

CASE NOTE

VIEWS ADOPTED BY THE UN HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5(4) OF THE OPTIONAL PROTOCOL, CONCERNING COMMUNICATION NO 2918/2016

RODOLFO RIBEIRO COUTINHO MARQUES*

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I INTRODUCTION

In December 2021, the UN Human Rights Committee ('HRC') published its views in a ground-breaking case (*Communication No 2918/2016*),¹ finding that the Netherlands had violated a child's right to a nationality by registering them as having 'unknown nationality' in their civil records. The HRC reasoned that, in so doing, the Netherlands hindered the child's access to international protection as a stateless child. This was the first time that the HRC has ruled on the right of a child to acquire a nationality under art 24(3) of the *International Covenant on Civil and Political Rights* ('ICCPR').

II FACTS

The case revolved around a petition by DZ, a child born in Utrecht in 2010 to a Chinese mother. In 2004, she was trafficked to the Netherlands as a minor but managed to escape her traffickers at the Schiphol Airport in Amsterdam. She then applied for asylum, but her application was unsuccessful. In 2006, DZ's mother was forced into prostitution. Two years later, she broke out of her captivity and reported the situation to the police, which gave her the right to a temporary status while the investigation was undergoing. After an unsuccessful, year-long investigation, her temporary residence permit was revoked, and her status changed to 'illegal alien [sic]'. Moreover, DZ's biological father, who did not recognise paternity, was not in contact with them or with DZ's mother.

* Teaching Assistant and PhD Candidate in International Law at the Graduate Institute of International and Development Studies. I would like to thank Dr Katia Bianchini and Professor Laura van Waas for their insightful feedback and comments. The usual caveats apply. An earlier version of this case note was published on EJIL:Talk! as a blog post.

¹ Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2918/2016*, UN Doc CCPR/C/130/D/2918/2016 (20 January 2021) ('*Communication No 2918/2016*').

Despite her efforts, DZ's mother could not produce any conclusive proof of the child's nationality or lack thereof, as required by Dutch law. Consequently, she was unable to change DZ's entry in the civil registry to 'stateless' and trigger the special protection afforded to stateless children under international and domestic law. In a decision on administrative appeal, the District Court of Midden-Nederland pointed out that the burden of proof in these cases rests on the claimant. Conversely, Dutch authorities are not required to conduct inquiries and determine stateless status. The ruling was later upheld by the Administrative Jurisdiction Division of the Dutch Council of State, which highlighted how neither national nor international law provides any rules on procedures for determining statelessness that state authorities are obliged to follow. Further, the Council did acknowledge that individuals entitled to international protection were falling through a gap in legislation but declined to fill any such loopholes. Doing so, according to the Council, would go 'beyond the law-making task of the judiciary'.²

After having all appeals and applications denied, DZ and their mother were living in a centre for failed asylum seekers with young children, with nearly no contact with Dutch society and the constant possibility of deportation. DZ's mother was not eligible for any social benefits apart from a small, weekly allowance. Although these restricted freedom centres were initially envisaged to serve as temporary facilities, DZ and their mother were living there for more than three years. This system is particularly harmful to children, who are exposed to constant fear, health problems, family tensions and social exclusion.³

III ISSUES

The main issue put before the HRC concerned the violation of art 24(3) of the *ICCPR*, which provides the right of every child to acquire a nationality. DZ claimed that the absence of a reliable opportunity for them to receive a nationality in their childhood, together with the years of limbo that they had to endure on account of the Netherlands' approach to addressing statelessness and related rules pertaining to residency rights and acquisition of nationality, violated their right under art 24(3) of the *ICCPR*. In this respect, DZ also highlighted the interrelationship between one's right to acquire a nationality at birth and an individual's enjoyment of juridical personality and respect for human dignity under the *ICCPR*.

A second issue concerned the Netherlands' failure to ensure that every child, especially stateless children and children born to parents with an irregular migratory status, enjoy their rights under the *ICCPR* — therefore violating arts 24 and 2(2) of the *ICCPR* (the latter requiring every state to adopt the necessary laws and measures to implement the rights set out in the treaty). Moreover, as DZ noted, this is a consequence of a systemic flaw in the Dutch legislation and administrative rules governing civil registration, nationality and immigration status. For instance, the Netherlands lacked a fair and balanced process to determine statelessness, including statelessness at birth. On top of that, there were no safeguards in place to prevent and reduce childhood statelessness and ensure that a child's best interest is fully respected.

A third issue related to the lack of an effective remedy in violation of art 24(3), read in conjunction with art 2(3), of the *ICCPR*.

² *ibid* 3 [2.6].

³ *ibid* 4 [2.9].

IV HOLDING

In its consideration of the merits of the case, the HRC concluded that, by registering ‘unknown nationality’ in DZ’s civil records and leaving them unable to effectively enjoy their right as a child to acquire a nationality, the Netherlands had violated art 24(3) of the *ICCPR*. It also noted that the failure of Dutch authorities to provide DZ with an effective remedy constituted a violation of art 24(3), read in conjunction with art 2(3), of the *ICCPR*. Moreover, the HRC observed that the Netherlands was under an obligation to make full reparations to the victim, by way of adequate compensation and by reviewing DZ’s living circumstances and residence permit. Likewise, the HRC found that the Netherlands was under an obligation to review its legislation, in accordance with art 2(2) of the *ICCPR*, to ensure that a procedure for determining stateless status is established, as well as making sure that the eligibility to apply for Dutch nationality complies with art 24 of the *ICCPR*.

V ANALYSIS

In its decision, the HRC reasserted the special measures of protection to which children are entitled under art 24 of the *ICCPR*, including the best interests of the child principle. On the child’s right to acquire a nationality, the HRC resorted to its *General Comment No 17* (1989) on the rights of the child, where it recognises that states must

adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.⁴

Moreover, the HRC reaffirmed that art 24(3) aims to prevent a child from being afforded less protection because of their nationality, or lack thereof. On the other hand, it did not go so far as to establish that states have a duty to confer nationality to every child born in their territory. This is in line with the long-established rule that nationality matters fall within the so-called reserved domain of states (*domaine réservé*) and, thus, should be determined at the national level. Such discretion, however, must be performed within the boundaries demarcated by, and in compliance with, the limitations stemming from international law.⁵

Among such limitations, as *General Comment No 17* specifies, is the prohibition of discrimination enshrined in arts 2 and 24 of the *ICCPR*, which operates, for instance, in relation to the modes of acquisition of nationality.⁶ This means that, if a given state adopts the *jus soli* principle as the main criteria to confer its nationality, it cannot discriminate between children born to single mothers and those born to married couples, nor between those born to stateless parents and those fathered by individuals of a given nationality. In this example, the civil and nationality statuses of the child’s parents become irrelevant.

⁴ *Report of the Human Rights Committee*, UN Doc A/44/40 (29 September 1989) annex VI ‘General Comment No 17 (Article 24)’ 175 [8] (‘General Comment No 17 (Article 24)’).

⁵ *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion No 4)* [1923] PCIJ (ser B) 6, 24.

⁶ General Comment No 17 (Article 24) (n 4) 174 [5].

Regarding the issue of determining who is a stateless person, the HRC relied on the 1961 *Convention on the Reduction of Statelessness* ('1961 Convention') — ratified by the Netherlands — and the UNHCR *Guidelines on Statelessness No 4*.⁷ Regrettably, the decision does not mention the 1954 *Convention relating to the Status of Stateless Persons* ('1954 Convention') — to which the Netherlands is also a party — which contains the internationally accepted definition of a stateless person and provides a number of essential rights to those recognised as stateless.⁸

Relying on the *UNHCR Guidelines No 4*,⁹ the HRC noted that a person would not be considered as a national of a particular state if 'the authorities of that state refuse to recognize that person as a national'.¹⁰ The *Guidelines* state that such a refusal may materialise when the authorities expressly recognise a person as a non-national, but it could also occur if they fail to 'respond to inquiries to confirm an individual as a national'.¹¹ In succinctness: there is no need for conclusive proof to establish that a person lacks a given nationality. *A fortiori*, the repeated refusal of the Chinese authorities to issue any proof of DZ's nationality would suffice to establish that they were not a Chinese national. On this point, the HRC could have elaborated further on how these criteria fit in the definition established in art 1(1) of the *1954 Convention*, according to which a person is stateless when 'not considered as a national by any State under *the operation of its law*',¹² but failed to do so.

Moreover, in view of the practical difficulties surrounding the determination of whether an individual has in fact acquired a nationality, the *UNHCR Guidelines No 4* advise that the 'burden of proof must be shared between the claimant and the authorities of the Contracting State'.¹³ This seems to be the adequate approach, for stateless individuals are often simply unable to substantiate their claims with much — if any — documentary evidence. The *UNHCR Handbook on the Protection of Stateless Persons* (regrettably not used by the HRC) also adopts this understanding, according to which 'both the applicant and examiner must cooperate to obtain evidence and to establish the facts [in the case of statelessness determination]'.¹⁴

Regarding the use of 'nationality unknown' in DZ's civil records, the HRC stressed that under the *1961 Convention*, states are required to 'determine whether a child would otherwise be stateless as soon as possible so as not to prolong a child's status of undetermined nationality'.¹⁵ Resorting to the *UNHCR Guidelines No 4* once again, the HRC pointed out that such a period should not exceed five years during which these children are to 'enjoy human rights (such as health and education) on equal terms as children who are citizens'.¹⁶

⁷ See generally *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 Report HCR/GS/12/04, 21 December 2012) ('*Guidelines on Statelessness*').

⁸ See *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1 ('*1954 Convention*').

⁹ *Communication No 2918/2016* (n 1) 7 [8.3].

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *1954 Convention* (n 8) art 1(1) (emphasis added).

¹³ *Guidelines on Statelessness* (n 7) 5 [20].

¹⁴ *Handbook on Protection of Stateless Persons* (UNHCR Report, 2014) 34 [89] ('*UNHCR Handbook*').

¹⁵ *Communication No 2918/2016* (n 1) 7 [8.3].

¹⁶ *ibid.*

In reality, DZ's situation is not exceptional. Rather, it is the result of a flawed system that traps thousands of individuals in a legal limbo. According to a recent study, there were 6,303 children registered as having 'unknown nationality' in their civil records, even though they were born in the Netherlands.¹⁷ Although draft legislation on a statelessness determination procedure has been pending before the States General (the Dutch Parliament) since 2016, the HRC stressed that this procedure did not meet international standards, since it does not ensure that a person recognised as stateless is granted a residence permit to fully enjoy their rights under the *ICCPR*.¹⁸

VI CONCLUSION

Albeit its historical importance, the HRC's decision failed to explore two key areas. The first relates to the way in which the HRC interpreted and applied the definition of a stateless person, in particular, the 'under the operation of its law' test. Instead of expressly relying on art 1(1) of the *1954 Convention*, which contains a clear definition of a stateless person, the HRC decided to build its reasoning around the *1961 Convention* and the *UNHCR Guidelines on Statelessness No 4*.¹⁹ While the reasons behind this choice are not entirely clear, the question of 'when is a person not considered as a national under the operation of a state's law' could have been unpacked in a more nuanced way. Relying on the *UNHCR Guidelines on Statelessness No 4*²⁰ and the *Handbook on the Protection of Stateless Persons*,²¹ the HRC could have elaborated further on how the persistent unwillingness of the Chinese authorities in recognising DZ as a Chinese national would meet the 'under the operation of its law' test.

The second unexplored area is the interrelationship between the right to acquire a nationality and an individual's enjoyment of juridical personality and respect for human dignity. If compared to the rich case law of the African²² and Inter-American human rights systems on the matter, the HRC's decision fell short in linking the right to acquire a nationality with other rights and guarantees under the *ICCPR*. For instance, in *Case of the Girls Yean and Bosico v Dominican Republic*, the Inter-American Court of Human Rights acknowledged that stateless children are left in a legal limbo, so far as they do not have a recognised 'juridical personality'.²³ As pointed out by H el ene Tigroudja in her concurring opinion, DZ's 'situation of statelessness' should have been 'analysed by the majority as a violation of the right to be recognized by the law as a legal person (art. 16) and the right to be treated with humanity and dignity (art. 7)'.²⁴

¹⁷ Institute on Statelessness and Inclusion, *Childhood Statelessness in the Netherlands* (Report, 2021) 2 <https://files.institutesi.org/Childhood_Statelessness_in_the_Netherlands.pdf>.

¹⁸ *Communication No 2918/2016* (n 1) 7–8 [8.4].

¹⁹ In fact, the Human Rights Committee relied on just one paragraph in the *Guidelines on Statelessness: Guidelines on Statelessness* (n 7) [16]. See also *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

²⁰ *Guidelines on Statelessness* (n 7) 4–6 [16]–[21].

²¹ *UNHCR Handbook* (n 14) 2014 12–13 [22]–[24].

²² See, eg, *Penessis v United Republic of Tanzania (Merits and Reparations)* (African Court on Human and Peoples' Rights, App No 013/2015, 28 November 2019) [84], [87].

²³ *Case of the Girls Yean and Bosico v Dominican Republic (Preliminary Objections, Merits, Reparations, Costs, Judgment)* (Inter-American Court of Human Rights, Series C No 130, 8 September 2005) 67 [180].

²⁴ *Communication No 2918/2016* (n 1) annex II 13 [5].

These issues notwithstanding, the HRC's decision does recognise the essential nature of the right to acquire a nationality and the concrete protection that it ensures for individuals. While the ways in which this decision will be implemented at the national level remain unclear, the HRC's ruling represents an important landmark in the global fight for the prevention and eradication of statelessness.