

COMMENTARY

STATELESSNESS AND THE RECOGNITION OF THE RIGHT TO HAVE RIGHTS IN GERMANY

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I INTRODUCTION

‘This means I will die as undetermined,’ a Statefree community member said during a recent discussion about the structural barriers stateless people face trying to access the right to nationality in Germany. Statefree,¹ a non-profit organisation dedicated to the empowerment of stateless people, had organised a *Community Lab*² in which participants discussed the recently announced proposal to reform German citizenship law.³ Community members affected by statelessness came together to discuss the implications of these reforms, highlighting the lack of consideration of stateless people in the reform. Echoing the opening quote in this piece, participants discussed the many barriers to meeting the requirements for naturalisation, especially due to the difficulty of being recognised as stateless in the first place. This struggle for recognition is the result of intersecting structural issues, such as the absence of a dedicated statelessness determination procedure and the extensive use of the administrative classification ‘undetermined nationality’ in Germany.⁴ The lack of information and awareness about statelessness on the part of administrative officials adds to the widespread misidentification of

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1 See ‘Statefree’, *Statefree* (Web Page) <<https://statefree.world>>, archived at <<https://perma.cc/NT5K-C37A>>.

2 *Community Labs* is a format created by Statefree that brings community members together with the goal of increasing exchange, participation and visibility. Topics have included discussing Statefree’s policy recommendations, reforms to German nationality law and co-creating a podcast on statelessness.

3 Nancy Faeser, ‘Nancy Faeser über ihre Einbürgerungspläne: “Damit schaffen wir Anreize für Integration”’ [Nancy Faeser on Her Naturalisation Plans: ‘In This Way we Create Incentives for Integration’], *Tagesspiegel* (online, 27 November 2022) <<https://www.tagesspiegel.de/meinung/nancy-faeser-uber-ihre-einburgerungsplane-damit-schaffen-wir-anreize-fur-integration-8927524.html>>, archived at <<https://perma.cc/A2KP-ZH36>>.

4 Holger Hoffmann, ‘Staatenlosigkeit — Rechte und rechtliche Folgen’ [Statelessness — Rights and Legal Consequences] [2017] (9) *Asylmagazin* 325; Katia Bianchini, ‘On the Protection of Stateless Persons in Germany’ (2014) 19(1–2) *Tilburg Law Review* 35, 42–6; Margarida Farinha, “‘What about it is Unclear? I Mean I was Born Here’ Ungeklärte Staatsangehörigkeit and the (Re-)production of De Facto Statelessness in Germany’ (2022) 26(6) *Citizenship Studies* 799, 800 (‘What about it is Unclear?’).

stateless people.⁵ As a result, more and more stateless people find themselves stuck in a legal limbo produced by being recorded as having an undetermined nationality.

This commentary provides an overview of statelessness in Germany and discusses Statefree's community-informed advocacy work. It argues that it is crucial to look at what statelessness means in practice and to attend to the intersectional effects of statelessness. This leads to an understanding that, following Hannah Arendt's argument that citizenship concerns 'the right to have rights',⁶ being stateless in Germany also concerns the struggle over the recognition of the right to have rights. Since many other rights depend on the state's formal recognition of a person's statelessness, it is crucial to drive advocacy work on the rights of all stateless people and those at risk of it, independent of whether they are formally recognised as stateless or not.

II STATELESSNESS IN GERMANY: THE FIGHT FOR RECOGNITION

At the end of 2021, 27,940 people in Germany were officially recorded as stateless, with another 94,945 registered with an undetermined nationality, meaning that over 122,000 people in Germany are either stateless or at risk of statelessness.⁷ More than 45,000 of people in these groups are minors and more than 34,000 were born in Germany.⁸ Despite these high numbers, there is still little public and political awareness about the issue. The absence of a dedicated statelessness determination procedure is reflective of this and contributes to the rising numbers of non-recognised stateless people. Without a specialised statelessness determination procedure, identifying statelessness is often a costly and lengthy process.⁹ It may be established through other administrative procedures, such as the asylum process, the application for a travel document for stateless persons or the application for naturalisation.¹⁰ However, immigration officers tend to avoid establishing statelessness and instead impose an undetermined nationality.¹¹ Even though undetermined nationality is an administrative term meant to be used only temporarily,¹² many people find themselves stuck with it for years, decades or even whole lifetimes due to the authorities' failure to identify and solve situations of statelessness.

While Germany has ratified the 1954 *Convention relating to the Status of Stateless Persons* ('1954 Statelessness Convention')¹³ and the 1961 *Convention*

⁵ Statefree, European Network on Statelessness and Inclusion and Institute on Statelessness and Inclusion, 'Review of Germany', Joint Submission to the Human Rights Council at the 44th Session of the Universal Periodic Review, 5 April 2023, 4–6 [15]–[22] <https://files.institutesi.org/UPR44_Germany.pdf>, archived at <<https://perma.cc/VWK3-QTUB>>.

⁶ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 296.

⁷ 'Ausländische Bevölkerung — Fachserie 1, Reihe 2, Ergebnisse des Ausländerzentralregisters' [Foreign Population — Specialist Series 1, Series 2, Results of the Central Register of Foreigners], *Destatis* (Web Page, 14 April 2022) <<https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Migration-Integration/Publikationen/Downloads-Migration/auslaend-bevoelkerung-2010200217005.html>>, archived at <<https://perma.cc/3K42-UL6G>>.

⁸ *ibid.*

⁹ Hoffmann (n 4) 334.

¹⁰ Bianchini (n 4) 38.

¹¹ *ibid.*

¹² Hoffmann (n 4) 329.

¹³ *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

on the *Reduction of Statelessness*¹⁴ dedicated to the protection of stateless people and safeguarding of their human rights, Germany does not extend their application to people whose statelessness has not yet been formally recognised. As a result, important rights such as the issuance of travel documents and the facilitation of naturalisation established in art 28 and art 32 of the *1954 Statelessness Convention* remain out of reach for stateless people recorded with an undetermined nationality in Germany.

Being categorised with an undetermined nationality has far-reaching consequences, especially with regards to obtaining legal status, travel documents, identification and naturalisation. Undetermined nationality makes securing a permanent residence permit, or even obtaining a temporary residence title, nearly impossible, as a clarified identity and nationality are, as a general rule, prerequisites for it.¹⁵ As a result, many non-recognised stateless people remain stuck in the extremely precarious condition of ‘tolerated stay’ (*Duldung*).¹⁶ Obtaining identity and travel documents is also made difficult; without formal recognition as stateless, the right to a travel document for stateless persons remains out of reach. A travel document for foreigners is only issued at the discretion of the immigration office and therefore is not a right that can be claimed.¹⁷ One’s freedom of movement is thereby severely restricted. Moreover, matters that entail identity verification such as opening a bank account, picking up a parcel or checking into platforms like Airbnb or flights online, transform into arduous, if not impossible, tasks.

Finally, those recorded with an undetermined nationality who have been able to obtain permanent residence still remain excluded from acquiring German nationality. This barrier to naturalisation was solidified in 2019 with the introduction of a ‘clarified identity and nationality’ requirement for naturalisation¹⁸ without adding an exception clause for hardship cases.¹⁹ This requirement also applies to people born in Germany who have their legal and habitual residence in Germany.²⁰ Not only does this contradict Germany’s official commitment to reduce statelessness and protect children’s right to a nationality; it also establishes the intergenerational transmission of undetermined nationality through legal means.²¹

¹⁴ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

¹⁵ *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz — AufenthG)* [Law on the Residence, Employment and Integration of Foreigners in Germany (Residence Act)], Bundesgesetzblatt I 1950 (Germany) amended by *Artikel 3 des Gesetzes vom 20 April 2023* [Article 3 of the Laws of 20 April 2023], Bundesgesetzblatt I Nr 106, § 9 (Germany).

¹⁶ *Duldung* is not a residence permit but describes a ‘temporary suspension of deportation’ and is thereby a very precarious status.

¹⁷ *Aufenthaltsverordnung vom 25 November 2004 (AufenthV)* [Ordinance Governing Residence of 25 November 2004], Bundesgesetzblatt I 2945 (Germany) amended by *Artikel 4 der Verordnung vom 20 August 2021* [Article 4 of the Act of 20 August 2021], Bundesgesetzblatt I 3682, § 4(1) (Germany).

¹⁸ *Staatsangehörigkeitsgesetz vom 22 July 1913 (StAG)* [Nationality Act], (Germany) amended by *21 December 2022*, Bundesgesetzblatt I, 2847, §§ 8 and 10 (Germany) (‘StAG’).

¹⁹ See OVG Schleswig-Holsteinisches [Schleswig-Holstein Higher Administrative Court], 4 LB 7/20, 20 April 2021 (‘OVG Schleswig-Holsteinisches, 4 LB 7/20’).

²⁰ *ibid.*

²¹ Farinha, ‘What about it is Unclear?’ (n 4) 805.

III STATEFREE'S COMMUNITY-CENTRED ADVOCACY

Without a specific institution responsible for dealing with matters of statelessness nor sufficient political will to prevent and reduce statelessness, stateless people in Germany are left alone with their concerns and have to navigate an often volatile and non-transparent bureaucratic system. As a result, statelessness is often a traumatic and isolating experience. With the goal of countering this isolation and empowering stateless people, the non-profit organisation, Statefree, was founded in 2020. Initiated and led by Christiana Bukalo, a stateless woman born in Germany, Statefree's mission is to build a community of belonging.²² After the launch of its online community platform at the beginning of 2022, Statefree expanded the scope of its action to the field of political advocacy. True empowerment of stateless people is only possible if they have access to rights; substantive structural changes thus need to be implemented at the political level.

Statefree's political advocacy is deeply rooted in the community it has built and continues to build together. It is guided by the understanding of how statelessness affects lives and shapes lived experiences. Statefree's advocacy is also shaped by the concerns, hopes and wishes of the Statefree community. For instance, when discussing Statefree's political recommendations in a *Community Lab*,²³ there was consensus among the group that — even though a statelessness determination procedure would be most relevant to resolve the limbo of non-recognised statelessness — the right of children to a nationality should be prioritised.²⁴ As one community member rightly said, 'the next generation needs to feel like they belong'.²⁵ While Statefree's commitment to implementing a fair statelessness determination procedure persists, the organisation has strengthened its effort to address childhood statelessness in Germany.

Community-centred advocacy not only concerns the alignment of priorities, it also centres the question: Do our political demands matter to the people they are meant to empower? Will they bring about substantial change or do they only look good on paper? Sustained exchange at eye level is crucial to identify the critical barriers and points of exclusion that need to be tackled for policy change to be truly effective and empowering. Statefree's community-centred approach has led to important insights in this regard. An alarming issue concerns the administrative practice of registering statelessness. Many of the stateless in Germany report inconsistencies, for instance, being registered as stateless (with the code 'XXA') under a residence permit, yet being issued a travel document for foreigners with the code 'XXX', which stands for undetermined nationality.²⁶ Other examples

²² 'Who We Are', *Statefree* (Web Page) <<https://statefree.world/about-us>>, archived at <<https://perma.cc/77D2-8E4U>>.

²³ 'Do Politicians Even Care?', *Statefree* (Blog Post, 16 August 2022) <<https://community.statefree.world/news-updates-2/do-politicians-even-care-185>>, archived at <<https://perma.cc/77D2-8E4U>>.

²⁴ Margarida Farinha, 'The Next Generation Needs to Feel Like They Belong: Fighting for Children's Right to Nationality', *Statefree* (Blog Post, 20 October 2022) <<https://community.statefree.world/our-articles-35/the-next-generation-needs-to-feel-like-they-belong-fighting-for-children-s-right-to-nationality-195>>, archived at <<https://perma.cc/S3RV-769Y>>.

²⁵ *ibid.*

²⁶ Margarida Farinha, 'What Makes Writing about Statelessness so Difficult?', *Statefree* (Blog Post, 12 December 2021) <<https://community.statefree.world/our-articles-35/what-makes-writing-about-statelessness-so-difficult-89>>, archived at <<https://perma.cc/3TXX-K5SL>> ('What Makes Writing about Statelessness so Difficult?').

include being registered as stateless by the Federal Office for Migration and Refugees (‘BAMF’) in the asylum process, but the immigration office changing the nationality status to undetermined afterwards.²⁷ Similarly, there have been cases where a change of residency to a different federal state prompted a change in statelessness status.²⁸ Inconsistencies between family members have also been reported, for instance, with some siblings being registered as stateless and some with undetermined nationality.²⁹ While a comprehensive study of statelessness registration practices that structurally illuminates these issues does not yet exist, these individual reports evidence the inconsistency and discrepancy to which stateless people are exposed, and the resulting precarity they have to navigate. It also points to the need for clear guidelines and adequate training to support administrative officials in identifying and dealing with matters of statelessness coherently across government agencies.

The current impossibility of relying on a settled recognition of one’s statelessness is also reflected in a statement issued by the Federal Ministry of the Interior and Community (‘BMI’) in 2020.³⁰ This statement acknowledges the lack of uniformity in how Palestinians are registered across the federal states and establishes nationwide guidelines for the recognition of their statelessness and issuance of travel documents. It also makes a revealing statement regarding the binding effect of the recognition of statelessness — or rather the lack thereof. It states: ‘Whether [the applicant is stateless] is to be checked by the Foreigners Authority incidentally; *a formal determination with binding effect vis-à-vis third parties is not associated with this.*’³¹ Without the binding effect of a formal determination of statelessness, stateless people cannot rely on their recognised stateless status (and the rights that come with it) as it may be questioned or reassessed in future administrative procedures. The uncertainty of one’s legal status therefore persists beyond one’s recognition as stateless in Germany. Implementing a fair and binding statelessness determination procedure is thus crucial for safeguarding the rights and protection of stateless people.

IV INTERSECTIONAL BARRIERS TO THE RECOGNITION OF STATELESS PERSONS

The struggle for the recognition of a person’s statelessness cannot be detached from the intersecting discriminations to which they may be exposed. Experiences of statelessness are multiple and intersect with other structural inequalities.³² Similarly, the availability of and access to official proof of one’s statelessness depends on differing and important factors that need to be taken into consideration for a statelessness determination procedure to be truly accessible. For instance,

²⁷ *ibid.*

²⁸ Farinha ‘What Makes Writing about Statelessness so Difficult?’ (n 26); *Staatenlosigkeit in Deutschland* (Drucksache 20/6463, 17 April 2023) 1 <<https://dserver.bundestag.de/btd/20/064/2006463.pdf>>, archived at <<https://perma.cc/A2VT-95Y4>>.

²⁹ Farinha, ‘What Makes Writing about Statelessness so Difficult?’ (n 26).

³⁰ Bundesministerium des Innern, für Bau und Heimat [Federal Ministry of the Interior, Building and Community] ‘Personen mit palästinensischer Volkszugehörigkeit’ [People of Palestinian Ethnicity], *Initiativ Ausschuss für Migrationspolitik* [Initiative Committee on Immigration Policy] (Statement, 18 June 2020) <https://ini-migration.org/wp-content/uploads/2020/12/2020_06_18-Reiseausweise_fuer_palaestinensische_Volkszugehoerige.pdf>, archived at <<https://perma.cc/5V3R-J2KR>>.

³¹ *ibid* [tr author] (emphasis added).

³² Deirdre Brennan, ‘Statelessness and the Feminist Toolbox: Another Man-Made Problem with a Feminist Solution?’ (2019) 24(2) *Tilburg Law Review* 170, 172.

people who are stateless due to belonging to a minority in their country of origin may face substantial barriers trying to provide official documentation of their identity and/or statelessness in Germany. This may affect Kurds, Palestinians, Tuareg people, the Romani and Sinti, or so-called ‘non-citizens’ from Latvia and Estonia.³³ Various community members have indicated that immigration offices often demand documents that the embassy from the country of origin does not issue. As a result, stateless people find themselves stuck in a limbo of conflicting institutional demands. Without a statelessness determination procedure that is sensitive to the contextual difficulties of providing certain documentation, the discrimination experienced in the country of origin intersects with, and manifests through, the inequalities faced in Germany due to being recorded with an undetermined nationality.

For those born and raised in Germany who are asked to ‘clarify’ their identity and/or nationality by the immigration office, this may be a similarly burdensome and traumatising endeavour, especially if no relatives live in their parents’ country of origin.³⁴ Since this request effectively means providing proof of the identity and/or nationality of the applicant’s parents or grandparents, the context of familial relations is decisive in being able to fulfil institutional demands. A particular case concerns children who grew up in foster care in Germany and became stateless through the state succession of the Soviet Union or Yugoslavia. Depending on the situation of their biological parents, these children may be unable to prove their statelessness within the parameters expected by the immigration office. Restrictive German nationality laws favouring citizenship by descent thus intersects with the assumption of available blood ties and nuclear family constellations for the inheritance and tracking of (a foreign) nationality.

Another concerning intersection is statelessness in the context of human trafficking. Since perpetrators of trafficking actively prevent the registration and documentation of their victims, the latter may become stateless as a result.³⁵ Without documents or proof of their identity, survivors of trafficking may remain stuck in an undetermined nationality and have to deal with the traumatic consequences of human trafficking and being stateless. Without awareness of, and sensitivity to, how human trafficking and statelessness can intersect, immigration officers uphold assumptions and demands that make survivors especially vulnerable to becoming stuck in an undetermined nationality and consequent precarious legal status.

Raising awareness about the different contexts in which statelessness arises, and the contextual and intersectional difficulties in proving one’s statelessness is a crucial first step to prepare administrative officials to deal with matters of statelessness effectively. Establishing a statelessness determination procedure with clear guidelines and reasonable parameters is indispensable for both stateless people and those at risk of statelessness to access recognition of their rights as stateless people.

³³ *Atlas of the Stateless: Facts and Figures about Exclusion and Displacement* (Rosa-Luxemburg-Stiftung October 2020).

³⁴ See, eg, OVG Schleswig-Holsteinisches, 4 LB 7/20 (n 19).

³⁵ Stateless children are also at increased risk of human trafficking since they are more vulnerable to exploitation and abuse. See, eg, United Nations High Commissioner for Refugees and Plan International, *Under the Radar and Under Protected: The Urgent Need to Address Stateless Children* (Report, June 2012) 5 <<https://www.unhcr.org/509a6bb79.pdf>>, archived at <<https://perma.cc/DC8N-GSPY>>.

V CONCLUSION

Based on its understanding of the intersectional effects of statelessness grounded in its community-work, Statefree has developed policy recommendations to improve the situation of stateless people in Germany. These concern 1) the right of children to be protected from statelessness; 2) the right of stateless people to official recognition of their status; 3) the right of stateless people to access citizenship; and 4) the right of stateless people to identity documentation and social welfare.³⁶ Important points of reference to implement these rights are facilitating the naturalisation procedure for stateless people in German nationality law. The draft bill of the proposed reform will soon be released and opened up for comment by associations and other actors, which represents a key opportunity to address statelessness and the mechanisms needed to solve it.³⁷ Particularly important is ensuring the visibility of stateless people in the proposed legislation and ensuring that the naturalisation of stateless children born in Germany complies with international law and the international conventions to which Germany has committed. Moreover, specific solutions for the stateless population stuck in the limbo of undetermined nationality have to be implemented, especially by breaking the intergenerational transmission of statelessness resulting from this categorisation and a restrictive nationality law, and by establishing a dedicated statelessness determination procedure with clear and fair guidelines. That is why Statefree is committed to developing a blueprint for a binding statelessness determination procedure. Taking an innovative and cross-disciplinary approach, the aim is to reshape traditional governance by including stateless people at the core of Statefree's advocacy processes, as well as integrating a diverse set of stakeholders from civil society, administrative authorities, academia, non-government organisations, law and politics.

As the experience of people affected by statelessness in Germany demonstrates, legislative change is indispensable and urgent. For it to be truly effective, it needs to be grounded in a thorough understanding of the multiple barriers, contextual difficulties and intersectional effects of statelessness. Similarly, policy changes introduced at the legal and political level also need to be implemented and monitored at the local level to make sure all stateless people have access to their rights. This is the only way Germany can catch up with other states in the European Union and eventually take on a pioneering role in dealing with statelessness.

³⁶ 'Policy Work', *Statefree* (Web Page) <<https://statefree.world/policy-work>>, archived at <<https://perma.cc/A7NH-4KUV>>.

³⁷ Bundesministerium des Innern und für Heimat [Federal Ministry of the Interior and Community], *Entwurf eines Gesetzes zur Modernisierung des Staatsangehörigkeitsrechts* [Bill to Modernise Nationality Laws] (Ministerial Draft, 19 May 2023) <https://www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/referentene Entwuerfe/VII5/gesetz-zur-modernisierung-des-staatsangehoerigkeitsrechts.pdf?__blob=publicationFile&v=2>, archived at <<https://perma.cc/JX5K-9XUP>>. See also Federal Ministry of the Interior and Community, 'Gesetzentwurf für modernes Staatsangehörigkeitsrecht veröffentlicht — Faeser: "Erwerb der Staatsangehörigkeit ist stärkstes Bekenntnis zu Deutschland"' [Draft Bill for Modern Citizenship Law Published — Faeser: 'Acquiring Citizenship is the Strongest Commitment to Germany'] (Press Release, 19 May 2023) <<https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2023/05/staatsangehoerigkeitsrecht.html>>, archived at <<https://perma.cc/3ECL-LWXM>>.