CASE NOTE

HOTI V CROATIA: EUROPEAN COURT OF HUMAN RIGHTS LANDMARK DECISION ON STATELESSNESS

KATJA SWIDER*

TABLE OF CONTENTS

I INTRODUCTION

On 26 April 2018 the European Court of Human Rights ('ECtHR') issued a landmark decision on statelessness in the case of *Hoti v Croatia* ('*Hoti*').[1] The Court found that Croatia's failure to ensure stability of residence for the stateless Mr Bedri Hoti, the applicant, amounted to a violation of art 8 of the *European Convention on Human Rights* ('*ECHR*') — his right to private and family life.[2]

The applicant's statelessness played a crucial role in the reasoning of the judgment, making this case a clear jump in the evolution of the ECtHR case law on statelessness. Even though stateless applicants have appeared before the Court in the past, their statelessness was at best framed as an additional source of vulnerability, but not as a central issue of their claims.[3] The *Hoti* judgment closely

* Dr Katja Swider is a Research Associate at the University of East Anglia and a Visiting Researcher at the University of Amsterdam. This case note is based on shorter blog posts by the same author. See Katja Swider, '*Hoti v Croatia* — A Landmark Decision by the European Court of Human Rights on Residence Rights of a Stateless Person' (*European Network on Statelessness Blog*, 3 May 2018) <https://www.statelessness.eu/blog/hoti-v-croatia-landmark-decision-european-court-human-rights-residence-rights-stateless-person>; Katja Swider, '*Hoti v Croatia* — Landmark ECHR Decision on Residence Rights of Stateless' (*GLOBALCIT*, 10 May 2018) <http://globalcit.eu/hoti-v-croatia-landmark-echr-decision-on-residence-rights-of-stateless/>.

1 *Hoti v Croatia* (European Court of Human Rights, First Section, Application No 63311/14 26, 26 April 2018) ('*Hoti*').

2 *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 ('*ECHR*').

3 See Caia Vlieks, 'Geen (recht op) nationaliteit: De relevantie van artikel 8 *EVRM* bij de beperking van staatloosheid in Europa' (2018) 43 *Nederlands Tijdschrift voor de Mensenrechten* 375. For examples of other cases, see also *Kim v Russia* (European Court of Human Rights, First Section, Application No 44260/13, 17 July 2014); *Kurić and Others v Slovenia* (European Court of Human Rights, Grand Chamber, Application No 26828/06, 26 June 2012) ('*Kurić*'); *Anastasov v Slovenia* (European Court of Human Rights, Fourth Section, Application No 65020/13, 18 October 2016) ('*Anastasov*').

engaged with the phenomenon of statelessness. First of all, the Court determined the applicant to be stateless,[4] even though the Government of the Republic of Croatia ('the Government') disputed this fact,[5] and the relevant evidence presented to the Court was far from straightforward.[6] Secondly, the Court emphasised the role of statelessness in the applicant's inability to enjoy his right to private life.[7]

This case note begins with a brief account of the facts that led to the *Hoti* judgment, followed by the analysis of the Court's reasoning. Three aspects of the judgment merit special attention: the determination of statelessness status of the applicant, the distinction between the right to a nationality and stable residence and the use of terms 'nationality' and 'citizenship' when dealing with post-Yugoslav cases — those are discussed in separate sub-sections of the analysis. The conclusion considers the potential of this case to influence national legal practices in the future.

II FACTS OF THE CASE

Mr Hoti established his residence in Croatia twelve years before Croatia declared independence and lived there for nearly forty years.[8] He was born in 1962 in the territory of Kosovo, then an autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia ('SFRY').[9] His parents were political refugees from Albania and enjoyed refugee status in the SFRY. In 1979, aged 17, the applicant moved to Croatia where he has lived ever since.[10]

Before Croatia declared independence, in 1987, Mr Hoti applied for a permanent residence permit but was refused it.[11] The SFRY policy at the time was to encourage Albanian refugees to apply for a SFRY citizenship, as opposed to residence statuses as foreigners.[12] Mr Hoti, however, refused to apply for citizenship, as he did not see any benefits in acquiring that status. He remained and worked in the territory of Croatia on the basis of the documents from Kosovo.[13]

On 25 June 1991, the Croatian Parliament declared Croatia independent from the SFRY, and on 8 October 1991, all ties between Croatia and the SFRY were severed.[14] During the war that followed the applicant was called up for mandatory civilian service, and was issued documentation to that end, valid until the end of 1992.[15]

After the cessation of hostilities, Mr Hoti applied for Croatian citizenship on two occasions. The first time, he was given an assurance that he would be granted

4 *Hoti* (n 1) [80].
5 ibid [76].
6 See, eg, ibid [6]–[58] for a summary of the facts of this case and the evidence presented. See also at: [113], [130], [133] and [138] for some of the complications the Court found with the evidence.
7 ibid [117].
8 ibid [99].
9 ibid [127].
10 ibid.
11 ibid [9], [11].
12 ibid [12].
13 ibid [13].
14 ibid [16].
15 ibid [17].

Croatian citizenship under the condition of renouncing his Albanian citizenship.[16] According to the statement of the applicant, when he attempted to renounce his Albanian citizenship, the Albanian authorities orally informed him that he was not one of their citizens.[17] The second time his application for citizenship was rejected on the basis that he did not fulfil the residence requirement. Mr Hoti lodged an appeal with the High Administrative Court of the Republic of Croatia ('Administrative Court') which decided against him.[18]

In 2001, Mr Hoti applied for a permanent residence permit. His application was dismissed in 2003, and he challenged the decision before the Administrative Court and subsequently before the Constitutional Court of the Republic of Croatia, both times unsuccessfully.[19] The decision refusing the permit, interestingly, specified that the Croatian authorities considered Mr Hoti to be a national of Serbia and Montenegro.[20]

Since 2011, Mr Hoti has been granted temporary residence on humanitarian grounds several times. Those decisions considered him to be a national of Kosovo. In 2014, he attempted to extend this residence permit, but he failed due to lack of a valid travel document.[21] After lodging a complaint with the ECtHR that he had not had an effective possibility to regularise his residence status in Croatia, Mr Hoti received a renewed residence permit on humanitarian grounds.[22] Nevertheless, the ECtHR considered his complaint.

III ANALYSIS OF THE JUDGMENT

A *Main Arguments*

The ECtHR found a violation of art 8 of the *ECHR* relying upon several considerations, among which were the context of state succession, the applicant's statelessness, his lack of any serious criminal record and the fact that Croatia consistently tolerated his stay and never initiated removal proceedings. The ECtHR criticised the government for denying Mr Hoti his permanent residence permit based on formalistic considerations and without regard to his specific personal circumstances, and found that Croatia failed to comply

> with its positive obligation to provide an effective and accessible procedure or a combination of procedures enabling the applicant to have the issues of his further stay and status in Croatia determined with due regard to his private-life interests under Article 8 of the *Convention*.[23]

The ECtHR kept emphasising throughout the judgment the peculiar situation of Mr Hoti as a 'stateless migrant', whose case needs to be 'understood in the context of the complex circumstances of the dissolution of the former SFRY'.[24]

The ECtHR dismissed the Government's preliminary objection that by granting the applicant a temporary residence permit on humanitarian grounds the case 'has

16 ibid [25].
17 ibid [38].
18 ibid [39]–[40].
19 ibid [41], [44].
20 ibid [93].
21 ibid [45]–[47].
22 ibid [55].
23 ibid [141].
24 ibid [117].

been resolved'.[25] The ECtHR found that such a temporary residence permit is not 'a measure removing the uncertainty of the applicant's residence status of which he complains'.[26]

Although the ruling was in the applicant's favour, it is interesting to note that the reasons put forward by the applicant to substantiate his claim were not reflected in the Court's reasoning. The applicant claimed that he had been 'erased' from the register of residents in the aftermath of the Yugoslav war,[27] and invoked the precedent of *Kurić v Slovenia* ('*Kurić*').[28] The *Kurić* case is a highly influential decision dealing with citizenship policies and state building practices of successor states, making it a logical point of appeal for an applicant in Mr Hoti's situation.[29] In particular, in *Kurić*, the ECtHR declared that Slovenia's policy of 'erasing' former Yugoslav citizens who did not become citizens of Slovenia from the population registry amounted to a violation of the *ECHR*.[30]

The Government in its submission tried to distance the case from the context of state succession, and instead framed it as the situation of a foreign national seeking to establish legal residence, and from whom it is reasonable to require a travel document.[31] It emphasised the personal responsibility of Mr Hoti to communicate with the state of his alleged nationality, Albania, about obtaining a travel document, or alternatively to substantiate why he was unable to have one.[32]

While ruling in favour of the applicant, it is interesting to observe that the Court dismissed the applicant's line of reasoning concerning the erasure,[33] and engaged with the Government's arguments on the nationality status of the applicant. In particular, the Court contested the Government's standpoint that the applicant is merely a foreigner seeking admission to Croatia. Instead, according to the Court, Mr Hoti's situation is that of an alien

> who, irrespective of many years of actual residence in a host country, [was] not able to regularise their residence status and/or their regularisation of the residence status was unjustifiably protracted.[34]

By categorising Mr Hoti as a special case of a long-term stateless resident, the ECtHR established Croatia's responsibility to ensure his right to private life through access to a stable residence status.

B *Determination of the Applicant's Statelessness*

One of the most fascinating aspects of the judgment is that the ECtHR on its own authority determined the applicant to be stateless. This is particularly controversial

---

25 ibid [77].
26 ibid [82].
27 ibid [89].
28 *Kurić* (n 3).
29 Following the *Kurić* case, Slovenia amended its laws and practice to remedy the situation of the 'erased', and established a compensation scheme for the violation of *Convention* rights that resulted from the erasure. More details can be found in a follow-up decision of the European Court of Human Rights: see *Anastasov* (n 3).
30 In particular, the violations of arts 8 (availability of remedies) and 13 (non-discrimination). See *Kurić* [9], citing *ECHR* arts 8, 13.
31 *Hoti* (n 1) [100]–[104].
32 ibid [102], [103].
33 It considered that the applicant was never included in the registry of permanent residents in Croatia in the first place, and therefore could not have been erased. See ibid [111]–[114].
34 ibid [118].

since both the applicant and the state authorities repeatedly and seemingly inconsistently alleged in various documents that the applicant was stateless, a national of Albania, of Kosovo and of Serbia and Montenegro.[35] However, no written statements by the Albanian authorities confirming or denying that the applicant was their national were submitted to the Court.

Evidence indicating that the applicant was stateless included his birth certificate issued in Kosovo, according to which he did not have any nationality, as well as the applicant's statement that when he attempted to contact the authorities of Albania and of the Federal Republic of Yugoslavia (while it existed), he was orally informed that he was not a citizen of those countries.[36]

On the basis of such evidence, the Court did not only declare the applicant to be stateless,[37] but found it 'striking'[38] that Croatia did not come to the same conclusion and did not comply with its statelessness-related international obligations. The ECtHR insisted that the statelessness of the applicant was 'apparent', and that there was no ground to believe he was either an Albanian or a Kosovar national.[39]

The Court found 'no reasons to doubt the applicant's arguments that he was advised by the Albanian authorities that he was not an Albanian national',[40] even though there was no written evidence or witness statements confirming that any contact between the applicant and Albanian authorities on this matter took place. The practice of 'doubting' stateless persons' accounts of their futile attempts to contact various embassies is fairly standard in Europe and the *ECHR* offers in this case a legal basis for a potential drastic change of discourse. Thus, the Court clearly indicates that if statelessness is a relevant factor in accessing *ECHR* rights, a state cannot place all the burden of proof on the individual in determining his or her statelessness, or set too high a standard of proof.

C *Right to Citizenship and Right to Stability of Residence*

The *Hoti* case, according to the ECtHR, is not about

> whether the applicant should be granted Croatian citizenship but rather whether, if he had chosen not to become Croatian citizen or had failed to do so, he would have an effective possibility to regularize his residence status allowing him to normally lead his private life in Croatia.[41]

This distinguishes *Hoti* from *Genovese v Malta*,[42] as in the latter decision the issue at stake was *nationality* as part of the concept of private life. Moreover, the reference to the choice of *not becoming a citizen* in the quote above is noteworthy. As mentioned in Part II above, in 1989 the applicant was encouraged to apply for the citizenship of SFRY, but refused to do so, citing the lack of benefits he saw in

35 ibid [21], [26], [29], [38]–[40], [48], [52], [54]–[55]. However, see also Part III(D), on 'the use of terms 'nationality' and 'citizenship' in the judgment.

36 ibid [37]–[38], [57], [110].

37 ibid section III, [109]–[110].

38 ibid [138].

39 ibid.

40 ibid [110].

41 *Hoti* (n 1) [131].

42 (European Court of Human Rights, Fourth Section, Application No 53124/09, 11 January 2012). See also Rene de Groota and Olivier Vonk, 'Nationality, Statelessness and *ECHR*'s Article 8: Comments on *Genovese v Malta*' (2012) 14(3) *European Journal of Migration and Law* 317.

the status of a national, and expressing preference for a permanent residence instead. After Croatian independence, Mr Hoti did apply for Croatian citizenship, but was refused it. The Court did not assign significance to the potential culpability of the applicant in his lack of citizenship, and insisted that Croatia had an obligation to ensure his stability of residence regardless of his prior reluctance towards becoming a citizen of the SFRY.

D *The Use of Terms 'Nationality' and 'Citizenship' in the Judgment*

The ECtHR did not clarify the meaning and use of the terms 'nationality' and 'citizenship' in its judgment. This is unfortunate, considering that in many Slavic languages, including Croatian, the two terms are used to denote very different phenomena, and the distinction between *nationality* and *citizenship* is particularly crucial in the context of the post-Yugoslav ethnically charged *citizenship* regimes.[43] The word *nacionalnost* in Croatian is used to refer to ethnicity — an important legal, political and social term in post-Yugoslav states, while the word *državljanstvo*, linguistically closer to the English term 'citizenship', is the one signifying a legal bond between a state and its citizens. The different meanings of these two words in Croatian may explain what appears to be an inconsistency in the English account of the applicant's and the Government's arguments regarding the *nationality* and *citizenship* statuses of Mr Hoti. For example, Mr Hoti claimed to be an Albanian *national*, and at the same time maintained that Albanian authorities denied that he was one of their *citizens*. The uncertainties could have been avoided if the Court had explicitly addressed the linguistic challenges of this case, clarified the terms 'nationality' and 'citizenship' in the English language and indicated the relevant terminology in Croatian when analysing the evidence.

IV CONCLUSION

Hoti v Croatia establishes an important precedent for recognising the role of statelessness in access to human rights at the level of international jurisprudence.

One of the most significant and potentially influential aspects of the judgment is the determination of the statelessness status of the applicant. Firstly, it entails that if the statelessness of an applicant is a relevant factor in the context of access to human rights, the standard of proof cannot be too high, and the state shares the responsibility to establish statelessness. The Court did not give much consideration to the Government's submission that it is up to the applicant to show that he is stateless, and instead confronted Croatia for not proactively determining the applicant to be stateless.

Secondly, the reasoning of the Court on the determination of Mr Hoti's statelessness implies an obligation on the part of states to have mechanisms and procedures in place to identify the status of stateless persons within their jurisdiction, at least in contexts where their statelessness might be a relevant factor in accessing the *ECHR* rights. This is in line with the United Nations High Commissioner for Refugees position, which identifies such an obligation as

---

43 See Jo Shaw and Igor Stiks, 'Citizenship in the New States of South Eastern Europe' (2012) 16(3–4) *Citizenship Studies* 309; Maria-Eleni Koppa 'Ethnic Albanians in the Former Yugoslav Republic of Macedonia: Between Nationality and Citizenship' (2001) 7(4) *Nationalism and Ethnic Politics* 37.

emanating from the 1954 *Convention Relating to the Status of Stateless Persons.*[44] However an *ECHR*-specific obligation to identify stateless persons can potentially have more far-reaching legal and political effects for stateless persons in Europe due to the advanced enforceability mechanisms of the *ECHR* which other international human rights treaties do not have.

In addition to the potential impact of the judgment on national statelessness determination procedures and practices, *Hoti* makes an important statement regarding the relationship between stateless persons' enjoyment of *ECHR* rights and their access to citizenship. The Court emphasises that the judgment is not about Mr Hoti's access to Croatian citizenship, but instead about his access to any status which adequately guarantees enjoyment of his right to private and family life. The applicant's earlier choice not to become a citizen of Croatia while it was still part of SFRY was not regarded by the Court as a legitimate barrier to his enjoyment of the right to private life. A stateless person may thus *choose* not to take up the citizenship of a host state, and nevertheless be entitled to the protection of their *ECHR* rights through access to an appropriate residence status. The *Hoti* judgment thus supports the argument that access to human rights cannot be made dependent on whether, when and how a stateless person may choose to invoke their right to a nationality.[45]

---

44 United Nations High Commissioner for Refugees, *Handbook on the Protection of Stateless Persons* (United Nations High Commissioner for Refugees 2014) 6, citing *Convention Relating to the Status of Stateless Persons,* opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960). See also Kate Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 108–11.

45 See Katja Swider, 'A Rights-Based Approach to Statelessness' (DPhil Thesis, University of Amsterdam, 2018); Katja Swider 'Why End Statelessness?' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 191.