Hotline for Refugees and Migrants

NO WAY OUT

De Facto Stateless Migrants in Israel

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December 2019

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About the Hotline for Refugees and Migrants

The Hotline for Refugees and Migrants (HRM) is a nonpartisan nonprofit organization that aims to protect and promote the human rights of refugees and migrants and to prevent human trafficking in Israel through client services, detention monitoring, legal action and public policy initiatives.

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According to data of the Population, Immigration, and Borders Authority (PIBA), about 33,000 asylum seekers and migrants who entered Israel through an irregular border crossing reside in Israel. The State calls these individuals "infiltrators." About 92 percent of them are asylum seekers from Eritrea and Sudan. In addition, about 16,000 migrant workers entered Israel through a regular border crossing, but remained in Israel illegally after their work visa expired. Finally, about 66,000 tourists who entered Israel on tourist visas continue to reside in the country after their visa expired. In total, therefore, Israel is home to about 120,000 asylum seekers and migrants who lack temporary or permanent legal status.[1]

Some among this group fear, or are not interested in, returning to their homeland. They include asylum seekers who experienced persecution in their countries of origin, such as citizens of Eritrea, Sudan and Congo, asylum seekers whose applications have been rejected but are still afraid for their lives; or individuals who meet the criteria of the Law of Return (intended to facilitate the immigration of Jews and their relatives to Israel) who immigrated to Israel without obtaining legal status.

Those who desire to return to their homeland, (in general, undocumented migrants are those interested in doing so), can return and in some cases the Israeli authorities will assist them in doing so.[2]

However, a third, unique group exists in Israel: stateless individuals who are interested in returning to their homeland, but cannot do so because they lack documents proving their nationality, and therefore cannot prove their connection to their homeland to the relevant authorities in their countries of origin. They are therefore unable to receive any travel documents – a passport or a laissez passer –

1 Population, Immigration, and Borders Authority (PIBA), *Data on Foreigners in Israel*, 1st quarter of 2019: https://bit.ly/2RTCjIB (Hebrew).

2 The Voluntary Departure Unit at PIBA assists citizens of certain countries, such as Sudan, Eritrea, the Ivory Coast and Ethiopia to return to their homeland or travel to a "third country" in Africa. This assistance is usually provided by issuing travel documents, purchasing flight tickets, granting a financial incentive and more. See the PIBA website: https://bit.ly/2NY4oSq. In addition, additional assistance can be received from the Center for International Migration and Integration (CIMI).

which would allow them to return to their countries of origin. Because these countries do not recognize these individuals as their citizens, they do not enjoy the basic rights of citizens who reside outside of their country, such as the right of a citizen to return to her country, and her eligibility (even if not an absolute right) to a travel document, such as a passport.

In practice, the status of these migrants is similar to individuals who are stateless.

The Convention Relating to the Status of Stateless Persons (henceforth the Convention on Statelessness or simply "Convention"), which Israel signed in 1954 and ratified in 1958,[3] defines a stateless person as "a person who is not considered as a national by any State under the operation of its law."

While those who are considered stateless under the Convention enjoy a significant set of rights (including civil rights, which at times are identical to those granted to foreigners with a known nationality residing in another country),[4] those who do not meet the definition of the Convention are not entitled to any rights under its auspices.

This includes individuals who can identify themselves as nationals of a certain country, but this country does not recognize them as its citizens. While their country of citizenship denies them rights that its recognized citizens enjoy, it does not categorically deny their claim to citizenship. As a result, these individuals are denied rights by both their country of citizenship as well as the country in which they reside because according to Israel, they are citizens of a foreign country, not stateless individuals. According to the definition of the United Nations High Commissioner for Refugees (UNHCR), these are *de facto stateless persons*.[5]

Most *de facto* stateless individuals in Israel share the same characteristics: they are migrants or asylum seekers who entered Israel through an irregular border crossing (instead of a recognized entry point, and without receiving a visa or a stay permit), or people who entered Israel as tourists, received a visa, but overstayed it. Unlike asylum seekers who live in Israel with asylum applications under examination or migrants who arrived in Israel with work visas, the *de facto* stateless persons have expressed

3 See *Convention Relating to the Status of Stateless Persons* from ,1954 which came into force on December 23, 1958 (PDF): http://bit.ly/2tbeE06.

4 Among other rights ,article 7 of the Convention stipulates that stateless individuals are to be granted the same rights as foreigners residing in signatories of the Convention.

5 *UNHCR and de facto Statelessness*, LPPR/2010/1, p. 26.

their desire to return to their country of origin after procedures to regularize their status in Israel failed or after they were detained for the purpose of their removal from Israel. However, they do not hold a document that attests to their citizenship (usually a passport), since such documents were lost or destroyed, sometimes years before they reached Israel. Many of them never obtained documents attesting to their citizenship and left their country in an irregular manner.

As will be expanded upon below, according to Israeli law, these *de facto* stateless individuals reside in Israel unlawfully and do not cooperate with the process of their removal. Israel recognizes them as holding a certain citizenship, but their countries refuse to acknowledge their citizenship due to a lack of documentation; or the State sees them as citizens of one country, while they claim to be citizens of another but are unable to prove their citizenship.,. As a result, although they are unable to leave Israel, these migrants are repeatedly detained and incarcerated in one of the detention facilities established to hold foreigners prior to their deportation, sometimes for periods lasting years.[6]

Surprisingly, the extent of the phenomenon is unknown because Israeli authorities do not regard this group as one which requires special handling, despite its unique characteristics. Even when attempts are made to receive information about the extent of the phenomenon by asking for data on the number of stateless persons held in detention, it is impossible to receive reliable information because Israeli authorities do not save any data regarding prior or repeat arrests of migrants. It is impossible to tell, according to the data provided by the State, whether the individual in question was detained for the first time or has been detained and released multiple times in the past. As a result, identifying a *de facto* stateless person can only be done by examining the particulars of his case, whether before official Israeli entities, or in dialogue with an NGO handling the case, such as the Hotline for Refugees and Migrants (HRM). I It is impossible to assess the exact number of *de facto* stateless individuals, but according to HRM's estimates, there are dozens of such individuals in Israel.

Given the limited number of people affected, this appears to be a relatively simple issue to resolve, particularly due to the common desire of migrants to return to their countries and the State of Israel's desire to remove them from its territory. However, despite this mutual interest, these individuals find themselves in detention time and time again, sometimes for prolonged periods, without any legal representation, or

6 Ibid.

ability to further their deportation from Israel.[7]

The purpose of this report is to shed light upon this phenomenon and detail the legal framework affecting *de facto* stateless persons residing in Israel, after their homelands refuse or fail to recognize them as citizens. Despite their desire to return to their homelands, these individuals are treated with disregard, indifference and carelessness by Israeli authorities, who place the full responsibility of facilitating their return on the migrants, even though they cannot possibly facilitate their return without the involvement of the State of Israel in the process. To prevent this Catch 22 in which individuals find themselves in prolonged and repeated detention and to prevent a significant waste of public expenditure, Israeli authorities, chief among them the Ministry of Foreign Affairs and the Ministry of Interior, need to accept responsibility and become actively involved in the process of facilitating their return. In a situation where the stateless individuals themselves have come to a dead-end trying to facilitate their own return, only such state involvement can provide a safe and voluntary return of people to their homelands. This report will focus on the diplomatic tools Israel can use to assist to *de facto* stateless persons to obtain travel documents, thus facilitating their removal.

The author of this report, Adv. Menachem Kanfi, graduated from the Hebrew University in Jerusalem in 1989. After serving as an academic reservist in the Prosecutor's Office of the Israel Defense Forces (IDF), Kanfi served in the Ministry of Foreign Affairs for 25 years in a number of roles in Israel and abroad, primarily in Africa. Between 2005-2008, Kanfi served as the Israeli Ambassador to Eritrea at a time when the first Eritrean asylum seekers began arriving in Israel. As part of his role, he drafted the Ministry's legal opinion according to which asylum seekers from Eritrea cannot be return without posing a threat to their lives. Between 2010-2011, Kanfi established the Israeli embassy in Accra, Ghana.

Adv. Kanfi's extensive familiarity with the Israeli Foreign Ministry's apparatus in west Africa, in addition to the particular issue of removal or non-removal of migrants to these countries, led him to the realization, following his retirement from the Ministry of Foreign Affairs, that he must raise awareness about this important issue affecting a particularly vulnerable population which does not garner much public attention.

7 For more information, see the HRM report, *Forgotten in Prison: The Prolonged Detention of Migrants*, December 25, 2016: http://bit.ly/2rQuvAt.

The Legal Situation in Israel

Stateless Persons Under Israeli Law

Israeli case law concerning statelessness largely deals with revoking the citizenship of Israeli citizens who do not have another citizenship, thus leaving them stateless if the citizenship is indeed revoked. The landmark case in this matter is that of al-Rai, which dealt with revocation the citizenship of Yigal Amir, the assassin of Israeli Prime Minister, Yitzhak Rabin.[8] The ruling in al-Raiand additional verdicts issued based on this precedent found that a person's citizenship must not be revoked if it leaves him stateless. This principle is manifested in the courts' examination of the right to citizenship.

The Supreme Court, in a decision written by Justice Yitzhak Zamit, found that:

"Citizenship is a fundamental right. This has been accepted in international law... [and] has been codified in the laws of many countries which determined that citizenship is a constitutional right... [Although] in Israel, [the right to citizenship] has not earned honorable codification in a Basic Law, it is undoubtedly one of the basic rights, in part because it is the basis for the right to vote for [representation to] the Knesset, the foundation of democracy. As is well known, all administrative authorities must avoid violation of fundamental rights, including the [right to] citizenship, unless this is done for a proper purpose and in a proportional manner; even more so when it comes to denial of citizenship, as opposed to another violation of a person's rights, and yet even more so when it comes to revoking citizenship of a person who enjoyed citizenship from birth and which would result in a person lacking any citizenship."[9]

In addition to this precedent-setting recognition of citizenship as a basic right, the Court's ruling recognized that the State should refrain from creating stateless individuals without providing substantial justification for it.

Despite this principle, which manifests concern about the phenomenon of statelessness, in other cases the Court has ruled that a person is not a citizen of any

8 High Court of Justice (HCJ) ruling 2757/96 *Al-Rai vs. the Minister of Interior.*

9 Ibid., p. 22.

country, thus creating a *de facto* stateless person. For example, in Administrative Appeal 6694/14 *Giday vs. the Ministry of Interior* (February 5, 2015), the Supreme Court approved the verdict of the District Administrative Court, finding that the appellant in the case should not be recognized as an Ethiopian citizen, while also rejecting his request to be recognized as an Eritrean. It should be noted that recognizing a person as an Eritrean at that time included the benefit of protection from deportation. Thus, the Court admitted to creating a stateless person, but ruled that, under the circumstances, there was no way to avoid such a ruling, leaving the decision in the hands of the Ministry of Interior.

It should be noted that I am aware that, upon issuing our ruling, the appellant will be left without a defined identity in the State of Israel, a situation that is not ideal, even difficult, for a person wherever he may be. However, this is a problem inherent to the issue of the infiltrators, which is not ours to resolve. The appellant is asking for practical assistance in his case to determine his fate on the day after the verdict is issued. However, it is neither our role nor within our authority to determine this. All we have been asked in this appeal is to determine whether he is Eritrean or not. The fate of the appellant is in the hands of the respondent [Ministry of Interior]" (Ibid., paragraph 15).

Therefore, while Israeli case law, in principle, instructs the courts to avoid creating a situation of statelessness by revoking the citizenship of an **Israeli citizen**, in other rulings it vicariously allows for the creation of stateless individuals who are not Israeli, whose cases are considered to be under the sole remit of Israel's executive branch.

Ministry of Interior on Recognition of Stateless Persons

In January 2007, the District Court ruled on a petition filed by the Association for Civil Rights in Israel (ACRI) concerning stateless persons for whom the Ministry of Interior refused to provide services. The Court ruled that the Ministry of Interior must allow stateless people to file applications to regularize their status prior to their arrest because, as they cannot be deported from Israel, their detention would lack purpose. The Court ordered the Ministry of Interior to formulate a regulation concerning the handling of stateless persons, which would grant them temporary stay permits and define the type of cooperation required of them in the process of

finding out whether their countries of origin are willing to accept them.[10]

Following the ruling, Israeli authorities promulgated a regulation. However, due to the many failings inherent in the regulation, ACRI was compelled to file a petition against it in 2010.[11] Following the petition, the Ministry of Interior decided to formulate a new regulation on the matter. As a result, in September 2010, Justice Noam Solberg a judge on the Jerusalem District Court at the time , decided to vacate the petition, ruling that "the respondent [Ministry of Interior] is in the final stages of formulating the regulation... and it should be published within a month's time." The Regulation Concerning the Status of the Stateless was eventually issued in November 2012, and has been updated several times since.[12]

However, this regulation has multiple flaws. First, it does not apply to those who entered Israel **through an irregular border crossing**, but only to those who entered Israel with a visa. Second, it obligates the stateless to produce identity documents, when oftentimes stateless individuals are unable to produce such documents, effectively denying the person the ability to be recognized as a stateless person. Finally, the current position of the State is that this regulation does not apply to *de facto* stateless individuals, but only to *de jure* stateless individuals, meaning only those whose citizenship was revoked or denied to them in a formal and complete manner.

As for who will be recognized as stateless, the Supreme Court acknowledged the ability of the courts to determine that a person is indeed stateless (as opposed to the State's view that only the Ministry of Interior has the authority to make such a determination). In addition, in Administrative Appeal 4204/14 *the State of Israel vs. Solo* (henceforth "the matter of Solo") the Court accepted the principle that the District Court has the authority to determine that a person is stateless under the Convention, despite the fact that he did not enter Israel through a regular border crossing. Although the Supreme Court urged the State to formulate a regulation concerning those who are found to be stateless and did not enter Israel through a regular border crossing, the Court avoided handing down any operational

10 Administrative Petition (Tel Aviv Court), 2887/05 *Al-Qasayeb vs. the Minister of Interior* (published in the legal database Nevo, January 29, 2017).

11 Administrative Petition 34499-04-10 *Al-Qasayeb vs. the Minister of Interior* (published in Nevo, September 14, 2010).

12 *Regulation on Handling a Foreign Subject who Claims to be Stateless*, no. 10.1.0015, last updated on May 29, 2019. https://bit.ly/2SkdnMr (Hebrew).

instructions on the matter. As a result, in a number of cases, the Appeals Tribunal in Jerusalem declined to compel the Ministry of Interior to expand the regulation to encompass those who entered through an irregular crossing, since this was not required in making a determination on individual cases.[13]

As a result, no appropriate regulation has been drafted, and the current regulation provides no solution for stateless individuals who enter Israel through an irregular border crossing.

The Legal Status of Migrants and Asylum Seekers in Israel

Two laws in Israel regulate the handling of migrants and asylum seekers in Israel: The Entry to Israel Law,[14] and the Anti-Infiltration Law.[15]

Article 1 of the Entry to Israel Law determines that entry into Israel by those who are not Israeli citizens is conditioned on "a visa and stay permit" to be issued for specific durations, in accordance with the purpose of entry into Israel (tourist visa, temporary work permit, etc.) Those whose visa expires become "illegal residents" under article 13 of the law, and as such, are liable for deportation, or "removal," as it is named in the law. Once the deportation order is issued by the Minister of Interior, the person must leave the country within three days.

Meanwhile, the Anti-Infiltration Law applies to all those who illegally enter Israel (i.e. through an irregular border crossing); such persons are also considered illegal residents who must be removed. Under the Anti-Infiltration Law, anyone who enters Israel in such a manner will be placed in detention for three months, following which he comes under the remit of the Entry to Israel Law.

This means that under Israeli law, after three months, migrants who entered Israel through a legal border crossing and remained in the country unlawfully, and those who entered Israel illegally and are not covered by group protection or other form of protection, are treated identically.

If a person is found to be an illegal resident and subject to removal from Israel, article 13(A) of the Entry to Israel Law allows the Border Control Officer at the Ministry of Interior to issue a detention order to facilitate their deportation. The law

13 See for example, Appeal (Jerusalem Tribunal) 1197-16 *John Emanuel vs. the Ministry of Interior*, ruling from December 29, 2018.

14 1952 *Entry to Israel Law*.

15 1954 *Anti-Infiltration Law* (Offenses and Judgement).

stipulates that this resident will be held in detention until he departs Israel or is removed from it, unless he is released on bail. Such a release can entail payment of a bail bond, a bank guarantee or some other form of guarantee. A release on bail is possible in four types of cases, referenced in article 13(F) of the Law: humanitarian circumstances that justify release; medical reasons; if the detention leaves a minor unsupervised; and if the person remains in detention for longer than 60 days.

The article stipulates, however, that if an illegal resident does not cooperate with the process of removal or if he poses a threat to public peace or safety, he can be kept in detention even if his situation meets the above criteria for release. Thus, any person perceived by the Population, Immigration and Border Authority (PIBA) as non-cooperative with the removal process can remain in detention for years without any possibility of release on bail.

The decisions of the Minister of Interior concerning **legal status, visas and stay permits** are subject to judicial oversight by the Appeals Tribunals, while judicial oversight of individuals **already in detention** is carried out by the Tribunals for Oversight of Detention of Illegal Residents (henceforth: The Detention Review Tribunal). The decisions of the Detention Review Tribunal and Appeals Tribunal can be appealed in administrative district courts.

To conclude, *de facto* stateless individuals, whether they entered through a regular border crossing or not, are considered to be illegal residents under the Entry to Israel Law. Hence, unless they attempted or are attempting to obtain legal status from the Ministry of Interior (usually through legal proceedings in the Appeals Tribunal, established in 2014), they must leave Israel. If they do not leave Israel, they can be detained and placed in administrative detention under a deportation order issued by a Border Control Officer. The decision to release them on bail or keep them in detention is then in the hands of the Detention Review Tribunals, which are located inside the detention facilities themselves, and were established in 2001 in accordance with article 13(11) of the Entry to Israel Law. The role of the Detention Review Tribunal is to carry out judicial oversight at pre-determined times of decisions made by the Border Control Officer concerning detention and release on bail. The Tribunal is authorized to release a person and set conditions for release on bail in line with the rules promulgated in the Entry to Israel Law.

It should be mentioned that over the years, the Supreme Court has restricted the application of the article allowing for open-ended detention by ruling that detention of undocumented migrants must not be punitive, and that its only purpose is to

enable implementation of deportation of those residing in Israel without a permit.[16] Therefore, the Court ruled that a person should not be held in detention if their removal is impossible.

An example is the decision of the Supreme Court in Administrative Request to Appeal 7696/16 *Tumuzgy Arya vs. the Ministry of Interior – PIBA* (issued on January 4, 2017):

The purpose of immigration detention under the Entry to Israel Law is intended to immediately end illegal residency, while allowing the State to arrange for the removal of an illegal resident. At the heart of the matter, this is an authority that is by nature an "auxiliary authority" for the purpose of removal (even if it cannot be considered as an auxiliary authority in the traditional sense of this concept, due to the requirement for explicit authorization to carry out actions infringing on human rights. See: Dafna Barak Erez, Administrative Law, Vol A, 147-148, 2010). It has been ruled in the past that "the purpose of detention for removal is not intended for coercive or punitive purposes; its sole goal is to realize the purpose of the policy to monitor those entering and residing in Israel illegally, and to provide authorities with effective means to realize this policy, while safe-guarding constitutional principles and protecting human rights..."

Despite this ruling on the matter of *de facto* stateless individuals, PIBA claimed that they should be kept in detention due to their lack of cooperation (in accordance with article 16(F)(B)1 of the Entry to Israel Law, which conditions release on bail on the detainee's cooperation with his removal proceedings). This claim is premised on the perception that a person's inability to obtain identifying documents indicates his lack of cooperation with his removal, based on the false assumption that if only the person was interested enough in doing so, he would be able to provide details that would assist the relevant authorities in producing the documents.

This argument leads to the prolonged incarceration of many stateless individuals, sometimes for years, although they lack the effective tools to further their own removal.

16 Administrative Request to Appeal 696/06 *Zorev Elkanov vs. the Detention Review Tribunal* (published in Nevo), paragraph 15 of the verdict issued on December 18, 2006.

International Law

Stateless Individuals According to International Law

After World War II, many civilians found themselves displaced, without legal status or citizenship. The phenomenon of statelessness, which until then had been only partially handled and in a generalized manner in customary international law, suddenly mushroomed into a major phenomenon affecting numerous individuals, leading the United Nations to recognize the urgent need to regularize the matter.

In 1947, the UN Human Rights Council adopted a decision that called for an effort to regularize the matter in conventions. Following this decision, the Economic and Social Council of the UN instructed the Secretary General to prepare a report with recommendations regarding statelessness. One of the central recommendations in the report was the establishment of an international convention. At first, attempts were made to handle the phenomenon of statelessness through the 1951 Refugee Convention and a protocol was developed, but during the deliberations concerning the protocol, it was decided to create a separate convention.

Thus, the Convention Relating to the Status of Stateless Persons was drafted and opened for states to join in September 1954. The Israeli delegation involved in the drafting of the Convention, as well as representatives of the Jewish diaspora (such as the World Jewish Congress) took an active role in the deliberations.[17] The same year, the State of Israel signed the Convention and ratified it in 1958. In 1960, the Convention came into force after a sufficient number of countries had signed it. In 1961, Israel signed another convention – the Convention on the Reduction of Statelessness, though it never ratified it.

The Convention Relating to Stateless Persons

The Convention deals primarily with the legal status of stateless persons and their rights in their countries of residence.

17 See for example the comments on the Convention made by Nehemia Robinson of the World Jewish Congress: http://bit.ly/36DfeBs.

Article 1 of the Convention defines a "stateless person": "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law."

Under the Convention, a stateless person is entitled to certain protections intended to equalize his status to that of a foreigner holding citizenship who resides outside of his country. Thus, for example, article 7(1) of the Convention determines that except in cases where the Convention grants greater rights to the stateless, countries should treat the stateless equally to foreigners in general, including their rights to education, owning property and work; article 26 of the Convention guarantees freedom of movement equal to that of foreigners; article 28 determines that the stateless have the right to travel documents and specifically says that stateless persons who reside in a country legally are entitled to documents that would allow them to exit and re-enter the territory. The article is particularly mindful of the rights of stateless persons who do not have the ability to obtain documents from their countries of origin. Article 31 of the Convention stipulates that countries must not deport stateless persons who are in the country legally unless they pose a threat to public safety or order (the article does not elaborate on the rights of those residing in the country illegally, and what constitutes legal or illegal stay).

As will be discussed in the next section, during the formulation of the Convention, those drafting it chose not to address or refer to the issue of *de facto* stateless individuals, but only to stateless individuals who cannot point to a country that recognizes them as its citizens.

De Facto Stateless Persons According to International Law

Across the world, migrants who illegally reside in a country and are unable to regularize their status are required to return to their country of origin. Problems arise when the deportation or exit of those individuals is not possible due to objective reasons beyond their control, such as lack of identifying documents that would indicate their nationality and lack of travel documents – a passport or a laissez passer.

This situation is known in international law as *de facto statelessness*. It describes individuals who in principle hold citizenship (i.e. it has not been revoked by a decision of authorities in their former country of citizenship and their country has not ceased to exist), yet they are unable to obtain the diplomatic (civil) protection of their country of citizenship. In other words, their countries of citizenship do not

recognize them to be citizens, although these countries have not taken official steps to deny them citizenship, and as a result, no country in the world recognizes them as its citizens.

Substantially, *de facto* stateless persons face a situation identical to those who are defined as stateless persons under the Convention Relating to the Status of Stateless Persons from 1954. Practically, however, they do not fully meet the criteria of the Convention since there is a country that has not revoked their citizenship and could, in theory, recognize them as citizens.

Therefore, the *de facto* stateless found themselves without the protection of any convention pertaining to their status.

This reality was officially recognized by a section of a 1961 decision of the member states of the Convention on the Reduction of Statelessness ,[18] which recommended that "persons who are stateless *de facto* should, as far as possible, be treated as stateless *de jure* to enable them to acquire an effective nationality."[19] As mentioned above, Israel signed this convention and voted in favor of the recommendation, so we can adduce that it accepts the principle at the heart of the recommendation. However, Israel never ratified this convention, and the text attached to the final act of the convention pertaining to the *de facto* stateless is only a recommendation.

The situation is relatively straight-forward when the country of origin explicitly states that a certain individual is not its citizen, but this is not the case when there is no such official declaration. However, even without an official revocation statement, there are certain basic civil rights, the denial of which can be interpreted as the state's repudiation of its citizen – or in simpler words – making him stateless.

Take, for example, the case of *Pham vs. Home Secretary* [2015] UKSC, which dealt with Pham, born in Vietnam and a holder of British citizenship, who was stripped of this citizenship due to involvement in terrorist activity. After his British citizenship was revoked, the Vietnamese government refused to confirm him as their citizen (although it did not officially state that it was revoking his citizenship). The British Supreme Court ruled that nothing prevents the UK from revoking Pham's British citizenship because it was not the revocation of **this** citizenship that rendered him stateless, since he held Vietnamese citizenship at the time. In other words, it was Vietnam's conduct that made Pham stateless, if at all. Eventually, Pham's case was

18 The decision is attached to the final act of the Convention. http://bit.ly/38ZmjOr.

19 The 1961 *Convention on the Reduction of Statelessness*.

referred to the Special Immigration Appeals Commission to deliberate on matters that had not come to the fore in the Supreme Court proceedings, including Pham's *de facto* statelessness.

Two of the basic rights of citizenship are the right to return to one's homeland and the right to a travel document that would allow this. Denying these rights can be seen as making a person stateless, at least *de facto*, and at times, *de jure*. Thus, there have been cases in which a person's removal was thwarted due to the refusal of their country of nationality to issue them a passport. For example, in one case, Brazil wished to deport a Romanian citizen back to Romania, but the courts there ruled that the deportation could not be carried out due to the refusal of the Romanian government to issue him a passport.[20] Courts in Canada and Britain have ruled that the inability of a country to issue a passport for a person it wishes to remove can thwart the removal process entirely.[21] Therefore, when there is no effective possibility to provide a person with a valid travel document to return him to his country of origin, the country of origin is essentially declaring that the person is no longer its citizen.

According to the principles set forth in the case of Nottebohm, formal documents are not a decisive factor when determining a person's link to a certain country. Thus, a passport in itself does not attest that a person holds a certain citizenship (and vice-versa: not holding a passport does not indicate lack of citizenship).[22] However, in practice a national passport is the primary means to prove citizenship and the rights that accompany it, so the absence of a passport (and the refusal to grant a travel document) has far-reaching consequences, including the denial of the right of return to one's country, which is a well established right in international law. Therefore, refusing the right of return, or not providing a travel document by the country of origin even for the purpose of establishing the person's identity, spells the effective denial of citizenship. In such cases, denying a basic civil right such

20 *Feldman v. Justiça Publica* [1939] Ann. Dig. 393 (no. 144) (Supreme Ct., Brazil), as cited in Turack, D., *Selected Aspects of International and Municipal Law Concerning Passports*, 12 Wm. & Mary L. Rev. 805 (1971). p. 820.

21 Ibid., p. 821

22 *The Nottebohm Case (Liechtenstein v. Guatemala),* International Court of Justice (April 6, 1955), 1955 I.C.J. 4. The ruling determined that a country has the authority to set citizenship laws as it sees fit, but should not expect its laws to receive international recognition if they contravene the overall international goal of granting citizenship based on the existence of an "effective tie" (close ties with the citizenship of the country) between the country and the individual.

as a travel document to those whose citizenship is in question, spells the denial of substantive nationality.

The approach adopted in the precedents mentioned above leads to the conclusion that even without the formal revocation of citizenship, it is possible (and at times, even obligatory) to view the non-recognition of a country of one of its citizens as the denial of "diplomatic protection" to that person, and he should be regarded as *de facto* stateless.

The Catch 22 of Stateless Persons in Israel: Four Sample Cases

The matter of *de facto* stateless persons has come up on several occasions before the Israeli judiciary, mainly in the context of judicial oversight of detention. Thus far, the tendency of the courts has been to encourage the parties to reach practical case-by-case solutions without addressing the substantive issues arising from the particulars of each case. In addition, even in cases where a ruling is issued concerning the particulars of the case, it usually does not set precedents regarding issues at the heart of the matter. As the following cases will demonstrate, the conduct of the Ministry of Interior and the rulings of Israeli courts, leave the stateless without a viable solution that would alleviate their difficulties.

Without such a solution, the *de facto* stateless find themselves detained for prolonged periods, sometimes for years, without furthering their removal from Israel. Even when they are released for limited periods of several months, the release is for the purpose of arranging their exit. They are expected to leave Israel at the end of the pre-determined period even if they are unable to do so. During their time outside of detention they are forbidden to work and are forced to live on the streets or depend on the generosity of others to provide them with basics such as food and housing. In addition, they are obligated to report to the Population, Immigration, and Border Authority (PIBA) offices on a weekly or monthly basis to renew their permit.

During this period, the *de facto* stateless must take multiple steps vis-à-vis their countries of nationality and other organizations to further their removal. This includes approaching the Voluntary Departure Unit at PIBA (even though PIBA makes clear that it cannot provide assistance to individuals lacking travel documents); contacting CIMI, an NGO which works in coordination with the International Organization for Migration (IOM); making multiple visits to the embassy of their country of origin in Israel if such an embassy exists, or approaching embassies outside of Israel; appealing to the International Committee of the Red Cross, UNHCR and other bodies. At the same time, despite these efforts, they are accused of non-cooperation with Israeli authorities when they are unable to produce the documents that would enable their departure to their country of origin.

As a result, the deadline set by the Detention Review Tribunals for leaving Israel

elapses, and because they were unable to leave, they are arrested once again during one of their regular visits to PIBA (complying with their release conditions) and placed in detention. These cycles can last for years and even decades because, between one release and another, no change actually occurs when it comes to their country of nationality.

Thus emerges an inextricable situation of detention periods and failed removal attempts, while the State, whether intentionally or due to a lack of interest, avoids adopting one of two paths that could lead to a resolution. One path involves releasing the individuals from detention, providing them temporary legal status and the right to work while conducting proper and reasonable monitoring, allowing the migrant to exhaust all possibilities for departure. The other option is for state authorities, including the Ministry of Interior, Ministry of Foreign Affairs, foreign embassies in Israel and Israeli embassies abroad, to energetically and decisively act to collect all relevant information concerning the migrant and facilitate his departure to his country of citizenship. Currently, Israel's sole actions are to purchase a flight ticket for the migrants and to provide them with an Israeli travel document, which usually does not allow a return to countries with which Israel does not maintain diplomatic relations These actions do not lead to the intended end result: the migrant's return to his country of origin.

Below are several case studies which epitomize the different types of cases that have been handled by the Hotline for Refugees and Migrants (HRM) over the years.

Isaca Dialo

Isaca was born in the Ivory Coast and fled his country in 2002 during the civil war at that time. He entered Israel in 2008 through an irregular border crossing in the Sinai border fence. He was detained and immediately taken to a holding facility. In 2009, he applied for political asylum. When his request was rejected he filed a request for a reexamination of this rejection. Because of the prolonged nature of the proceedings and the delays in a final determination of his case, the Detention Review Tribunal ordered his release from custody in March 2010, after two years in detention. In 2012, Isaca's reexamination request was rejected and he was placed in detention again. In January 2014, after 18 months in detention, Isaca declared that he wanted to return to the Ivory Coast (where the conflict had since subsided) or to travel to any other country. He was therefore released by the Tribunal once again, since Israeli authorities failed to bring about his removal despite his willingness to

leave.

After his release, Isaca made multiple efforts to facilitate his own departure. He independently turned to the embassy of the Ivory Coast where he was told that without identifying documents, there was no way to assist him; he also turned to the Voluntary Departure Unit at PIBA. Despite these efforts, he was again placed in detention in July 2014. He was released a month later when it was made evident that he was cooperating fully with the process of his removal. After his release, Isaca again appealed to the embassy of the Ivory Coast, and again was told that without documents, Ivorian authorities could not recognize him as a citizen. In July 2015, despite his full adherence to his conditions of release and attempts to facilitate his own departure, Isaca was arrested (again) and placed in detention. In October 2015, he was again released by the Detention Review Tribunal after PIBA, once again, failed to deport him.

In December 2015, HRM filed a request on Isaca's behalf to recognize him as a stateless person based on the Regulation on Stateless Persons described above. Authorities denied the request on two grounds: the first being that Isaca did not enter Israel through a regular border crossing and is therefore excluded from the remit of the Regulation; and the second that he is a citizen of the Ivory Coast (although Ivorian authorities are unable to determine his citizenship). He was therefore found not to be stateless under the definitions of the Regulation and the Convention.

Isaca filed an appeal against this decision to the Jerusalem Appeals Tribunal.[23] On September 6, 2017 the Tribunal rejected the appeal, ruling that the requirement of legal entry into Israel for the application of the Regulation on Stateless Persons is an appropriate and reasonable requirement. Beyond the legal questions, the Tribunal adopted the position of the Ministry of Interior that the request would have been rejected regardless of his port of entry, since Isaca had not cooperated with his removal, and therefore, did not meet the criteria set in the Regulation on Stateless Persons, which requires such cooperation (article A(5)).

HRM filed an appeal on Isaca's behalf to the District Court against the Appeal Tribunal's ruling.[24] As part of the appeal, Isaca raised two central legal arguments. The first is that the exclusion from the Regulation of those who enter Israel through

23 Appeal (Jerusalem Tribunal) 2271-16 *Isaca Dialo vs. PIBA*.

24 Administrative Appeal 15579-11-17 *Dialo vs. the Ministry of Interior – PIBA*.

an irregular crossing is not aligned with international law and denies rights to persons who could be considered stateless. The second is that a person can be considered stateless even if his citizenship was not formally denied by his country of origin.

The District Court addressed the issues raised in Isaca's appeals that went beyond his individual circumstances and accepted the Appeals Tribunal's argument that the fact that "infiltrators" were excluded from the remit of the Regulation does not leave them without an entity to which they can appeal. Their matter can be deliberated under the general authority of the Minister of Interior based on the Entry to Israel Law. In addition, the Court raised, but did not answer the question of whether a person in Isaca's situation (i.e. *de facto* stateless), fits the definition of the Regulation on Stateless Persons as well as the remit of the Convention Relating to Stateless Persons. Beyond this, the Court chose to focus on the particulars of the case which led it to reject the appeal, finding that Isaca lacked credibility and had not cooperated with authorities trying to facilitate his departure.

Following these rulings, Isaca filed a request to appeal to the Supreme Court.[25] The appeal repeated Isaca's prior arguments and added another important one: that merely because the Minister of Interior has the authority to decide on cases of *de facto* stateless individuals, does not mean that the processes pertaining to the granting of legal status, which are directly related to the most basic rights of individuals, should be based on "oral traditions." Instead, they should be based on written guidelines. Therefore, Isaca's appeal argued that the Regulation on Stateless Persons should be applied to him, or alternatively, a new regulation should be promulgated to address the needs to people like himself.

During the Supreme Court hearing, the Ministry of Interior informed the Court about an imminent change in policy of the Ivory Coast embassy in Israel due to the arrival of a new ambassador. According to the State, though it had been impossible in the past to assist Ivorian nationals who lacked identification documents, the embassy was now willing to assist those without documents to prove their nationality. As a result of this information, and despite the opposition of HRM (which believed that this information did not change the fundamentals of the situation), the Supreme Court vacated the appeal and instructed Isaca to turn, once again, to the embassy.

25 Administrative Request to Appeal 7407/18 *Isaca Dialo vs. the Ministry of Interior – PIBA* (and prior proceedings).

And in fact, when Isaca again went to the embassy to receive assistance, he soon discovered that the supposed change in policy had not actually occurred. As of today, he has not received any assistance from the Ivorian embassy without being able to supply identification documents.

This means that the questions at the heart of the matter raised in HRM's appeal remain without resolution. As a result, every migrant in a similar situation must repeatedly turn to the courts to examine the legality of the Ministry of Interior's actions in their own case, while being subject to repeated arrest whenever they report to the PIBA offices to comply with their release conditions, and prolonged detention, while being denied the right to earn a living.

Inze Kony

Inze Kony is a citizen of the Ivory Coast who entered Israel in 2007 through the border with Egypt. Until January 2012, Inze enjoyed the group protection granted to Ivory Coast nationals due to the violence in the country. In 2012, he applied for asylum but his request was denied. At first, Inze refused to return to the Ivory Coast, and even though he later agreed to do so, his return was not possible because he lacked documents that would identify him as a citizen of the Ivory Coast. Until late 2015, Inze was held in detention several times while HRM carried out multiple legal proceedings regarding his placement in detention and removal from Israel. Each time Inze was released from detention, one of the conditions for his release set by the Detention Review Tribunal was that he must leave Israel by a specific date., This condition meant that Inze would be placed in detention again because he could not leave Israel by that date despite the fact that Inze tried, unsuccessfully, to obtain identification documents that would enable his departure from Israel.

In late 2015, Inze turned to the Detention Review Tribunal, asking that it rescind the condition of a specific date for his departure from Israel, pointing to the efforts he had made over the years to leave Israel. His request was denied by the Detention Review Tribunal without holding a hearing with representatives from both sides. Inze filed an appeal of this decision to the District Court and later to the Supreme Court, which ordered that the case be returned for reexamination by the Detention Review Tribunal in the presence of both sides.[26] During this new hearing, the Detention Review Tribunal ruled that while it would extend Inze's departure date from Israel, it was not authorized to release him without a specific date for his departure, since

26 Administrative Request to Appeal 1280/16 *Inze Kony vs. PIBA* (published in Nevo, July 18, 2017).

such a release would amount, to granting him *de facto* legal status in Israel. Inze filed an appeal to the District Court,[27] which ruled that Inze was not cooperating with his removal, but instead was using legal proceedings in an attempt to regularize his status *de facto*, and that the Tribunal does not have the authority to set conditions of release without an exit date from Israel.[28] On September 9, 2019 the Supreme Court issued a ruling that dealt with two central questions: the first, whether the Tribunal can extend or alter release conditions that had been previously set; and the second, whether the Tribunal has the authority to release a person without setting a specific date for their departure. Concerning the first question, the Supreme Court rejected the State's objection, ruling that the Detention Review Tribunal is authorized to alter the conditions of release set by itself and by the Border Control Officer. Concerning the second question, the Supreme Court ruled that the Detention Review Tribunal is not authorized to release a person without setting a date for his departure from Israel, since such a release would be akin to granting legal status in Israel. At the same time the Court ruled that the Tribunal has the right to set the date of departure which would take into account the circumstances of the released individual as well as his likelihood of leaving Israel.

Essentially, the Supreme Court's decision resulted in codification of the normative cycle of detention: the return to detention of those who, despite their efforts, are unable to leave Israel, and recurring releases from detention for limited periods of time.

Dialo Mukhtar

Dialo Mukhtar, a Guinean citizen, entered Israel without identity documents in 2007. After his asylum request was denied in 2012, he was detained, and since then has expressed the desire to return to his country. Dialo cooperated with all attempts to facilitate his removal and in September 2015, agreed to board a flight to Guinea. Although Guinea established diplomatic relations with Israel in July 2016, it does not maintain a diplomatic representation office in Israel, which makes identification of its citizens in Israel difficult. Israel, therefore, issued an Israeli laissez passer for his travel. After a three-day journey through a number of transit countries, Dialo reached Guinea, but upon arrival, his entry was refused because an Israeli-issued laissez passer is not a recognized travel document in Guinea.

27 Administrative Appeal 15565-11-17 *Inze Kony vs. PIBA*.

28 Administrative Request to Appeal 1780/18 *Inze Kony vs. PIBA* (published in Nevo, September 2, 2019).

After the State failed to remove him over a prolonged period, the Detention Review Tribunal released Dialo from detention on the condition that he leave Israel. Upon his release, Dialo made every effort to further his return to his country of origin, including appeals to the Guinean embassies of various countries, the IOM, the International Committee of the Red Cross, and UNHCR to obtain identification documents from Guinea. The Detention Review Tribunal repeatedly ruled that Dialo was doing everything in his power to return to his homeland but that the Ministry of Interior was not doing all it could to facilitate his departure, leading the Tribunal to repeatedly delay the deadline for Dialo's departure from Israel. However, the Detention Review Tribunal refused to drop the requirement of a specific departure date from Israel, accepting PIBA's argument that lifting that requirement would amount to regularizing Dialo's legal status, a matter outside the authority of the Tribunal. Dialo clearly could not meet this requirement which left him in a no-win situation where he continually violated the conditions of his release, despite his efforts.

In October 2018, the Detention Review Tribunal extended Dialo's deadline for departure from Israel by another four months. However, it also ruled that despite Dialo's cooperation, the Tribunal would not extend Dialo's departure deadline after these four months because, it would amount to regularizing Dialo's legal status in Israel. This decision meant that Dialo was guaranteed to be detained again, knowing full well that in the coming months he would not be able to reach his country of origin despite his efforts.

Dialo filed an appeal to the District Court of Lod against this decision.[29] But the deliberations on the appeal were suspended until a ruling was issued in the case of Inze Kony (see above), because the Supreme Court found that the substantive questions in both cases are identical. On September 2, 2019, the court ruled in Kony's case that the Detention Review Tribunal is not authorized to release individuals without setting a date for their departure from Israel, but is entitled to extend and change its conditions of release. This ruling does indeed address the main issues at the heart of Dialo's appeal, so his appeal was vacated and he was instructed to return to the Detention Review Tribunal for a reexamination of his release conditions.

Meanwhile, Dialo continued to try to be recognized as a Guinean citizen. Among other steps, he turned to five Guinean embassies across the world. He received an answer only from the embassy in Turkey, which stated that it could not help him

29 Administrative Appeal 39693-11-18 *Dialo Mukhtar vs. PIBA.*

because the Guinean embassy in France is the one responsible for cases in Israel. In addition, Dialo turned to PIBA, asking to meet with a Guinean delegation which planned to visit Israel, so as to conduct an identification interview to enable him to be recognized as a Guinean citizen.

The possible arrival of the Guinean delegation first became public knowledge in a notice to the Supreme Court by PIBA on October 22, 2018 as part of an Administrative Request to Appeal 3819/17 *Okoby Zerila vs. PIBA*. As part of the notice, PIBA referred to ongoing deliberations between the Ministry of Foreign Affairs and Guinean authorities which would result in the arrival of a Guinean delegation to Israel. During a Supreme Court hearing on this case (December 26, 2018), the State representative announced that the delegation would arrive "in the coming weeks" and "in the near future." The last delegation from Guinea to facilitate recognition of its citizens in Israel arrived in 2011. Since then, PIBA has regularly promised the arrival of another delegation for the same purpose, but no such delegation has arrived. Reports about the delegation were also mentioned during the hearings in Dialo's case in the District Court, as well as in cases of others held in immigration detention who were brought before the Detention Review Tribunal. As of the writing of this report, no delegation has arrived and it is unclear whether one will ever do so.

Despite Dialo's efforts and delays in the arrival of the Guinean delegation (probably the only actor who could assist in the matter), Dialo faces the constant threat of arrest, and resides in Israel without a work permit that would allow him to make even the most basic living.

A. S.

A. S. is a Guinean citizen who entered Israel in 2005 through the Egyptian border. He turned to the UNHCR, first identifying himself as a citizen of the Ivory Coast and later as a citizen of Guinea. Upon his arrest in 2009, A. S. claimed to be Guinean, but refused to return to the country. A. S. was held in detention for a total of almost nine years. His first detention lasted approximately four years before his release in February 2012, after which he was jailed again when he failed to return to Guinea within six months. During his detention, it became apparent that A. S. might be suffering from a mental disorder. He was diagnosed with a personality disorder in 2013 by the head of the treatment and rehabilitation department of the detention facility, requiring intensified supervision. At the same time, the Detention Review Tribunal found A. S. to be fully cooperating with his removal, but the State was

failing to assist in his identification and removal from Israel. Despite this, A. S. remained in detention when it was found that his mental condition did not permit his release.

In December 2014, in an extraordinary step, the Detention Review Tribunal referred A. S.'s case to the Attorney General, the body authorized to appoint a guardian to oversee legal proceedings. The referral bore fruit and two months later a guardian was appointed. Following her appointment, A. S.'s situation began to improve. He started receiving regular pharmacotherapy, fully cooperated with his removal and repeated his desire to return to Guinea. In 2017, a psychiatric evaluation found A. S.'s situation to be stable, determining that he does not pose a threat to public safety. In March 2017, he was released from detention.

In its decision, the Detention Review Tribunal once again found that the State had failed to remove A. S. from Israel, and that "there is no action that the detainee can carry out while in custody to facilitate his removal." Despite this ruling, in November 2018, A. S. was arrested again by the Border Control Officer and returned to detention.

On November 19, 2019, following an entire year in detention during which A. S. continued to fully cooperate with his removal, he was released from custody once again. He was ordered to leave Israel within four months, or his matter would be referred again to the Border Control Officer who would decide whether to place him in detention once more. At the same time, A. S. was forbidden to work, and was ordered to report frequently to the PIBA office, as well as be accompanied by another person 24/7 for the purpose of monitoring.

As of the writing of this report, A. S. continues to face the threat of repeated arrests without any prospect for his removal. It appears that the only opportunity for his removal will entail the arrival of the Guinean delegation which could eventually lead to his identification. However, such a delegation has yet to arrive.

Solutions

The Responsibility for Finding Solutions

There is no doubt that the burden for locating and delivering identity documents lies largely with those who claim to be stateless. At times, they bear a significant share of responsibility for their unique situation, whether because they left their homeland without a passport, did not renew their passport in time, neglected to preserve their passport, or even destroyed it for various reasons.

However, this burden does not absolve the State of its responsibility, which also has an interest in facilitating the return of these individuals to their homelands. On more than one occasion, various legal instances have found that the State shares the responsibility for finding solutions for stateless individuals.

For example, in the Administrative Appeal 696/06 *Zorev Elkanov vs. the Detention Review Tribunal* (published in Nevo, December 18, 2006), which dealt with the matter of Georgian citizens who arrived in Israel as Jews under the Law of Return and whose Israeli citizenship was subsequently voided, the Court found that "...as part of this oversight [of detention] it should be examined, from time to time, whether the conduct of the person held in detention still prevents or hinders his removal; and on the other hand, whether the State is doing everything necessary and possible to carry out the removal, and whether it is possible to carry it out without the cooperation of the person held in detention" (paragraph 22).

In addition, in the Administrative Petition (Tel Aviv Court) 304/06 *the Ministry of Interior vs. Faysal Madadel* which dealt with a Somali citizen who lacked identification documents and remained in detention for a prolonged period, the Court ruled that "...the responsibility for finding a solution and the removal of the appellant partially lies with the State. Immigration Detention – a tool from the arsenal of administrative law – should not be used as punishment, as if dealing with a person convicted of criminal offensive, for such a prolonged period of time" (paragraph 15).

This particularly applies to the four cases presented above, which demonstrate that when a person appeals, on his own, to his country of origin, results are not forthcoming. This could stem from a lack of assertiveness on the part of the

migrant due to fear of authorities from his country when interacting with embassy staff (especially when the person in question is a member of a minority group), as well as a lack of enthusiasm of embassy staff to take on additional work. In such a situation, intervention by Israeli authorities can go a long way in facilitating the handling of the request, or at the very least, help the migrant obtain information about its status.

Many of the solutions require close cooperation and coordination between Israeli government ministries, particularly the Ministry of Interior and the Ministry of Foreign Affairs. Based on past experience, such cooperation is not a given and may require an agreement between the directors of the ministries, and possibly even an order by the Director of the Prime Minister's Office to ensure full cooperation.

In some cases, significant involvement by the Ministry of Foreign Affairs has produced results, as in Solo's case, mentioned above. Here, cooperation between the Ministry of Interior and the Africa Division at the Ministry of Foreign Affairs led to a clear declaration by the ambassadors of Congo and Cameroon that Solo is not a citizen of their countries. These declarations allowed the Court to rule that the man is stateless, paving the way for his case to be handled under the Regulation Concerning Stateless Persons.

The key to handling these cases is coordination, in advance, with the country of citizenship. In 1933, the Canadian Supreme Court ruled in the matter of *In Re Janoczka* with regards to the removal of a foreign citizen. The ruling stated that a country that wishes to deport a citizen of another country from its territory does not require the permission of the country to which it is deporting, but communications with that country must be consistent In other words, communication between countries is a well-known, customary and legitimate practice in deportation proceedings.[30]

It is almost impossible to return a person to his country without the assent (at least partial assent) of his country of citizenship. This is evident in the case of Dialo Mukhtar mentioned above, who was flown to Guinea with an Israeli travel document, spending three days on planes and in airports, only to be denied entry to Guinea because that state refused to accept the travel document. Another case is that of Issa Mohammed, a citizen of Niger who was deported twice without proper travel documents. The first time, Issa was removed from Israel with an Israeli travel document, he was jailed in Niger for eight days and deported back to Israel. Despite

30 *In Re Janoczka*, [1933] 1 D.L.R. 123 (1932), at 128.

this, Issa was flown again to Niger with the same Israeli travel document, via Ethiopia and Burkina Faso. This attempt to enter Guinea failed as well. Issa was sent back to Addis Ababa and found himself trapped in the airport for six months. Eventually, he was offered refugee status in Ethiopia. At that stage HRM lost contact with Issa Mohammad, and we do not know his fate.[31]

These cases demonstrate the need to take diplomatic action to conduct a voluntary and responsible return of a person to his country of origin, without posing a threat to the person's life or liberty The practical solutions for the problem of *de facto* stateless people can be divided into two broad areas: assisting a person to regularize his status with his country of origin; or carrying out actions that would enable a person's removal without the country determining his permanent legal status. For both areas there is a range of actions the State of Israel needs to take to reach a solution for each case.

Currently, Israel maintains diplomatic relations with most countries in the world. Israel maintains relations with most countries in Africa; all countries in Latin America, except some countries like Cuba, Bolivia and Venezuela; with most Asian countries except North Korea, Indonesia, Malaysia, Iran, Brunei, Bhutan, Afghanistan, Pakistan and Bangladesh. Israel does not have diplomatic relations with most Arab League members.

The country of origin plays a crucial role in resolving the matter of *de facto* stateless persons, since it affects the ability of a person to contact his country's authorities and obtain travel documents to return home. There is a difference in handling the three categories of migrants who lack legal status in Israel: when their country of origin has an official representative office in Israel; when their country does not have an embassy but maintains diplomatic relations with Israel; and when the country of origin does not maintain diplomatic relations with Israel.

We shall now discuss the diplomatic tools Israel can use to assist the *de facto* stateless in obtaining travel documents, thus facilitating their removal, based on the three categories.

1. Citizens of Countries with Official Representation in Israel

Some countries whose citizens reached Israel without documentation have a

31 For additional cases in which migrants were deported to countries that refused to accept them after their arrival with Israeli travel documents, see: *Forgotten in Prison*, footnote 7 above.

diplomatic representation office in Israel, such as the Ivory Coast. Most citizens of that country entered Israel in the early 2000s due to the civil war raging in the Ivory Coast during those years. They filed asylum requests, and enjoyed temporary group protection, in force until 2012.[32] After their asylum requests were rejected and following the removal of group protection, citizens of the Ivory Coast were ordered to return to their homeland. Since the Ivory Coast maintains an embassy in Israel, many Ivorian citizens turned to their embassy to receive a passport, but their requests were denied by embassy staff for various reasons, mostly based on the argument that they could not be certain that the person requesting the document was indeed a citizen of the Ivory Coast. These refusals were based on their linguistic differences from the majority group, belonging to a minority ethnic group, residing in areas in which citizenship is not granted automatically and more. Since the Ivory Coast does not recognize these migrants and its citizens (although Israel recognizes them as Ivorians), and since no other country, including Israel, recognizes them as its citizens, they are considered *de facto* stateless.

Israel and the Ivory Coast maintain full diplomatic relations and permanent embassies. There is an Ivorian embassy in Ramat Gan and an Israeli embassy in Abidjan. This significantly facilitates coordination between the two countries concerning the identification of individuals and their return to the Ivory Coast. Therefore, in situations where it is not possible to rule that a person is **not** a citizen of the Ivory Coast, Israel should carry out a series of steps to allow for his return to that country.

As will be expanded on below, the actions that Israeli authorities (the Population, Immigration, and Border Authority (PIBA)and Ministry of Foreign Affairs) can carry out to a allow a person to return to his country include: assistance in inquiring about a person's citizenship; assistance via-a-vis the relevant embassy to ensure the issuance of a travel document; and in cases when such a document cannot be produced, obtaining permission to enter the country with a signed document of the destination country vowing to honor the Israeli travel document,;[33] and escorting the individual on his flights to the country of destination, after ensuring that the country will receive him and that the migrant is willing to return.

32 For more information on Israel's temporary group protection policy, see: HRM, *Temporary Protection*, http://bit.ly/2RDvldK.

33 By issuance of an Israeli laissez passer to foreigners.

2. Citizens of Countries that Do Not Have Official Representation in Israel but which Maintain Diplomatic Relations with Israel

Another category includes citizens of countries that do not have a representation office in Israel, but which maintain diplomatic relations with Israel and have an embassy elsewhere which handles issues in Israel as well. For example, the Guinean Republic, also known as Guinea Conakry (after the name of the capital), established diplomatic relations with Israel in 2016, but did not establish an embassy. Guinea maintains embassies around the world which are authorized to handle the country's citizens residing in Israel. In reality, the Guinean ambassador to France also serves as the ambassador to Israel (and as a rule, is supposed to visit Israel several times a year). The Israeli ambassador to Dakar, the capital of Senegal, also serves as the Israeli ambassador to Guinea.

Because the countries maintain diplomatic relations, in theory, there should be no legal and political obstacles hindering coordination between the two countries. Although the absence of an embassy in Israel complicates the situation, there is still an official channel of communication through which it should be possible to inquire about a person's status and coordinate his return to Guinea.

On a practical level, real obstacles in coordination emerge. Because citizens of Guinea cannot turn to a Guinean embassy in Israel, they turn, from afar, to Guinean embassies around the world in an attempt to receive assistance. Regrettably, these appeals often go unanswered. In these cases, the Ministry of Foreign Affairs could facilitate the removal of the migrant by turning to the most relevant Guinean embassy and ask for its assistance.

3. Citizens of Countries that Do Not Maintain Diplomatic Relation with Israel

A third group, the one with the most difficulties in this regard, are citizens of countries with which Israel does not maintain diplomatic relations, such as Mali. There are informal channels of communication with some but not all of these countries. Where such informal channels exist, they can be used to obtain a travel document (which does not have the same authority as a passport), such as a letter confirming that the person's entry into his country would be allowed upon his arrival at a border crossing, while not officially recognizing the existence of diplomatic relations with Israel. This would allow the citizen to enter his homeland, For the most part, an appeal to such countries would have to be done through a third county (often the colonial power that ruled it in the past), or a relevant international

organization (UNHCR, IOM, etc.)

Options in Dealing with *de facto* Stateless Individuals

We shall now discuss each of the State of Israel's options in dealing with *de facto* stateless individuals, based on the different attributes of this population.

1. Technical Coordination of Travel

This category includes cases when "technical" actions are required to facilitate the departure of an individual when travel is delayed due to procedural reasons. Such assistance includes filing a request for issuance of a passport (or a laissez passer) of the other country to enable the person to return to his homeland; providing an Israeli laissez passer and a letter from the country of destination vowing to allow the person to safely re-enter his country; or issuing some kind of written document that would allow him to enter his country.

In some situations, a preliminary step of ascertaining a person's citizenship is required.

2. Directly Ascertaining Citizenship

The best way to assist a *de facto* stateless person involves connecting him to representatives of his country of origin. The goal of such a procedure, whatever form it takes, is a clear determination of whether the person is the citizen of that country, or not. A positive determination will allow the file to be transferred to the embassy for handling, thus ending Israel's role in the case. A negative response would enable a determination that the person is stateless (*de jure* or *de facto*).

There are several ways to carry out this procedure:

- **Countries with embassies in Israel:** applying directly to the embassy for assistance or through the Ministry of Foreign Affairs.
- **Countries maintaining diplomatic relations with Israel but without an embassy:** approaching the country through the Israeli embassy in a 3rd country which covers the country of destination, for example, approaching Guinea through the Israeli embassy in Dakar, which also covers Guinea.
- **Countries without diplomatic relations with Israel:** approaching the IOM, UNHCR or a third country with a request that they mediate between Israel and the country of destination. The third country is usually a European country with

unique influence or a colonial past in that country, for example, France in Mali.[34] In most cases, PIBA demands that the migrant himself reaches out (as part of the "cooperation" required of him), but as mentioned above, such steps by an individual do not usually produce results. Therefore, Israeli authorities should readjust their expectations and actions to the reality in which international organizations and third countries view a request from a governmental office of another country (such as the Ministry of Foreign Affairs) to be of greater importance than a request from an individual. In reality, the request submitted by a country will be prioritized, with organizations and third countries making an effort to find a practical solution. In some cases, a request by an individual will be summarily rejected, while a formal request will be handled.

It should be assumed, however, that in some (or most) cases a definitive answer regarding the citizenship of a person will not be given, and therefore, interim steps will be needed to enable a person to return to his country **where the process of ascertaining his legal status can be continued**.

3. Preliminary Steps

It should be stated that the unofficial "guiding principles" accepted by Israeli governmental authorities, such as carrying out unilateral actions and expecting the countries of citizenship to simply "let the stateless in," or relying on "luck" when attempting to remove a person, is not favorably regarded by countries of citizenship and is often counterproductive.

More explicitly, any process of removal must be preceded by at least the acquiescence of the country of citizenship, while Israeli authorities should always strive to obtain an explicit agreement. As discussed above, this agreement can be manifested in issuing a travel document, a visa or some other written document. Israeli authorities should insist on receiving some form of written proof of this agreement, especially in cases of doubt by the country of citizenship.

In this context, it should be mentioned that international law recognizes the right of return to one's country of citizenship, as well as to receive a passport from that country.

34 Israel has informal channels of communications with most of these countries, but it is likely that the Israeli actors responsible for such ties, which focus on security matters, are not interested in cooperating with efforts pertaining to issues of migrants without a direct order from the Israeli prime minister.

Public international law (the branch of law that regularizes relations between countries) recognizes the right of a person to return to her country of citizenship, unrelated to the formal process of issuing passports or travel documents, a matter that is codified in the national legislation of each country, and not international law. This right has been codified in several international agreements including the **Universal Declaration on Human Rights** (an addendum to the UN Charter), article 13(2) which states "everyone has the right to leave any country, including his own, and to return to his country,"[35] as well as the **International Covenant on Civil and Political Rights**, article 12(4) which states that "no one shall be arbitrarily deprived of the right to enter his own country."[36] In all cases involving the removal of the *de facto* stateless, these rights should be demanded from the countries of citizenship.

Several preliminary steps may be required to assist a person in gaining entry to his country of citizenship:

- **An appeal by the Israeli Ministry of Foreign Affairs** to the country of citizenship through one of the channels mentioned above. As stated, the weight accorded to such a request will be significantly higher than a request by the citizen himself. Foreign embassies accord greater importance to official requests and those will be handled with care.

  As mentioned above, there are many channels for such an appeal: contacting the embassy in Israel; contacting the embassy responsible for Israel in the country of citizenship; a direct appeal from one ministry of foreign affairs to another; and conveying the appeal through an organization or a third country, where Israel does not maintain diplomatic relations with the country of origin.

- **An "identification delegation" from the country of citizenship to Israel for the purpose of conducting interviews.** This step has been taken several times before. As mentioned above, as of the writing of the report, Guinean citizens residing in Israel are still awaiting the arrival of such a delegation which could enable them to be identified as Guinean citizens. Bringing such a delegation entails significant costs, without any guarantees of the outcome of the process. It is possible, therefore, that a source of funding for the delegation will need to be found, whether by the Israeli government or an international organization. In addition, the terms of reference of the delegation need to be established

35 The 1948 *Universal Declaration of Human Rights*: http://bit.ly/2Gusm10.

36 The 1966 *Convention on Civil and Political Rights*: http://bit.ly/2GytPDK.

beforehand, for example, agreeing that the delegation reach an incontrovertible finding concerning each person's citizenship, whether favorable or negative, with the exception of cases in which individuals will receive a travel document (such as an Israeli laissez passer or letter of transit), for the purpose of continuing the examination in the country of citizenship. In principle, this possibility is only available in countries with which Israel maintains diplomatic relations, because (it should be assumed) the leadership of countries with which Israel does not have diplomatic relations will be deterred by the prospect that Israel might use the delegation's visit to accrue a political or media victory. However, this option of a visiting delegation is not beyond the realm of possibility even for countries with whom Israel does not maintain open diplomatic relations.

- **Removal with an escort and consent of the migrant**. PIBA has both the capacity and experience of escorting undocumented migrants during the process of forcibly deporting them from Israel. This experience could be used to reduce concerns in situations where a person wants to return to his country of origin, but there is no full guarantee that this country will agree to admit him. Thus, if a situation arises where there is uncertainty surrounding the reasons why a person's prior entry has been refused (for example, a refusal to accept a person with Israeli travel documents), it might be possible to prevent a repeat of this refusal in subsequent deportation attempts. If the migrant is denied entry to the receiving country, the escort returning with him to Israel can attest to the situation that unfolded, for the purpose of examining alternative routes for removal or granting the migrant legal status in Israel.

4. Amending the Regulation Concerning Stateless Persons

In parallel to the steps discussed above, Israeli authorities should amend the current regulation concerning stateless persons, or write an entirely new regulation which would cover cases in which the person claiming to be stateless entered Israel through an irregular border crossing.

Amending the Regulation Concerning Stateless Persons (or alternatively, promulgating a new regulation covering those who entered Israel illegally) appears to be the easiest route, since it entails the initiative and effort of PIBA alone. As mentioned above, the current Regulation on Stateless Persons does not apply to individuals who entered Israel through an irregular border crossing. Therefore, the only way a person who enters Israel this way can prove that he is indeed stateless is by a legal decision requiring that he be recognized as such (see the matter of

Solo above). Attempts to convince the courts to force PIBA to expand the regulation to apply to those who entered Israel through an irregular crossing, even without a peremptory ruling, have not produced results. Moreover, in the case of Dialo Mukhtar, the Court ruled that decisions on these matters can be made under the general authority of the Minister of Interior, even without promulgating a relevant regulation.

However, this solution is hardly satisfying. It neither meets the test of reasonableness, nor is it in line with the authorities' obligation to develop regulations that set standards concerning the core rights of individuals. The current legal situation, which excludes from the Regulation's remit those who entered through an irregular border crossing, violates that Convention Concerning Stateless Persons, which does not condition granting the status of a stateless person upon legal entry or even legal residency in the country. In addition, such an exclusion does not provide solutions to actual cases that PIBA encounters and to which it must develop solutions.

The UNHCR Handbook on Protection of Stateless Persons has recognized that at times, the fact that a person is stateless is what prevents him from obtaining the necessary documents for the purpose of travel and entry to different countries.[37]

Even if illegal entry could affect granting certain rights in certain circumstances, this fact should not, in itself, affect the core basic rights and legal status.

In addition, it is doubtful that the distinction in the application of the Regulation based on mode of entry meets the general guidelines of administrative law, which obligates authorities to apply uniform, clear and reasonable rules concerning similar cases, as well as to formulate regulations in cases when a practiced policy impacts the rights of many individuals.

Amending the current regulation, or promulgating a new regulation that would apply to those who have entered Israel illegally, whether or not they have documents attesting to their citizenship, may prevent significant harm to the *de facto* stateless, who remain stripped of any rights. In addition, such a regulation can assist the country in dealing with the legal limbo that emerges in these cases, minimizing the prolonged and fruitless periods of detention which reach judicial oversight time and again, requiring the State to address the case every single time it comes up for periodic review.

37 Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons.

Summary and Conclusions

This report presents the story of *de facto* stateless individuals residing in Israel. These are migrants and asylum seekers who entered Israel without identification documents, usually through an irregular border crossing, and who wish to return to their countries of origin and citizenship; however, those countries refuse to recognize them as citizens or accept their return.

Thus, these migrants find themselves denied all rights by their country of citizenship and by the State of Israel, and are excluded from the remit of the Regulation Concerning Stateless Persons, which applies only to those who entered Israel through a regular border crossing and hold identifying documents.

In addition, because Israel determines that these migrants do not cooperate with their removal proceedings, they are detained and jailed in immigration detention facilities, without a limit to the duration of detention and without being eligible for legal representation provided by the State. These migrants find themselves in detention for years.

At times, the migrants are released from detention for brief, pre-determined periods to try to further their process of removal outside of prison walls. But during these brief periods they have no actual tools to advance their removal, nor do they receive any assistance or cooperation from Israeli authorities. Furthermore, during this period they are not entitled to work and support themselves, and they are often forced to live in the streets or rely on handouts to obtain food, housing and medical care.

And so, during the brief periods outside of detention, the migrants turn to any official body that can assist them, at times doing so independently or with the help of human rights organizations. They turn to the Voluntary Departure Unit at PIBA; to CIMI, the NGO working in cooperation with the International Organization for Migrants; embassies in Israel, if those exist; the International Committee of the Red Cross; UNHCR, etc. In most cases, these efforts are fruitless, and the period outside of prison ends without results. The migrants, once again, find themselves in open-ended detention.

This undesirable state of affairs greatly harms both the migrants and the State of Israel, draining its resources, yet the State does not use its diplomatic abilities to assist the migrants in returning to their countries of origin. This assistance is likely the only solution that will end this sad state of affairs. Providing such assistance is in line with Israel's legal obligations, under both Israeli and international law, as the party responsible for those residing within its borders.

The recommendations below are intended to ameliorate this legal aberration, minimize the violation of the *de facto* stateless' right to liberty, and increase the likelihood that these migrants will be able to return to their homeland.

- First and foremost, the Ministry of Foreign Affairs should work in creative ways to reach out to representatives of countries of citizenship for the purpose of identifying their citizens and issuing documents for them while they are in Israel. To this end, the Ministry of Foreign Affairs can contact embassies in Israel and beyond, lodge formal requests to international organizations in the countries of origin, and to coordinate the arrival of delegations from the country of origin for the purpose of identifying their citizens in Israel.
- Israel can assist in issuing travel documents or obtaining documents from the countries of origin attesting to their willingness to accept the migrants.
- Israel should stop pressuring citizens of other countries to return to their homeland or leave to other countries using an Israeli-issued laissez passer, unless those leaving with the laissez passer are provided with prior, written guarantees that they will be safely received by their country.
- Authorities should amend the Regulations Concerning Stateless Persons or promulgate a new regulation that would apply to those who entered Israel through an irregular border crossing and do not hold identification documents.
- The State should provide legal representation for any undocumented migrant held in detention for the purpose of his removal for more than six months. This might facilitate his removal, as well as ensure the migrant is represented in legal proceedings concerning his detention and its legality. Such representation is required in accordance with a constitutional obligation to protect the liberty and dignity of the migrants, and the obligation to limit the violation of these rights.
- The release of undocumented migrants after prolonged periods in detention should not entail setting conditions they cannot meet, such as high bail or demanding

they find monitors who would supervise their movements around the clock.

- Upon their release from prolonged detention, the migrants should be granted a B1 work visa, or at the very least, a 2(A)5 stay permit, to allow them to work and lead a dignified life while they strive to find documents to leave the country.
- Those released from prolonged detention should not be arrested while they report to PIBA offices to comply with the conditions of their release. If PIBA staff believe that a migrant should be placed in detention, they should notify him in writing and summon him to a hearing, where he should be allowed to have legal representation, including representation provided by the State, to allow him to demonstrate the efforts he has made to facilitate his departure from Israel, before a decision is made to return him to detention.