In Annex II to an early draft of the *Refugee Convention*, the Ad Hoc Committee on Statelessness and Related Problems stated that 'members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined'.[43] Similarly, Mr Paul Weis for the International Refugee Organization proposed that 'the status of children of refugees should, even if they had been born after the outbreak of the war, be determined by that of their fathers, or, if they were illegitimate, by that of their mothers, provided that they themselves had not acquired a nationality', to which the delegates agreed.[44]

Recommendation B inserted into the *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* asserted that governments should take:

> the necessary measures for the protection of the refugee's family, especially with a view to ... [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.[45]

This recommendation affirmed the long-standing practice of affording derivative status to family members, where the head of household satisfied the

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39 *Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements*, opened for signature 12 May 1926, 89 LNTS 47, 50 [4].

40 *Convention concerning the Status of Refugees Coming from Germany*, opened for signature 10 February 1938, 192 LNTS 59 (entered into force 26 October 1928).

41 ibid art 3(2)(f).

42 Intergovernmental Committee on Refugees, *Final Act of the Intergovernmental Conference on the Adoption of a Travel Document for Refugees and Agreement relating to the Issue of a Travel Document to Refugees who are the Concern of the Intergovernmental Committee on Refugees*, 11 UNTS 150 (15 October 1946) art 4.

43 UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950*, UN Doc E/AC.32.5 (17 February 1950) 40.

44 UN Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Seventeenth Meeting Held at Lake Success, New York, on Tuesday, 31 January 1950, at 11am: Provisional Draft of Parts of the Definition Article Prepared by the Working Group*, UN Doc E/AC.32/L6.Rev.1 (6 February 1950) [34].

45 *Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc A/CONF.2/108/Rev.1 (26 November 1952) 8 [4]; Conference Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fourth Meeting*, UN Doc E/CONF.2/SR.32 (30 November 1951) 4–9.

refugee criteria.[46] Despite support from the UNCHR[47] and some states (against the predominant tide of state practice) to grant refugee status to family members who have satisfied the refugee definition, this recommendation did not grapple with, or address, the fact that the *Refugee Convention* does not prescribe this approach and that refugee status determination is individualistic and personal to the refugee claimant.[48] As such, there remains no remedy or substitute in the recommendation for the protection gap identified.

The absence of any child-specific treatment in the definition has caused UNHCR and prominent academics to describe children as 'invisible' in the *Refugee Convention* and its early application.[49] Arnold reasons that the siloing of child rights in international law was possibly 'for fear of undermining the rights of the family unit', or because children were not considered by the drafters of the *Refugee Convention* as significant or as important beneficiaries of protection in their own right.[50]

Other academics specialising in child rights have critiqued that the *Refugee Convention* has largely been applied through an 'adult-centred perspective'.[51] UNHCR notes that the refugee definition has traditionally been interpreted in light of adult experiences and many claims made by children have been 'assessed incorrectly or overlooked altogether'.[52] What may be distilled from this is that the '*Refugee Convention* is not an adequate framework for child applicants on its own as it did not sufficiently consider their particular needs, abilities and circumstances'.[53]

It was not until the 1980s, with the advent of the *CRC*, that a child-sensitive framework emerged, reaffirming the core human rights contained in salient treaties such as the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights*,[54] and introducing rights specifically tailored to children. Such rights included the best interests of the child principle contained in art 3.[55] These developments activated a precipitous shift from the concept of children as passive dependents to active subjects and rights-bearers.[56] This shift in understanding was critical given the individualised nature of refugee status determination, where child claimants must alone satisfy the elements of the refugee definition in order to be recognised as refugees.

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46 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011) 36 [181]–[185].

47 ibid.

48 New Zealand, for example, does not accord derivative refugee status to children of refugees independent of any inquiry as to whether they individually meet the refugee definition: see *GD (China)* [2021] NZIPT 801793-94, 11 [45].

49 Pobjoy (n 38) 5, 46.

50 Arnold (n 31) 82.

51 Pobjoy (n 38) 5.

52 ibid 3.

53 Arnold (n 31) 95.

54 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

55 See *CRC* (n 15), and interpretive commentary that has ensued, including the *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* (UNHCR 22 December 2009); Executive Committee of the High Commissioner's Programme, *Conclusion on Children at Risk No. 107 (LVIII)*, UN Doc A/AC.96/1048 (5 October 2007) 5–8 [14](b)(x).

56 Pobjoy (n 38) 6–7.

Since this evolution, many aspects of the refugee definition, which may not have been apparent to the drafters, have been refined in a child-sensitive manner.[57] This can be seen, for example, in the heightened understanding of child-specific forms of harm that inform the notion of persecution.[58] In recognition of some child-specific harms, Jason Pobjoy delineates:

> [o]nly a child can be at risk of infanticide, underage military recruitment, forced child labour, forced underage marriage, child prostitution, child pornography, domestic child abuse, corporal punishment or pre-puberty FGC [female genital circumcision]. Similarly, only a child can be denied a primary education, separated from a parent because of discriminatory custody laws or discriminated against because of [his/]her status as an illegitimate child.[59]

However, there remains a paucity of guidance as to how a child-sensitive interpretation, with reference to the rights of children, informs the notion of a country of former habitual residence. As is aforementioned, an inequitable lacuna exists in a plain, ordinary interpretation of the refugee definition. This is best understood in the context of a drafting 'oversight',[60] as such an interpretation is plainly inconsistent with the humanitarian purpose, intended symmetry and equality of status between those with or without a nationality.

There are other factors that illuminate this oversight in the application of the notion of a country of former habitual residence to children, which include the temporal scope delineated by the drafters, who then had little foresight or vision as to the predicament of stateless children who would subsequently be born in a country of refuge and face the discriminatory deprivation of core human rights which occasion serious harm to them.[61] Their gazes were fixed upon existing and well-known situations and categories of refugees, such as the mass denationalisation and expulsion of Jews across Europe.[62] This theme continued in discourse and jurisprudence, referring to beneficiaries of refugee protection as having 'broken … ties with' or of leaving their *former* 'home country',[63] with little appreciation of future *sur place* statelessness predicaments, through which a discriminatory nexus may engage the refugee definition. A further permutation to consider is the fact that the drafters had little sense of the human rights dimension of the problem of statelessness and the fact that the discriminatory denial of a nationality might constitute persecution, as opposed to simply being a technical legal problem.[64]

As will be seen, this drafting oversight and the failure to appreciate child-specific qualities and experiences has produced a body of refugee jurisprudence that largely overlooks the interests of children (in particular, stateless children born abroad).

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57 ibid 30.

58 *GD* (*China*) (n 44) 18–22 [73]–[84]; Pobjoy (n 38) 5.

59 Pobjoy (n 38) 117.

60 ibid 2.

61 Atle Grahl-Madsen refers to the situation of refugees in the post-war period who were conceived as possessing the formal nationality of their country of origin, with the reality that '[t]heir children born abroad will often be awarded "uncertain" or "undecided" status': Grahl-Madsen (n 10) 376. He refers to the Norwegian *Law of 8 August 1924*, s 9, which refers to children born outside Norway who do not inherit their parent's nationality or acquire any other nationality.

62 Foster and Lambert (n 17) 26.

63 Atle Grahl-Madsen, 'The Special Regime of Refugees' in Gundmunder Alfredsson and P Macalister-Smith (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (Kluwer Law International 2001) 165; Jacques Vernant, *The Refugee in the Post-War World* (George Allen and Unwin Ltd 1953) 13; Hathaway and Foster (n 23).

64 Foster and Lambert (n 17) 11.

Such oversights call for 'a creative alignment' between refugee law and 'the fast-evolving body of international law on the rights of the child', so as to colour the meaning of a country of former habitual residence as an integral component of the refugee definition.[65] Before doing so, and as a backdrop to inform this analysis, this article depicts the current state practice.

## III STATE PRACTICE

In leading refugee status determination systems, a base ingredient for a country of former habitual residence is that a claimant has at least resided in the concerned country territory for 'some standing or duration', in order for that territory to be designated a substitute country of reference (as an alternative to a nationality) for stateless individuals.[66] Overlaying this base denominator are further broad indicators as to the characterisation of time spent in a country — such as the degree of establishment, referred to as 'durable ties'[67] or as an individual's 'abode or the centre of his or her interests'.[68] Such indicators depict the bond between individuals and the countries in which they have resided, signalling something more than simple residence in a territory.[69]

There are several examples of such formulations in Commonwealth countries. The High Court of Australia has observed that a 'broad factual inquiry' is required when identifying a country of former habitual residence for the refugee inquiry, including 'the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), [and] the degree of assimilation into the state'.[70]

In New Zealand, the Refugee Status Appeals Authority ('RSAA')[71] has found it sufficient to establish the fact that a claimant 'has in fact taken up residence and lived in the country for a period which showed that the residence had become, and was likely to continue to be, habitual'.[72]

In the Canadian case of *GRF (Re)*,[73] the Immigration and Refugee Board of Canada ('IRB') considered the question of whether a child could be conceived as having a former habitual residence in Lebanon, the country in which that child had been born but had only lived in for two months before departing.[74] In designating that country as a former habitual residence, the IRB reasoned that the fact of the child holding a Lebanese passport and having rights to enter and reside there reflected rights broadly comparable to that of a citizen.[75]

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65 Pobjoy (n 38) 5.

66 Atle Grahl-Madsen, *The Status of Refugees in International Law* (AW Sitthoff 1966) vol 1, 160; *Refugee Appeal No 72635/01* (Refugee Status Appeals Authority, Chairperson Haines and Member Plunkett, 6 September 2002) 26–27 [116].

67 *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, 1942.

68 *Refugee Appeal No 72635/01* (n 66) 27 [116].

69 Hathaway and Foster (n 23) 66–70; *Refugee Appeal No 72635/01* (n 66) 26 [113]; *Paripovic v Gonzales* 418 F 3d 240, 245 (3rd Cir, 2005).

70 *Tahiri v Minister for Immigration and Citizenship* [2012] HCA 61, 6 [16].

71 The predecessor to the Immigration and Protection Tribunal.

72 *Refugee Appeal No 72635/01* (n 66) [116].

73 *GRF (Re)* [2001] CRDD No 88.

74 ibid 12.

75 ibid 14.

This jurisprudence reflects the notion of a former habitual residence being employed in relatively broad and flexible terms, in recognition of the intensely fact-specific inquiry that is called for and the host of potentially relevant factors to consider.[76]

There are further examples of the inherent fluidity of the notion, where courts have found that the fact of a designated country of former habitual residence being a colony or entity (not an independent sovereign state) will not preclude a definitive finding of that territory as a country of former habitual residence. It is sufficient if 'the territory has the attributes of a state, such as defined borders, systems of law and a permanent identifiable community'.[77] Further, it has also been established that there is no requirement that a claimant entered into the territory of concern legally[78] or that the claimant demonstrate an ability to legally or factually return to the designated country in order for it to qualify as a country of former habitual residence.[79]

When a question about returnability arises on the facts, decision-makers have assessed on that claimant's hypothesised presence in the country of reference.[80] As identified by James Hathaway and Michelle Foster, in this designating exercise, 'no one factor should be treated as essential' and the returnability criterion, for instance, 'should be understood as relevant to, rather than determinative of, the existence of a country of former habitual residence'.[81]

Notwithstanding the primary indicium that a claimant has at least resided in the territory concerned, there is some support from academics and refugee determination bodies for the view that in very particular circumstances, a state may be properly understood as constituting a country of former habitual residence when that person has not in fact resided there. Foster and Lambert argue that:

> [w]hile this is difficult to reconcile with the ordinary meaning of 'residence', there is a convincing purposive argument that where an applicant has a right to return and reside in a state, the risk of being persecuted must be assessed in relation to that state in order to avoid a violation of the principle of *non-refoulement*. This is particularly the case in relation to stateless children born abroad who may be returned to their parents' country of former habitual residence even though they have never resided there.[82]

This nuanced and sensitive approach towards stateless children born abroad has been pursued in Australia by certain courts and refugee status determination bodies, where stateless children born there have been deemed to have the country of nationality or former habitual residence of their parent(s). In the case of *SZEOH v Minister for Immigration*,[83] the Federal Magistrates Court of Australia considered whether an applicant child, who was born in Australia and had never left that territory, could be conceived of as having the mother's country of nationality or former habitual residence in Singapore. It held that the Australian Administrative Appeals Tribunal ('AAT') had not erred in finding that Singapore

76 Hathaway and Foster (n 23) 70 citing *Refugee Appeal No 72635/01* (n 66) 26–27 [116].

77 Foster and Lambert (n 17) 133 quoting Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press 2011) 298–99.

78 *Elastal v Canada (Minister of Citizenship and Immigration)* [1999] FCJ NO 328, 8 [19].

79 *AL (Myanmar)* [2018] NZIPT 801255 (11 August 2018) 25–26 [97]–[99].

80 *GD (China)* (n 48) 8–10 [38]–[42]; *YL v Secretary of State for the Home Department* [2003] UKIAT 00016, 15 [62]; *SZTEOH v Minister for Immigration* [2015] FCCA 4 [10].

81 Hathaway and Foster (n 23) 70.

82 Foster and Lambert (n 17) 136–37.

83 *SZEOH v Minister for Immigration* [2005] FMCA 1178.

was an appropriate country of reference, holding that it was 'practical and fair' to do so given the claimant's fear of persecution in Singapore and the fact that child would otherwise be without a country of reference for the inquiry. The Court, in upholding the decision of the AAT, relied upon principles espoused by the Federal Court of Australia in *Koe v Minister for Immigration & Ethnic Affairs*,[84] which considered the question of whether Hong Kong could serve as a stateless applicant's country or place of former habitual residence. It found that:

> [t]he objective of the *Convention* is to provide a practical humanitarian solution to the problems of refugees. It should be interpreted with this objective in mind. Individuals should not be denied the protection of the *Convention* by an unnecessarily narrow reading of the definition of 'refugee'. It is not appropriate to conclude that an applicant has no recourse under the *Convention* simply because his or her 'country' of former habitual residence happens to be a colony or other entity that is not an independent sovereign state.[85]

The precedent set in *SZEOH* has been adopted in subsequent decisions of the AAT, such as in *1617142 (Refugee)*,[86] where the AAT considered it appropriate to assess the stateless child (again, born in Australia and had only ever resided there) against the country of nationality or former habitual residence of her mother, namely, Lebanon.[87]

This approach is transformative for child applicants born outside the country of nationality or former habitual residence of their parent(s) and who have never resided in the territory of a designated country. In charting this course, the Australian courts and refugee status determination bodies have identified the guiding humanitarian purpose of the *Refugee Convention* as guarding against any narrow, rigid approach to the refugee question. They have signalled the duty to determine the question of risk without prejudice to the refugee claimant, which may deem the country of nationality or former habitual residence of a parent as a country of reference for a stateless child born abroad. In the end, they have concluded that it is appropriate, practical and fair to do so.

In New Zealand, the Immigration and Protection Tribunal ('IPT') has recently engaged with the issue, in the case of a stateless child born to Malaysian nationals.[88] In that case, the IPT delineated a purposive interpretive pathway to the finding that this stateless child born in New Zealand to Malaysian nationals shared the same former habitual residence, namely, Malaysia, as his parents. From a teleological and child-sensitive perspective, the reality of the legal returnability of the child with his parents to Malaysia meant that he shared the country of former habitual residence of his parents. In the context of a forward-looking inquiry into risk — by hypothesising the child's presence at the time of refugee status determination, together with his parents in Malaysia — the IPT found as follows:

> in the case of a stateless child born abroad and denied their parent(s) nationality through discrimination, their connection to the designated country of reference/COFHR would stem from their shared parent–child aspect or relationship, manifest through the tangible transference of qualities from parent to child, which entail: (i) a child's entitlement to a nationality in a designated country's territory — here the unrealised nationality denied through discriminatory

84 *Koe v Minister for Immigration & Ethnic Affairs* (1997) 148 ALR 353 ('*Koe*').
85 ibid 360.
86 *1617142 (Refugee*) [2017] AATA 990.
87 ibid 14–18 [49]–[58].
88 *BV (Malaysia)* (n 19).

> means; and (ii) the child's ability to legally/factually enter and reside in their parent(s) COFHR.[89]

In adopting this interpretation, the IPT elaborated that:

> [t]his interpretation ensures fidelity to purpose, and the equality of status as between adults and children, and between children born with or without a nationality abroad. It also, critically, observes the good faith principle of treaty interpretation and the fundamental obligation of non-refoulement, protecting a child against return to a country where there is a real chance of them being persecuted. As can be seen above, the risk (conveyed through the conduit of a parent) of refouling a child to a territory where they hold a well-founded fear of being persecuted is only too real, should a rigid adult-centric, interpretation of the notion of a COFHR be maintained. The reality is that plethora of rights and freedoms for a young child, such as the son, including freedom of movement across state borders and the right to enter and remain in state territories, is largely contingent upon the actions of their parents as the first benefactors of the child's rights.[90]

The IPT's finding that the stateless child had a country of former habitual residence was defined in relation to other core components of the refugee definition, which included the nature and risk of being persecuted. The affirmative finding was confined, on the facts of that case, to identifying a country of former habitual residence in the instance of a child denied a nationality through discriminatory means. For the reasons that will be elaborated upon in this article, it is the position of the author that a purposive interpretation is not constrained to conceiving of a country of former habitual residence for stateless persons born outside the country of nationality or former habitual residence of their parent(s), who face serious harm emanating solely from the discriminatory deprivation of a nationality, but may extend to any other discriminatory infringements of human rights that occasion serious harm.

As the following Part will convey, and as discerned in *BV (Malaysia)*,[91] it is necessary to fully understand the function of the country of reference (in this case, a country of former habitual residence) and its relationship to other components of the refugee definition. It is the position of the author that the notion of a country of former habitual residence is not a stand-alone concept. Instead, it is an interconnected component of the refugee definition which needs to be interpreted in its totality, in tandem with other integral definitional components, such as the nature and risk of being persecuted and the forward-looking lens of 'well-foundedness'.

## IV THE RELEVANCE OF A DESIGNATED COUNTRY OF REFERENCE TO THE INQUIRY

The definitional element of being 'outside' a country of nationality (or former habitual residence) serves two primary purposes, each threaded with an overarching question of protection. First, the country of reference serves as a backdrop for the assessment of unwillingness or inability to avail oneself of the protection of (in the case of a national) or to return to (in the case of a stateless individual) that country, owing to holding a well-founded fear of persecution. Second, the condition of being outside the country of reference identifies 'the unqualified protective competence of

89 ibid 50 [222].
90 ibid 51 [225].
91 ibid.

other states', as once outside the territory of the original state, other governments have full capacity to protect refugees, 'whatever the inclinations of the refugee's home country'.[92] In this sense, the definitional elements of the notions of a country of nationality and country of former habitual residence are functional equivalents within the meaning of the refugee definition.

In effect, the country of reference (whether a country of nationality or country of former habitual residence) reflects the availability of state protection internally and externally at the heart of the assessment. As explained by David Cantor, it is the absence of state protection (internal protection) in the context of alienage (external protection) which acts as 'the pivot on which notions of "surrogate" protection by host States operate'.[93]

As can be seen in the previous discussion, the utility of the country of reference is simply to inform the protection quotient of the refugee definition. For this reason, the substitute notion of a country of former habitual residence for stateless persons (an otherwise incomparable notion to the legal relationship between a state and its nationals) serves as a functional equivalent.[94]

It is helpful now to consider the operation of the notion of a country of former habitual residence within the broader framework of the refugee definition. Some have framed identification of the country of reference in art 1A(2) as a 'gateway' or 'threshold question'. For example, Hathaway and Foster state:

> an initial question in the process of refugee status assessment is thus the identification of the applicant's country of nationality, since all other aspects of the refugee definition can only be analysed once this threshold question has been resolved.[95]

Where it is readily discernible, it makes sense to first identify the country of reference before proceeding with the rest of the assessment in art 1A(2). However, in more complicated cases, as in the instance of a stateless child born outside the country of nationality or former habitual residence of their parent(s), it may be problematic to posit the country of reference as a 'gateway' or 'threshold' question in any rigid or prescriptive sense. Fundamentally, the refugee definition is a compound expression of interlocking elements, which cannot be interpreted in isolation. As stated by the RSAA, it is 'a mistake to isolate elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations'; furthermore, it is 'the totality of the words that define a refugee'.[96] The process of answering the refugee question will require analysis of each constituent part and their relationship to one another.

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92 Hathaway and Foster (n 23) 23.

93 David Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in Bruce Burson and David Cantor (eds), *Human Rights and the Refugee Definition* (Brill Nijhoff 2016) 350, 363.

94 A country of nationality, in its legal sense, is largely irrelevant to the quality of a refugee: Guy Goodwin-Gill, 'Stateless Persons and Protection Under the 1951 Convention or Refugees, Beware of Academic Error!' (Conference Paper, Colloque portant sur Les récents développements en droit de l'immigration, 22 January 1993). See generally Michelle Foster, Jane McAdam and Davina Wadley, 'The Protection of Stateless Persons in Australian Law: The Rationale for a Statelessness Determination Procedure' (2017) 40(2) *Melbourne University Law Review* 401–55. As concerns the legal definition of statelessness, see Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232, 232: the definition of statelessness is 'a deliberately narrow, technical definition that "is not one of quality, simply one of fact"'.

95 Hathaway and Foster (n 23) 54.

96 *Refugee Appeal No 74665* (Refugee Status Appeals Authority, Chairperson Roche, Members Haines and Murphy, 7 July 2004) 21 [46]–[48].

Hathaway and Foster, mindful that a state's ultimate duty is to assess whether a person is a refugee, recommend a flexible approach to identifying the 'threshold' question of a country of reference. In this vein, academics, refugee status determination bodies and courts have repeatedly emphasised that in instances where a state is unable to identify a country of nationality, they should proceed 'to assess whether or not the individual is a refugee', noting that 'status may not lawfully be denied simply because the applicant's country of nationality was not properly identified by her'.[97]

As emphasised by Foster and Lambert, there is a fundamental point of principle in which:

> states parties have a legal duty to implement the *Refugee Convention* in good faith, which means facilitating the identification of those entitled to protection, not introducing procedural barriers that in practice represent substantial obstacles to delivering protection obligations.[98]

The analogy of the country of reference as a gateway, through which the internal and external aspects of the protection question are resolved, is evocative. However, there is a real risk with 'gateway' and 'threshold' terminology that stateless children born outside the country of nationality or former habitual residence of their parent(s) may be left 'at the gate' or 'on the doorstep' by overzealous guards.[99] A more fitting analogy might be to regard the country of reference simply as a medium or conduit, through which the definitional charge of the protection assessment courses through. As a conduit, the country of former habitual residence has receptors to which other core components of the definition, such as persecution and well-foundedness, may adhere.

With respect to persecution, a critical territorial link may be identified in the case of a stateless child born outside the country of nationality or former habitual residence of their parent(s), who presents with the predicament of a discriminatory denial of nationality. The insidious nature of discrimination readily identifies the state actor as a key figure in its exercise of discretion in the administration of its nationality laws. It would be intuitively wrong to ignore this connection where there has been a denial of fundamental human rights, including the aptly coined 'gateway' right to a nationality (as the precursor to other rights) and a continued withholding of that nationality with ensuing effects. Irrespective of such a discriminatory denial, there remains a latent seed — a genuine link to the country that has denied a child a nationality.

As such, the persecution feared, along with the *Refugee Convention* nexus of discrimination, both inform and reflect the country of reference for the purpose of the interpretive exercise. Recall *BV (Malaysia)*, where one limb of the finding that the stateless child shared his parents' country of nationality or former habitual residence in Malaysia was the determination that the country had deprived him of a nationality through discriminatory means.

There is also a necessary point of connection between the country of reference and the well-foundedness aspect of the refugee definition. This element is forward-looking in nature, anchored in the notion of alienage, and posits the question of risk to the person in the future. The prospective assessment then assumes a physical presence in the country of nationality for the purposes of

97 Hathaway and Foster (n 23) 54.
98 Foster and Lambert (n 17) 116.
99 *BV (Malaysia)* (n 19) 44–45 [196]–[200].

assessing the future risk of being persecuted under the *Refugee Convention*.[100] As elucidated by the IPT in *GD (China)*:

> [t]he reference to 'hypothesis' should not be taken to imply uninformed guesswork, untethered to an evidentially-established reality, but rather describes an assessment of risk in an assumed future presence in the country of nationality, grounded in evidence of relevant country conditions. Should the risk assessment conclude that the current alienage arises because the claimant satisfies the requirements of the *Convention*'s refugee definition, status must be recognised.[101]

It transpires, in terms of the forward-looking inquiry, that for the physical presence of a stateless child born outside the country of nationality or former habitual residence of their parent(s) to be hypothesised in a designated country of reference, it must first be grounded in an 'evidentially-established reality'.[102] Where such harm (whether that is the discriminatory denial of a nationality or other discriminatory deprivation of human rights) is feared in the future in that country territory, it suggests that, at a minimum, a stateless child born outside the country of nationality or former habitual residence of their parent(s) must practically be able to enter and remain in the territory of a designated country in order to satisfy the objective 'real chance' protection question.

Whilst there is no requirement for stateless individuals, once in a predicament of alienage, to demonstrate their ability to re-enter a country of former habitual residence for the purposes of the refugee inquiry, it follows that a tangible connection to the designated country would be requisite for stateless children born outside the country of nationality or former habitual residence of their parent(s), who have not yet had the benefit of residing in that country. Such would be probative of a real and continuing connection to that territory and, as a central incident of nationality, illustrates the functional equivalency between the notions of a country of nationality and a country of former habitual residence.[103] The forward-looking inquiry would then conceive, against the vector of time, the claim of being persecuted through the deprivation and continued withholding of a nationality or other discriminatory deprivation of human rights.

Distilled to its barest essence, the notion of a country of former habitual residence signifies a territorial connection between an individual and a designated country and serves as a medium or conduit for protection analysis, with no hard-edged definition. This enables the presence or absence of protection-sensitive factors to inform the fluid operation of the notion of a country of former habitual residence in the context of the refugee definition and its operative components, which serve dual protection-sensitive purposes.

Guiding this analysis is the resounding theme in state jurisprudence that was depicted previously in this article, that the notion is flexible and broad, and that any interpretation of the notion should not be so unduly restrictive as to pre-empt a claim to refugee status for a stateless person who has demonstrated a well-

100 *GD (China)* (n 48); *AL (Myanmar*) (n 79) 9 [40].

101 *GD (China)* (n 48) 10 [41].

102 ibid.

103 Notably, the fact of a minor retaining a passport and having the right to enter and remain in the territory of a country in which he was born, but had only lived in for two months, was determinative in the IRB designating that country as a former habitual residence for the application of art 1A(2): *GRF (Re)* (n 73) 104–106.

founded fear of persecution on any grounds listed in the *Refugee Convention*.[104] The rationale behind the inclusion of the notion was to afford stateless persons a country of reference from which to claim refugee status, and the utility of the notion is plainly servile to the question of protection.

At this juncture, it is relevant to note the synergy and cross-fertilisation between the notion of a country of former habitual residence within the separate refugee and statelessness regimes. While the definition of statelessness under the *1954 Statelessness Convention* is formulated in the negative, and the definition of a refugee under the *Refugee Convention* formulated, conversely, in the positive, the separate regimes are both guided by similar humanitarian and protection rationales. The former aims to identify, prevent and reduce statelessness by protecting stateless persons with a core set of rights, and the latter to recognise refugees and afford them, too, a core set of rights. Notably, under the statelessness regime, the country of former habitual residence is one of several criteria that can be used to establish a relevant link with a country of reference for stateless children. As noted by UNHCR, other criteria include birth on the territory, descent, marriage and adoption.[105] Under the refugee definition, the notion of a country or former habitual residence alone serves as the country of reference for the assessment of risk for the refugee claimant. When conceiving of the synergy between the regimes, it is relevant to note that similar indicia that inform a relevant connection to a state for the purposes of a statelessness assessment may be relevant to identify the notion of a country of former habitual residence as it concerns children, such as the shared parent–child aspect through descent and adoption. Such indicia will be elaborated upon in the sections that follow.

In sum, what may be distilled from this Part is that the rationale behind including the notion of a country of former habitual residence in the refugee definition was to afford stateless persons a country of reference from which to claim refugee status, and the utility of the notion is plainly servile to the question of protection. It is not a stand-alone notion in the refugee definition, as it serves as a medium through which core definitional components, such as the nature and risk of being persecuted, fall to be assessed. Rather like a mirror, these integral components reflect back the country of reference — here, the country of former habitual residence. It follows that such definitional components inform the baseline indicia for the notion of a country of former habitual residence, which, historically, have been conceived from an adult-centric perspective. The next Part carefully discerns definitional indicia that are integral to the notion and may usefully inform a child-sensitive interpretation.

## V NO REQUIREMENT OF HAVING RESIDED IN THE TERRITORY IN ORDER TO SATISFY REFUGEE CLAIM

The intensely fact-specific nature of the inquiry into a country of former habitual residence has meant that state parties, on the whole, have adopted a relatively fluid interpretation of the notion. This is notwithstanding, as indicated previously, a core definitional ingredient shared in their jurisprudence — that an individual must

104 *Kadoura v Minister of Citizenship and Immigration* [2003] FC 1057 6–7 [14]; *Koe* (n 84) 358–61. See also Foster and Lambert (n 17) 119, who eschew any 'excessive focus' on whether an individual is stateless, detracting from the core focus of whether such individual has a well-founded fear of being persecuted.

105 *UNHCR Handbook* (n 12) 35 [92].

demonstrate residence of some duration as well as a level of attachment in the concerned territory. From this baseline a broader band of indicia inform the notion, depicted in terms of the character and durability of ties in the country.

Rigid adherence to this baseline interpretation prevents a stateless child born outside the country of nationality or former habitual residence of their parent(s) from satisfying the definition and predominantly reflects adult-centric experiences, with the exception of a stateless child who might be born in the country of reference prior to their arrival in the country of refuge.

From this underbelly of inequity, a teleological perspective beckons. As emphasised by Foster and Lambert, the *Refugee Convention*'s humanitarian purpose, and the tug of a live protection issue embedded in the discriminatory nexus, may well signify a country of former habitual residence for stateless children born outside their parent(s) country of nationality or former habitual residence — in such circumstances where that country is 'the centre of [a child's] interests', notwithstanding that they have not resided there.[106]

It is prescient to keep the definition's rationale front and centre — as the drafters made plain, their intention that individuals without a nationality would, in accordance with the principle of equality of status, maintain a foothold to a claim for refugee protection with a country of former habitual residence serving as their country of reference.

Fundamentally, where a claimant — a stateless minor born outside their parent(s) country of nationality or country of former habitual residence who has not resided in the designated country — asserts an unwillingness to access the protection of that designated country (an unwillingness embedded in discrimination and a real chance of serious harm), the definitional scope for the notion of that country of former habitual residence should not undermine the *Refugee Convention*'s protection purpose.

Plainly, the indicium of having a residence of some duration in the country of former habitual residence is an ill-fit for children. In search of a better fit, this article next explores the question of what child-specific experiences might better inform the more broadly formulated 'centre of [a child's] interests' definition. As can be expected, a purposive interpretation affords some leeway to imbue the notion of a country of former habitual residence with child-sensitive indicia to fairly apply the individualised refugee assessment to children born outside the country of nationality or former habitual residence of their parent(s).

With this flexibility in mind, a child-sensitive lens is now employed in the analysis.

## VI A Child-Sensitive Lens

It has long been recognised in refugee status determination that children may be imbued with the characteristics of their parents. They inherit entitlements and qualities from their parents, and agents of persecution also impute children with their parents' characteristics, including their civil and political status. In view of this vicarious parent–child aspect, state parties have, incrementally, employed a child-sensitive lens to substantive and procedural aspects of refugee status determination. However, with the exception of the thread of jurisprudence in Australia outlined previously, and now in New Zealand, there has been little engagement by state parties with regards to the question of how the unique characteristics of children,

106 Foster and Lambert (n 17) 136–37.

both individually and as imparted through their relationship with their parents, informs the notion of a child's country of former habitual residence.

Some salient observations on this topic are made in this Part. The first concerns the manner in which children establish ties to a country territory across the vector of time, as distinct to that of adults.

### A *Child-Specific Ties to a Territory and Habituality*

Given the paucity of literature and refugee case law that engages with the meaning of a country of former habitual residence from a child's perspective, it is helpful to look more broadly to other areas of law. Some helpful observations can be drawn from international family law, as both areas of law consider the protection needs of children, as guided by the *CRC*, and at the heart of either inquiry is the notion of a child's habitual residence.

International family law conventions which refer to the notion of a habitual residence include the 1902 *Hague Convention on Guardianship*,[107] the 1961 *Hague Convention on the Protection of Minors*,[108] the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* ('*1980 Hague Convention*')[109] and the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.[110] As in the context of refugee law, no definition for a habitual residence is outlined in these conventions and there is no universal standard for the notion of a former habitual residence. Such has been deemed a matter of deliberate policy, aiming to leave the notion free from technical rules, which may breed rigidity and inconsistency between different legal systems.[111] It has generally been conceived that the notion is heavily fact-intensive and cannot be reduced to a predetermined formula, varying with the circumstances of each case. As explained by Paul R Beaumont and Peter E McEleavy, to preserve its versatility, 'the Hague Conference has continually declined to countenance the incorporation of a definition'.[112]

Case law applying the *1980 Hague Convention*, for example, is by no means consistent across jurisdictions when weighting factors as to the child-aspect of acclimatisation in a territory and the parent-aspect as to a settled purpose, when discerning a country of habitual residence for a child. The proportionate weight given to these two lead factors varies across jurisdictions. What is common, however, is that the principle of the best interests of the child guides the

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107 See, eg, *Convention of June 12, 1902 relating to the Settlement of Guardianship*, opened for signature 12 June 1902 (entered into force 30 July 1904) arts 2, 3. See also *Protocol Concerning the Adhesion of States Not Represented at the Third Conference on Private International Law to the Convention of June 12, 1902, relating to the Settlement of Guardianship of Minors*, opened for signature 28 November 1923, 51 LNTS 221 (entered into force 20 July 1926).

108 See, eg, *Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants*, opened for signature 5 October 1961, 1967 UNTS 145 (entered into force 4 February 1969) arts 4–6, 11, 13.

109 See, eg, *Convention on the Civil Aspects of International Child Abduction*, open for signature 25 October 1980, 1343 UNTS 98 (entered into force 12 January 1983) arts 3–5.

110 See, eg, *Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, 1870 UNTS 167 (entered into force 1 May 1995) arts 2, 14.

111 *Re Bates (Minor)* (High Court of Justice in England, Family Division, Waite J, 23 February 1989).

112 Paul R Beaumont and Peter E McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press 1999) 89.

assessment, which looks broadly to the centre of gravity of a child's life, the place where the current centre of a child's life is located. A detailed rendition of this complex area of the law is not called for here; rather, a trifecta of interconnected themes can be distilled, which assist understanding of the notion of a habitual residence from a child's perspective.

First, there has been widespread recognition by the courts that the effective centre of a child's life may, in certain instances, more usefully be expressed in terms of persons, not territory. Scholars and courts have readily discerned that, in particular, for young children, their primary point of contact is with their family environment and respective caregiver or parent, as they are too young to acclimatise to their broader social environment in country territory.[113] The second related point is that courts in various jurisdictions (while by no means consistent) have found in the case of young children (predominantly infants) that their habitual residence inheres to shared parental intentions as to the child's residence and may follow that of a parent *despite that child never having resided on that territory*, reflecting the reality that young children primarily integrate into a social and family environment.[114] As held by the Court of Justice of the European Union in *Mercredi v Chaffe*:[115] 'as a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of'.[116]

The third point of guidance from the international family law context relates to the notion of habituality. Given the distinct temporal and developmental differences between adults and children, what is habitual to an adult may not be habitual to a child. In the case of *SK v KP*,[117] the New Zealand High Court observed that, even if the 'habituality' in the notion of habitual residence can be shortened for adults who are capable of making independent decisions, this would not be appropriate for children because they simply cannot make such decisions. Children need time to adapt to their surroundings. As young children do not have the same independence or autonomy as adults, their habits and ties to a territory will naturally take longer to establish.

Exactly how a child's family environment, or more precisely, the parent–child relationship, may inform the notion of a habitual residence in the context of refugee status determination is explored in the following Part.

### B *Shared Parent–Child Aspect as Conduit for Transference of Characteristics*

The *CRC*, as the lead international convention on the rights of children, depicts the close relationship between parent and child, where children are presented with dual capacities, as both vulnerable persons in need of protection and as rights-

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113 *Mercredi v Chaffe* (Court of Justice of the European Union, C-497/10PPU, 22 December 2010) 8–9 [52]–[54] ('*Mercredi*'); *Delvoye v Lee*, 329 F 3d 330, 332–34 (3rd Cir 2003); Aude Fiorini, 'Habitual Residence and the Newborn: A French Perspective' 6(2) *International and Comparative Law Quarterly* 530.

114 *Mercredi* (n 113) 9 [53]–[54].

115 The Court of Justice of the European Union was called to give a preliminary ruling on the question of the appropriate test to interpret the notion of a habitual residence in arts 8 and 10 of the *Brussels II Regulation*: *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000* [2003] OJ L 333/1.

116 *Mercredi* (n 113) 9 [54].

117 *SK v KP* [2005] 3 NZLR 590.

holders. The role of the family, the rights that derive from family life and unity and the responsibility of parents to facilitate a child's access to those rights, amongst others, are intricately woven into the text of the *CRC*.[118]

The fundamental role that parents have in the nurturing, protection and development of their child is prominent in the *CRC*. For instance, art 5 provides that parents have the overarching responsibility and right to direct and guide their child in the realisation of their rights. As Arnold explains, parents are viewed as 'the first benefactor of individual rights under international law', as they are 'the first party with responsibility in realising children's rights'.[119] In particular, for young children, parents are often the conduit through which they access rights.

Of particular relevance to this inquiry are states that have adopted nationality laws based on a combination of the principles of *jus sanguinis* (nationality based on descent) and *jus soli* (nationality based on birth), the former reflecting the fact of children inheriting a nationality through parentage. Relevantly, in instances where a child would otherwise be born stateless, the *CRC* and the *Statelessness Conventions* contain provisions that govern the conferral of nationality through parentage and impose obligations on states that concern not only the state of birth of the child, but to 'all countries with which a child has a relevant link, such as through parentage or residence'.[120]

Article 1 of the *1961 Statelessness Convention* further specifies that where a child would otherwise be stateless, the Contracting State in which the child is born should grant its nationality to prevent statelessness. Article 4 provides that in the event that a child is born to a national of a Contracting State in the territory of a non-Contracting State, the state of nationality of the parents must grant its nationality if the child would otherwise be stateless.[121]

Anchoring the previous discussion in the context of refugee status determination — for the stateless child born outside the country of nationality or former habitual residence of their parent(s) (denied a nationality according to the *jus sanguinis* principle owing to discrimination), their unrealised entitlement to a nationality may be best characterised as the ungerminated seed of nationality in the country of former habitual residence of their parent(s). Though unrealised (in actuality, denied), this point is not insignificant, as it concerns a child's right to a nationality as protected in international human rights law and signals the intersection point between a country territory and the notion of being persecuted. It has further relevance in the context of conjoined family claims, where a forward-looking assessment anticipates a hypothesised future in the designated country.

Some may argue at this juncture that the door is closed on any claim being made, that 'a nationality denied' may serve as the designated country of reference for the refugee inquiry. However, entertain for one moment, by way of inequitable comparison, the case of an adult claimant who has been arbitrarily deprived of their nationality and yet has a country of former habitual residence for the purpose

118 Arnold (n 31) 58.

119 ibid 97.

120 See *Guidelines on Statelessness No 4: Ensuring Every Child's Right to Acquire a Nationality Through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness* (UNHCR 2 December 2012) 3 [11].

121 Relevantly, the long-standing historic practice of parents transferring their personal and legal qualities to their children, including their domicile when foreigners in a territory, was noted in the Lake Success *Study of Statelessness*, a precursor analysis to the *1961 Statelessness Convention* (n 12): Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness* UN Doc E/1112 (1 August 1949) 28.

of refugee status determination.[122] To extrapolate from this comparison, where the 'country of nationality' is simply supplanted with 'a country of former habitual residence', there is no similar mechanism for stateless children born abroad who are outside the country of nationality or former habitual residence of their parent(s) as designated for the refugee status determination inquiry. The notion has been clearly 'tailored to fit' an adult-sized pattern of habituality and experience of time, reflecting their personal history and connection with the country they resided in prior to their predicament of alienage, hence the qualifier 'former' in the notion of a country of former habitual residence. Plainly, a stateless adult will inevitably have resided 'somewhere' outside the country of refugee and will have 'a foothold' or 'default' country of reference for the inquiry.

Absent any child-friendly definition of a country of former habitual residence reflecting their centre of interests (encompassing a different time vector and more nuanced and shared parent–child ties to territory), a stateless child without a country of former habitual residence has no country of reference for the inquiry. Such children do not have the same benefit of time as adults to establish 'former' or even 'durable' connections to the designated reference country.

It is necessary to distinguish further that a child born in the country of refuge or in territory other than the designated country of former habitual residence, who is conferred a nationality, has a country of reference for the inquiry. The *Refugee Convention*'s humanitarian rationale (to afford protection from serious harm arising from the discriminatory denial of fundamental human rights) would strongly call for a parallel treatment and access to the *Refugee Convention* for children born into a nationality and those who are not, where otherwise the credentials to refugeehood are met.

This article proposes that the refugee definition is capable of responding in equitable terms to the claims of children denied a nationality whilst born outside the country of nationality or former habitual residence of their parent(s). To find otherwise would be 'intuitively wrong'.[123] As will be explored later in this article, this is possible through the recognition of core indicia that inform a child-sensitive understanding of a country of habitual residence, a notion that is the embodiment of a child's centre of interests at the time of refugee status determination.

It should be noted that the intersection point between the discriminatory denial of a nationality (that would otherwise be inherited through parentage) and a country of reference signals a protection-sensitive factor that informs the child's centre of interests (ie, habitual residence). This factor lay dormant up until the

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122 Eric Fripp argues that the country that has denationalised the applicant should remain the country of nationality for the refugee inquiry as to do otherwise 'adds a potential denial of international protection to the arbitrary removal of that individual's nationality and intuitively seems wrong': Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 211. However, as conveyed by Foster and Lambert, such an interpretation is difficult to reconcile with the plain text of the refugee definition and its drafting history and is a 'strained and complicated' avenue to accommodate the protection needs for those denationalised by country of origin. These academics point out that the *Refugee Convention* provides a more 'straight forward and less complicated method of achieving outcome', where the reference state becomes the country of former habitual residence: Foster and Lambert (n 17) 123. See also Eric Fripp 'Deprivation of Nationality, "the Country of His Nationality" in Article 1A(2) of the Refugee Convention, and Non-Recognition in International Law' (2016) 28 *International Journal of Refugee Law* 453, 475; *AL (Myanmar)* (n 79) 27–37 [105]–[137].

123 To adopt the language of Fripp (n 122) in the context of stateless persons arbitrarily denied a nationality and a country of nationality within the meaning of art 1A(2). See also Foster and Lambert (n 17) 125.

point of refugee status determination, when a hypothesised presence in the country of reference is germinated. It is helpful to, again, visualise the heuristic of the country of reference as a servile medium through which the qualities of refugeehood are distilled (as distinct to the notion being a limiting definition in itself). The exercise of recognising the intersection point of persecution through this country medium is not defining the notion by the illegality of the harm, but simply signalling a protection-sensitive factor which informs the medium through which the future harm feared (persecution) and risk (well-foundedness) aspects of the refugee definition are assessed.

This article will now turn to the effect of concurrent family claims and the cascade of characteristics between family members in refugee status determination assessments which engage the notion for the purposes of the inquiry.

### C *Hypothesised Presence of the Family in the Country of Reference*

The *Refugee Convention* is silent as to refugee status determination procedures per se and as to how they may apply to children. It provides no guidance as to whether a child's status should be independently assessed or should flow from the successful or unsuccessful determination of a parent's claim. There are also no directives as to whether a child's status may be derived from their parent(s).[124] As such, the international protection regime has permitted states wide discretion as to the design, implementation and adoption of procedures for refugee status determination.

To take the example of New Zealand: the IPT has adopted child-sensitive procedures for refugee status determination, including a nuanced understanding of how the concurrent nature of conjoined family claims inform the substantive refugee definition for families that include children. In *GD (China)*, the Tribunal underscored the importance of an individualised assessment, where 'family members must establish their claim and identify the characteristic(s) or behaviour said to give rise to a risk of transferred adverse interest'.[125] Concerning concurrent family claims, the IPT added that the inquiry as to risk cascades through the assessment of family members as a group. This ensures that the assessments of individuals comprising the family group are informed by the consideration of how they would be treated by an agent of persecution in light of the accepted refugeehood-related alienage of one or more family members.[126]

What this means for a stateless child born outside the country of nationality or former habitual residence of their parent(s) is that the assessment of their hypothesised future presence in a designated country may be conducted with the vector of time — that is, the forward-looking nature of the assessment — projecting into the future. This, of course, is premised on an 'evidentially-established reality' inherent in the well-founded, real chance standard and identification of the relevant definitional indicia for a country of former habitual residence as concluded later in the article.

124 See Pobjoy (n 38) 44.
125 *GD (China)* (n 48) 15 [62].
126 ibid 13 [55].

## VII A Child-Sensitive Approach to Defining a Country of Former Habitual Residence

In similar terms to that found in *BV (Malaysia)*,[127] for the stateless child born outside the country of nationality or former habitual residence of their parent(s), the notion of a country of former habitual residence crystallises at the point of refugee status determination through the shared parent–child aspect in the forward-looking inquiry. The relevant indicia for the notion include (a) the discriminatory denial of the child's right to a nationality, or some other discriminatory denial of core human rights in the country of former habitual residence of their parent(s),[128] and (b) the ability to enter and reside in that country of former habitual residence — in effect, latent indicia which are activated by the persecution and well-foundedness components of the refugee definition. For children, who do not have the same benefit of time as adults to establish territorial connections, the tangible and evidentially established fact of their ability to enter and remain in a designated country owing to their relationship with their parent(s) means their presence may, at the time of refugee status determination, be hypothesised in that country through a forward-looking lens. The future tense of the substantive protection inquiry signals the redundancy of the linguistic 'former' in the notion of a country of former habitual residence for stateless children born outside the country of nationality or former habitual residence of their parent(s). Metaphorically speaking, this linguistic qualifier is simply the optional waistcoat in the national dress for stateless persons, as demonstrative of their effective territorial ties.

This interpretation abides by the protection rationale of the refugee definition, premised on principles of non-discrimination and equality of status as between stateless adults and children, and children born with or without a nationality. It is principled and effective, reconciling the text to its contemporary international legal context. It also ensures fidelity to the non-refoulement principle and relevantly enlivens a necessary segment of the refugee definition in danger of ossifying for stateless children born outside the country of nationality or former habitual residence of their parent(s).

## VIII Conclusion

This article has identified an unprincipled protection gap in the literal interpretation of the notion of a country of former habitual residence within the refugee definition. The subset of stateless children who have been born outside the country of nationality or former habitual residence of their parent(s) and cannot access refugee protection may be refouled to serious harm should they be returned to a parent's designated country. Even with access to a statelessness regime, they would not be afforded the more comprehensive protections of refugee status. This article has charted a principled and protection-sensitive interpretation of the notion of a country of former habitual residence that appreciates child-distinct patterns of habituality and experience with time and recognises that the effective centre of a child's life may, in certain instances, be better expressed in terms of persons than

127 *BV (Malaysia)* (n 19).

128 See ibid, wherein the inclusion of other discriminatory denials of human rights in such criteria is an extension from the finding on the facts.

territory. Such recognition of the shared parent–child aspect (where children may, for instance, inherit or accrue entitlements, such as the legal right to enter and reside in a country owing to a parent's status there) has enabled an interpretation where stateless children born outside the country of nationality or former habitual residence of their parent(s) can be conceived, at the time of refugee status determination, as having a country of former habitual residence within the meaning of the refugee definition, notwithstanding that they have never before resided in that territory. This is possible in the context of the forward-looking assessment of concurrent yet individually assessed family claims that hypothesises the child's presence, together with their parent(s), in the country of former habitual residence of their parent(s), in tandem with considerations of potential returnability and risk of persecution upon return.