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European Council
on Refugees and Exiles

THE RIGHT TO A NATIONALITY OF REFUGEE CHILDREN BORN IN THE EU AND THE RELEVANCE OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

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INTRODUCTION¹

Under international law, the enjoyment of human rights is, in most cases, not attached to holding a specific nationality. Despite this gradual ‘denationalisation’ of human rights, **nationality still appears to be crucial for the actual enjoyment of human rights** and the access to protection mechanisms in case of rights violations. Not having a nationality – being stateless – may easily push a person into the margins of society, exposing her/him to poverty, exclusion, and all sorts of human rights violations. And even in the absence of such grave consequences, statelessness may still cause numerous difficulties at all spheres of everyday life.

The definition of a stateless person in international law reads as ‘a person who is not considered as a national by any State under the operation of its law’.² There is broad consensus that **statelessness must be avoided**, a principle confirmed by a large set of international treaties and recommendations.³ Safeguards are particularly strong in case of new-born children,⁴ yet they are far from fulfilling their objective in day-to-day practice. UNHCR estimates that over 420 000 stateless persons live in the European Union, and the actual number may be even higher, due to frequent underreporting and methodological difficulties. A large proportion of these people are children and/or were born in an EU Member State. With the increase in persons coming to Europe to seek international protection, this number may be on the rise in forthcoming years.

Refugee children born in exile are particularly exposed to the risk of statelessness. While most of them, in principle, inherit their parents’ nationality, many of them do not, for example due to sex-based discrimination in the nationality law of the parents’ country of origin. Several refugee children automatically acquire their parents’ nationality at birth, but this nationality will often only exist in theory, as parents are prevented from registering their child with authorities of the country of origin. Ensuring that refugee children born in exile in the EU acquire a ‘real’ nationality within a reasonable time is a demanding endeavour. Difficulties are multiplied by the lack of clear guidance (or at least a general agreement on the recommended course of action in these cases), by diverging birth registration practices and by the general lack of awareness about this issue throughout EU Member States. As a consequence, thousands of refugee children ‘fall through the cracks’ in the EU and are condemned to statelessness or to live being registered with ‘unknown’ or a purely fictitious nationality, despite the fact that several EU Member States have included safeguards in their domestic legislation to avoid such situations.⁵ This is a serious human rights violation that needs to be addressed in order to comply with States’ international obligations, to respect children’s best interest and to contribute to meaningful refugee integration.

The EU Charter of Fundamental Rights provides an innovative, yet unused tool to address this complex challenge. This note aims to help human rights advocates, policy-makers and lawyers in this endeavour. The leaflet starts by briefly presenting the relevant standards under international and European law. This is followed by a list of particular challenges that are specific to the case of refugee children born in exile. Finally, the paper concludes with concrete guidance on how to use the Charter in order to advocate for better mechanisms in the EU for the prevention of statelessness among refugee children.

I. INTERNATIONAL LAW

EVERY CHILD’S RIGHT TO ACQUIRE A NATIONALITY

Despite its great importance, **nationality has no universally accepted, clear definition in international law**, and approaches to this concept diverge across the globe (as a result of cultural, historical, legal and political differences). One of the most frequently quoted judicial definitions of nationality was provided by the International Court of Justice in its 1955 *Nottebohm* judgment, according to which nationality ‘is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments,

1 Written by Gábor Gyulai, Refugee Programme director at the Hungarian Helsinki Committee (www.helsinki.hu) and president of the European Network on Statelessness (www.statelessness.eu).

2 1954 Convention relating to the Status of Stateless Persons, Article 1 (1).

3 See for example: 1961 Convention on the Reduction of Statelessness; 1997 European Convention on Nationality, Articles 6 (1) (b), 6 (2) and 7 (3); 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

4 See later in this paper.

5 See European Network on Statelessness, *Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices*, April 2014, available here <http://bit.ly/2IRGBRF>

together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State’.

The right to a nationality is firmly anchored in international law. Article 15 (1) of the 1948 Universal Declaration of Human Rights emphasises that ‘Everyone has the right to a nationality’. Article 24 of the 1966 International Covenant on Civil and Political Rights and Article 7 (1) of the 1989 UN Convention on the Rights of the Child (CRC) stipulate **the right of every child to acquire a nationality**. This obligation has a more limited scope than the original concept of the Universal Declaration, as it focuses only on children’s access to a nationality, but does not address – at least not explicitly – the problem of not *having* a nationality at any later point in life.⁶ In addition, a number of universal conventions refer to the general right to a nationality⁷ or to acquire a nationality⁸ as a human right that should be ensured to all, without discrimination. However, while widely ratified international instruments stipulate that States parties shall ensure that children born on their territory acquire a nationality, most relevant treaties remain silent about *which* particular nationality the child is entitled to.

It is important to note the **best interest principle** as stipulated by Article 3 (1) of the 1989 UN Convention on the Rights of the Child, according to which ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’, since this provision is applicable in all measures concerning the child’s nationality and the avoidance of statelessness, too. As for the practical application of the best interest principle in individual cases, the relevant General Comment of the UN Committee on the Rights of the Children emphasises – among other principles – that:⁹

- » The child’s best interest should be **determined individually**, considering the particular circumstances of each and every case;
- » Due to their special situation (dependency, legal status, ‘voicelessness’, etc.), children have less possibility than adults to make a strong case for their own interests, therefore **those involved in decisions affecting them must be explicitly aware** of their interest;
- » ‘Primary consideration’ means that the best interest should not be considered on the same level as all other considerations, i.e. it must have a **clear priority** over other aspects;
- » Considering the child’s vulnerability of any sort is a key element in the best interest determination, and **being a refugee is clearly marked as a vulnerability factor** – and therefore a relevant consideration in best interest determination.¹⁰

It is noteworthy that the Committee specifically emphasised that **this principle also applies to nationality-related procedures**.¹¹ The UNHCR concluded that ‘[i]t follows from Articles 3 and 7 of the CRC that **a child must not be left stateless for an extended period of time: a child must acquire a nationality at birth or as soon as possible after birth**. The obligations imposed on States by the CRC are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence’.¹² Considering these important guidelines, as well as the widely documented negative impact of statelessness on children’s ability to enjoy all sorts of human rights (identity, education, health care,

6 Nevertheless, Article 8 of the CRC stipulates that states shall respect the child’s right to preserve her/his identity (including her/his nationality), and that if a child is deprived of her/his nationality, states shall provide assistance and protection with a view to re-establish that.

7 1966 International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii).

8 1979 Convention on the Elimination of All Forms of Discrimination against Women, Article 29 (1); 2006 Convention on the Rights of Persons with Disabilities, Article 18 (1) (a).

9 UN Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, Paras 32, 37 and 75-76

10 See also UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, available here <http://bit.ly/2lvpLvL>.

11 UN Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, Para. 30.

12 UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, Para. 11 – emphasis added, available here <http://bit.ly/23wTx2X>.

etc.) worldwide,¹³ and the variety of international legal instruments and recommendations that stipulate the necessity to avoid statelessness,¹⁴ it may be concluded – borrowing the words of Nils Muižnieks, Council of Europe Commissioner for Human Rights¹⁵ – that **it is in the child's best interest to have a nationality.**¹⁶

PREVENTION OF STATELESSNESS AT BIRTH

The **1961 Convention on the Reduction of Statelessness** was the first international treaty specifically aimed at avoiding future cases of statelessness. Article 1 of the Convention sets forth a complex list of rules meant to minimise the possibility of any child born in a contracting state remaining stateless after birth. In brief, these rules stipulate that:

- » States shall grant their nationality to any person born on their territory if that person would otherwise be stateless;
- » States may grant their nationality in such cases (a) at birth ex lege, or (b) later, upon application;
- » States choosing option (b) can only prescribe the following conditions and cannot reject the grant of nationality on any other ground:
 - » That the application is lodged within a limited period of time, which should begin before the person's 18th birthday and should finish after her/his 21st birthday (thus leaving at least three years to complete this procedure after reaching the age of majority);
 - » That the person has habitually¹⁷ resided in the territory of the state for a period fixed by the state itself, not exceeding 5 years directly before the lodging of the application, nor 10 years in all;
 - » That the person has never been convicted of an offence against national security and has never been imprisoned for 5 years or more on a criminal charge;
 - » That the person has always been stateless.

In a typical case of a stateless refugee child born in a State party to this convention these rules would mean that:¹⁸

- » Either the State grants its nationality to the stateless refugee child at birth, automatically;
- » Or it allows the child to register as a national from the age of five, with this option being available at least until the child turns 21. Nationality registration in this case is a non-discretionary procedure.

At the time of writing, 71 states have ratified the 1961 Convention (including 19 EU Member States), and there is a notable trend of more States ratifying in recent years.

¹³ See for example: UN Secretary General, *Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, A/HRC/31/29, 16 December 2015, available here: <http://bit.ly/2n50xAz>.

¹⁴ See for example: 1961 Convention on the Reduction of Statelessness; 1997 European Convention on Nationality, Art. 4 (b) and 6 (1)-(2); UN General Assembly Resolution No. A/RES/68/141, 18 December 2013, Para. 9; UN Human Rights Council Resolution No. A/HRC/RES/20/4, *The right to a nationality: women and children*, 16 July 2012, Preamble and Para. 3; Council of Europe Committee of Ministers, *Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness*, 15 September 1999; etc.

¹⁵ Keynote address by Nils Muižnieks, Council of Europe Commissioner for Human Rights, at the First Global Forum on Statelessness, The Hague, 15-17 September 2014 (CommDH/Speech(2014)8).

¹⁶ This line of thinking finds further support in: Council of Europe Parliamentary Assembly, *The need to eradicate statelessness of children*, 16 February 2016, Paras 16-17.

¹⁷ Habitual residence is to be understood as factual, stable residence, and not as a matter of a particular legal status (residence permit, domicile, etc.). Cf. UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, Paras 40-41; Council of Europe Committee of Ministers, *Resolution (72) 1 On the Standardization of the Legal Concepts of 'Domicile' and of 'Residence'*, 18 January 1972, Paras 7 and 9.

¹⁸ Supposing that such a young child cannot constitute a national security risk, nor can she/he commit a serious crime, as well as that she/he is residing habitually in the country of refuge.

II. COUNCIL OF EUROPE STANDARDS

THE 1997 EUROPEAN CONVENTION ON NATIONALITY

The **1997 European Convention on Nationality**¹⁹ is the first regional instrument that specifically and exclusively deals with the issue of nationality. The Convention sets forth important principles relevant to the subject in focus, namely:²⁰

- » Every person's right to a nationality;
- » That statelessness shall be avoided; and
- » The prohibition of discrimination in nationality matters.

Article 6 (2) of this convention – echoing the 1961 Convention – includes **technical provisions specifically aiming at avoiding statelessness at birth**. Under these rules, States parties shall grant their nationality to any child born on their territory who do not require at birth any other nationality. States may choose between:

- » Granting their nationality in such cases already at birth, *ex lege*; or
- » Granting it later, upon application. In this second case, the only condition States may prescribe is a maximum of five years of lawful and habitual residence, before lodging the application.

Therefore, on one hand, the 1997 Convention contains higher standards than the 1961 Convention, as it allows much fewer conditions that can be required for the grant of nationality to children born on the territory of the state party who did not obtain any other nationality. On the other hand, it is stricter than the universal treaty, as it allows states to require not only habitual, but also lawful residence. For states that ratified both conventions, the stronger obligation (i.e. the higher human rights standard) always applies. The following table sets out what this means in practice, in case a State opts to not grant nationality *ex lege* at birth, but rather later, upon application:

Types of conditions States may stipulate	Obligations for States that only ratified the 1961 Convention	Obligations for States that only ratified the 1997 Convention	Obligations for States that ratified both conventions
Timeframe to lodge application for nationality	A period that starts before the applicant's 18 th birthday and ends after her/his 21 st birthday	Any time after the child has met the residence requirement	Any time after the child has met the residence requirement, in case of an upper age limit, it cannot be before her/his 21 st birthday
Residence requirement	Max. 5 years of <i>habitual</i> residence before applying, max. 10 years of <i>habitual</i> residence in total	Max. 5 years of <i>habitual</i> and <i>lawful</i> residence	Max. 5 years of <i>habitual</i> residence
Other possible conditions	No conviction for national security reasons or serious crime The applicant has always been stateless	None	Not possible

In addition to the relevant principles and technical rules, the 1997 Convention also sets forth **important procedural safeguards** with regard to all nationality-related procedures, namely that:²¹

- » Applications shall be processed within a **reasonable time**;
- » Decisions shall contain **reasons in writing**;
- » **Administrative or judicial review** against rejections shall be available.

¹⁹ At the time of writing, 20 states have ratified the 1997 Convention, among which 12 EU Member States (all of which have also ratified the 1961 Convention).

²⁰ 1997 European Convention on Nationality, Art. 4-5.

²¹ 1997 European Convention on Nationality, Art. 10-12.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The **European Convention on Human Rights**²² does not include the right to a nationality as such.²³ However, since the late nineties, the European Court of Human Rights has been repeatedly referring in its jurisprudence to **the link between the access to nationality and the person's ability to exercise her/his right to private life** (Article 8 ECHR). The Court first explicitly addressed this issue in the 1997 *Karashev* judgment, pointing out that '[...] the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual.'²⁴ Most of the subsequent judgments that evoked the link between nationality and the right to private life concerned cases of stateless persons, whose access to nationality was denied (typically as a result of state succession).²⁵

The Court went further in its 2011 milestone judgment in the *Genovese* case, when it pointed out that

[...] the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.²⁶

Mr. Ben Alexander Genovese was neither stateless, nor threatened with expulsion, but as a child born out of wedlock to parents of different nationalities he was adversely affected by discriminatory nationality laws in Malta, which denied him access to the country's nationality by birth. By ruling that this form of discrimination constitutes a breach of Article 14 of the ECHR (non-discrimination) in conjunction with Article 8 (right to private life), and by evoking the concept of **social identity** in the reasoning, the Court lowered its previous threshold, **opening avenues for a more extensive interpretation of the link between the right to private life and nationality**, even in cases not resulting in statelessness. It is particularly interesting that the Court established a violation of Article 14 in conjunction with Article 8, *without* finding a violation of Article 8 *per se*, concluding that the denial of nationality in this particular case was not such as to constitute a violation of the right to private life, in itself (the child as an EU citizen had ample residential and free movement rights in Malta, even without acquiring Maltese nationality at birth). This judgment therefore **emphasises the particular importance of the ECHR's non-discrimination provision in relation to nationality matters**.

The Court confirmed its line taken in *Genovese* in the 2014 *Mennesson* judgment.²⁷ This case concerned the two children of a French couple, born via surrogacy in the United States. France, although aware that the two children were already identified in the US as the children of the Mennesson couple, it nonetheless denied them that status under French law. The ECHR considered that 'a contradiction of that nature undermines the children's identity within French society'. In addition, the Court specifically emphasised that the fact that the children were facing **'a worrying uncertainty as to the possibility of obtaining recognition of French nationality' was 'liable to have negative repercussions on the definition of their personal identity'**.²⁸ In the Court's assessment, this – together with other concrete consequences of the non-recognition of the legal parent-child relationship, such as the negative impact on inheritance rights – infringed the children's right to respect for their private life.

Considering that an arbitrary or discriminatory denial of nationality can result in the breach of Article 8 and 14 of the ECHR, Article 13 of the ECHR – **the right to an effective remedy** – is also applicable, provided that

²² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 – (hereinafter 'ECHR').

²³ This constitutes a major difference in comparison with, for instance, the inter-American regional framework. Cf. 1969 American Convention on Human Rights, Art. 20.

²⁴ *Karashev v. Finland*, Application no. 31414/96, Admissibility decision of 12 January 1999.

²⁵ See in particular *Slivenko and Others v. Latvia*, Application no. 48321/99, Admissibility decision of 12 January 1999, Para. 77; *Kuduzović v. Slovenia*, Application no. 60723/00, Admissibility decision of 17 March 2005, Para. 2; *Kurić and Others v. Slovenia*, Application no. 26828/06, Chamber Judgment of 13 July 2010; *Kurić and Others v. Slovenia*, Application no. 26828/06, Grand Chamber Judgment of 26 July 2012, Para. 336.

²⁶ *Genovese v. Malta*, Application no. 53124/09, 11 October 2011, Para. 33; see also Gerard-René de Groot, Olivier Vonk, *Non-discriminatory access to the nationality of the father protected by the ECHR – A comment on Genovese v. Malta*, EUDO Citizenship, 2012, available here: <http://bit.ly/2INuaW4>.

²⁷ *Mennesson v. France*, Application no. 65192/11, Judgment of 26 September 2014, see in particular Paras 96-102.

²⁸ Emphasis added.

the person concerned can present an ‘**arguable claim**’²⁹ of such violation. In the *Kurić* case, the Court found that the fact that the applicants did not have access to ‘adequate’ and ‘effective’ remedies to redress, at the material time, their ‘erasure’ from the list of citizens (which is a violation of Article 8 itself), constituted a breach of Article 13 as well, in conjunction with Article 8.³⁰

While the **best interest of the child principle** is not explicitly included in the ECHR, the European Court of Human Rights has repeatedly evoked this concept in relation to Article 8 of the Convention. In *Menesson*, the Court held that it was **seriously questionable whether the non-recognition of a legal parent-child relationship (which also impacted the children’s nationality³¹) was compatible with the best interest** of the children concerned.³² Beyond this concrete reference, the following relevant principles emerge from the review of the Court’s judgments that are not necessarily related to nationality and/or the right to respect for private life:³³

- » In all decisions concerning children, their best interests must be **paramount**;
- » The identification of the child’s best interests **requires to weigh a number of factors in the balance**, which may vary depending on the circumstances of the case in question, and there is no exhaustive list of such factors;
- » The best interests of the child, depending on their nature and seriousness, **may override those of the parent(s)**;
- » It is in the child’s best interests **to ensure her/his development in a safe and secure environment**.

III. EUROPEAN UNION LAW: APPLICABILITY AND RELEVANT STANDARDS

EU Member States are **not bound by concrete, technical EU law standards** that would regulate or set a clear framework for domestic nationality legislation. At the same time, certain aspects of EU Law are applicable regarding a States obligation to avoid statelessness at birth.³⁴

THE ‘DUE REGARD TO COMMUNITY LAW’ REFERENCE IN CJEU JURISPRUDENCE

The **Court of Justice of the EU** (hereinafter ‘CJEU’) has repeatedly confirmed in its jurisprudence that while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, when doing so, they must have ‘**due regard to Community law**’.³⁵ If nationality-related procedures could not fall under the scope of EU law (at least under certain circumstances), these repeated references would not make sense, thus raising serious concerns with regard to the proper application of the subsidiarity principle, as defined by the EU Treaty.³⁶ Based on these judgments we can conclude that, **in general terms, EU law is relevant to procedures related to the acquisition of nationality, and therefore to the procedures aiming at preventing statelessness at birth by conferring an EU Member State’s nationality to a child born in the EU**. CJEU jurisprudence is yet relatively silent on which actual standards are applicable in these cases and

29 See among others *Leander v. Sweden*, Application no. 9248/81, 26 March 1987, Para. 77.

30 *Kurić and Others v. Slovenia*, Application no. 26828/06, Grand Chamber Judgment of 26 July 2012, Paras 369-372.

31 See above.

32 *Menesson v. France*, Application no. 65192/11, Judgment of 26 September 2014, Para. 99.

33 See for example: *Görgülü v. Germany*, Application no. 74969/01, 26 February 2004, Para. 43; *Krisztián Barnabás Tóth v. Hungary*, Application no. 48494/06, 12 February 2013, Para. 32; *Qama v. Albania and Italy*, Application no. 4604/09, 8 January 2013, Para. 81; *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, 6 July 2010, Paras 135-136; *Y. C. v. United Kingdom*, Application no. 4547/10, 13 March 2012, Paras 134-135; *R. and H. v. United Kingdom*, Application no. 35348/06, 31 May 2011, Paras 73-74.

34 See a partly different set of arguments for the applicability of EU law with regard to naturalisation procedures in Gábor Gyulai, *The Black Box of Nationality – The Naturalisation of Refugees and Stateless Persons in Hungary*, Hungarian Helsinki Committee, pp. 10-13, 2015, available here; <http://bit.ly/2IRPqLb>.

35 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, C-369/90, 7 July 1992, Para. 10; *Belgian State v. Fatna Mesbah*, C-179/98, 11 November 1999, Para. 29; *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, 19 October 2004, Para. 37; *Janko Rottmann v. Freistaat Bayern*, C-135/08, 2 March 2010, Para. 39

36 Treaty of the European Union, Article 5 (2) – If nationality-related procedures could not fall under the scope of EU law, the Court of Justice would not have the right to evoke standards of EU law in this respect.

how.³⁷

THE UNBREAKABLE LINK BETWEEN NATIONALITY AND EU CITIZENSHIP

EU citizenship is established by the Treaty on the Functioning of the European Union,³⁸ which also sets out the main rights attached to this status. Member States implement EU law when dealing with matters related to EU citizenship. At the same time, the only way to access this status is through acquiring the nationality of a Member State, i.e. in a procedure governed by domestic rules. The CJEU provides guidance on how to interpret and resolve this apparent contradiction. The well-established jurisprudence of the CJEU confirms that ‘implementing Union law’ equates to ‘**acting in the scope of Union law**’ (echoed also by the explanatory memorandum of the EU Charter of Fundamental Rights).³⁹ The Court found that its interpretation extends beyond the direct implementation of EU law and **includes legal actions that serve the fulfilment of EU obligations**, even if they are not directly based on EU law. For example, in the 2013 *Fransson* case, this principle was applied to Swedish proceedings for the prosecution of a tax evader (not governed by EU law), as they served the *objective* of ensuring the collection of value-added tax and the avoidance of fraud (both of which are under the scope of EU law), and thus the proper implementation of EU law.⁴⁰ The *Fransson* principle can be directly applied to the issue in focus as well: if a domestic legal proceeding (prosecution for tax evasion in *Fransson*, acquisition of nationality in our case) is **clearly linked to an objective established under EU law** (VAT collection and anti-fraud measures in *Fransson*, effective existence of EU citizenship), **the domestic procedure is to be considered to fall within the scope of EU law**.

While addressing a somewhat different scenario, the 2010 *Rottmann* judgment of the CJEU can be evoked in support of this line of thinking:

Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the **loss of the rights enjoyed by every citizen of the Union**. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.⁴¹

The *Rottmann* judgment, in explicit terms, solely deals with the *loss* of EU citizenship and the rights attached thereto – a scenario somewhat different from that of *not being able to acquire* EU citizenship. Nevertheless, those refugee children born in the EU who acquire no nationality at birth (see ‘Scenario 1’ in the next chapter) and, therefore, their country of birth must, under its international and/or domestic obligations, offer its nationality to them to prevent statelessness, are in a comparable situation. **They are entitled to the nationality of a Member State and thus to EU citizenship (either at birth *ex lege* or later through a non-discretionary procedure), which they may be denied *in practice***, if the domestic legal safeguards are insufficient (in breach of international legal standards) or not applied effectively. In these circumstances, based on a parallel with *Rottmann*, Member States may arguably be acting within the scope of EU law.⁴²

CONCRETE OBLIGATIONS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS

By virtue of Article 51 of the EU Charter, Member States are obliged to apply the rights therein when ‘implementing Union law’.⁴³ As mentioned above, the implementation of EU law can include legal actions that serve the fulfilment of EU obligations, even if they are not directly based on EU law. **The EU Charter is applicable to questions surrounding EU citizenship, and therefore, in order for states to fulfil this obligation, the acquisition of nationality.**

³⁷ A noteworthy example for a concrete standard in this respect is the obligation to observe the principle of proportionality when withdrawing nationality (which entails the loss of EU citizenship), based on the fact that nationality was obtained on deception – See: *Janko Rottmann v. Freistaat Bayern*, C-135/08, 2 March 2010, Paras 55 and 58.

³⁸ Treaty on the Functioning of the European Union, Article 20.

³⁹ Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, 14 December 2007.

⁴⁰ *Aklagaren v. Hans Åkerberg Fransson*, C-617/10, 26 February 2013, Paras 24–29.

⁴¹ *Janko Rottmann v. Freistaat Bayern*, C-135/08, 2 March 2010, Para. 56 – emphasis added.

⁴² See a similar line of arguments with regard to naturalisation procedures in Gábor Gyulai, *The Black Box of Nationality – The Naturalisation of Refugees and Stateless Persons in Hungary*, Hungarian Helsinki Committee, pp. 10–13, 2015, <http://www.refworld.org/docid/5792070a4.html>

⁴³ Charter of Fundamental Rights of the European Union, Article 51 (1).

In so far as the Charter contains rights which correspond to the rights guaranteed by the European Convention on Human Rights, **‘the meaning and scope of those rights shall be the same as those laid down by the [ECHR]’**, including its case law, not preventing the EU from providing more extensive protection.⁴⁴ Based on this rule and the relevant jurisprudence of the European Court of Human Rights three Charter provisions seem directly applicable to the acquisition of nationality at birth:⁴⁵

Right	Charter	ECHR	Explanation
Right to private life	Article 7	Article 8	The European Court of Human Rights established a clear link between the access to nationality and the person’s ability to exercise her/his right to private life. In <i>Genovese</i> , the Court ruled that the private life of an individual is a concept that embraces aspects of a person’s social identity, and that the impact of excluding a child from the acquisition of nationality at birth on her/his social identity can be such as to result in the violation of the right to private life.
Prohibition of discrimination	Article 21	Article 14	The European Court of Human Rights, on various occasions, evoked the breach of States parties’ non-discrimination obligation in conjunction with the violation of the right to private life, in nationality-related cases. In <i>Kurić</i> , the applicants’ nationality status, while in <i>Genovese</i> , the applicant’s status as a child born out of wedlock was found as a prohibited ground for differentiated treatment in certain nationality-related matters. In <i>Genovese</i> , the Court made it clear that the violation of Article 14 (in conjunction with Article 8) can be established even when the harm does not reach the threshold of violating Article 8, in itself.
Right to an effective remedy	Article 47	Article 13	In <i>Kurić</i> , the European Court of Human Rights established the breach of the right to an effective remedy in conjunction with the right to private life for the lack of an effective and timely redress against the deprivation of nationality.

Beyond these rights having an obvious parallel in the ECHR, two other Charter provisions may be evoked, too, as relevant to the issue in focus:

- » **Children’s right to the protection and care necessary for their well-being and the supremacy of the best interest principle** (Article 24): Observing the best interest provision in conjunction with Article 7 (right to private life), on the basis of the consequent jurisprudence of the European Court of Human Rights,⁴⁶ as well as considering that a child’s nationality may have a crucial impact on her/his access to the necessary protection and care mechanisms, this provision appears relevant in the context of States’ efforts to prevent statelessness at birth and properly determine all children’s nationality born on their soil.
- » **The principle of the right to good administration, including impartial, fair and properly reasoned decisions taken within a reasonable time, the right to be heard and the access to case files** (Article 41): In explicit terms, this provision only binds the bodies and institutions of the Union itself (but not the Member States). Nevertheless, the jurisprudence of the CJEU clearly made these rights applicable in any procedure by any Member State authority, provided that it acts in the scope of EU law. In the *M.M.* case,⁴⁷ the Court directly evoked Article 41 of the Charter as binding on Member States’ administrative practices, while later the same Court rejected this approach, arguing that this provision only applies to the EU itself.⁴⁸ Nevertheless, the Court still maintained in recent judgments that the right to good administration is a **general principle of EU law**, therefore has a wider scope of application than the more limitative wording of the Charter.⁴⁹ Therefore, while Article 41 of the Charter cannot be *directly* relied on in national procedures, the right to good administration, as a general principle of EU law, can. The rich jurisprudence by the EU Court of Justice that has developed and interprets this general principle served as basis for the concrete

⁴⁴ Charter of Fundamental Rights of the European Union, Article 52 (3).

⁴⁵ See earlier the full references to the cases cited in this table.

⁴⁶ Which in light of Article 52 (3) of the Charter shall guide the interpretation of the parallel provision from the Charter (in this case Article 7, the right to private life).

⁴⁷ *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012, Paras 87-88.

⁴⁸ See for example: *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, 5 November 2014, Para. 44; *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, C-249/13, 11 December 2014, Para. 32.

⁴⁹ *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, 8 May 2014, Paras 49-50; *YS v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. M.S.*, Joined cases C-141/12 and C-372/12, 17 July 2014, Para. 69.

wording of Article 41 of the Charter.⁵⁰ Based on this clear link, the concrete standards emanating from Article 41 can be relied on when interpreting the right to good administration in national procedures, even if they do not provide the direct legal grounds thereof. In conclusion, **based on the proviso that when ensuring children's access to nationality at birth, in order to avoid statelessness, Member States act in the scope of EU law,⁵¹ the right to good administration, as a general principle of EU law must be observed.**

IV. THE NATIONALITY OF REFUGEE CHILDREN – SPECIFIC CHALLENGES

As the above summary indicates, a number of concrete international legal provisions are in place to make sure that no child is born or remains stateless in the EU. Unfortunately, these rules **too often remain ineffective in practice**, for a number of reasons, for instance:

- » Several Member States have neither ratified the 1961 Convention on the Reduction of Statelessness, nor are they party to the 1997 European Convention on Nationality. These countries are not confronted with specific, detailed international standards with regard to the focus issue.
- » While there has been promising jurisprudence from the ECHR and the CJEU, these judgments are yet far from providing definitive guidance for State action with regard to the prevention of statelessness at birth.
- » **Safeguards in domestic legislation are often incomplete and/or not properly applied in practice.** The European Network on Statelessness found 13 EU Member States in 2015 that only provided partial safeguards against statelessness at birth, while two Member States had no or only minimal safeguards in their law. The same study found 11 Member States in breach of their relevant international obligations.⁵²
- » Practices related to the establishment of nationality at birth in case of children born to non-nationals are inconsistent and **lack any sort of harmonisation** throughout the Union. In certain Member States (such as Italy or Romania), state authorities automatically attribute the parents' nationality (or the nationality indicated by the parents) to the baby on birth certificates. Birth certificates often serve as the primary source of data for other official documents issued later, this practice may give the false impression that the nationality status of the child is properly determined and that statelessness was effectively avoided. In other countries (like Hungary), children born to non-nationals are automatically registered as of 'unknown nationality'. This may be a legally correct statement at birth, but it can easily become a source of hardship, legal limbo and human rights violations if it persists for several years.⁵³ In other states (like France, the United Kingdom or the Czech Republic), no information concerning nationality is entered on the birth certificate. What is often missing, under all these scenarios, is **the proper and timely determination of what the child's actual nationality is**, which process could also allow for a conclusion of statelessness, and thus the application of the safeguards applicable for 'otherwise stateless' children, if the conditions are met.

These factors explain why child statelessness is still prevalent in the EU. In this context, **children born to refugees⁵⁴ should be considered particularly vulnerable and exposed to a risk of statelessness.** Children born to migrant parents can usually be registered with the consular authorities of the parents' country of nationality, and thus – if the *jus sanguinis* rule applies – can both acquire the parents' nationality and a documentary proof thereof. At the same time, **refugees and other forced migrants cannot, as a general rule, contact the authorities of their country of origin.** This would put them at risk of persecution, and could even cost them their refugee status, as host countries often see such an act as a proof of an unfounded protection claim. As a consequence, in the absence of a general *jus soli* provision in the host country (as it is the case in all EU Member States) **refugee children's nationality may often remain uncertain.** Two scenarios need to be distinguished in this respect:

50 Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, 14 December 2007, Explanation on Article 41 (including a selection of relevant CJEU judgments).

51 See various arguments supporting this interpretation in this section.

52 Only partial safeguard: Austria, Croatia, the Czech Republic, Denmark, Estonia, Germany, Hungary, Latvia, Lithuania, the Netherlands, Poland, Slovenia and Sweden; No or minimal safeguard: Cyprus and Romania; Member States in breach of their international obligations: Austria, Croatia, the Czech Republic, Denmark, Germany, Hungary, Latvia, Lithuania, the Netherlands, Romania and Sweden – European Network on Statelessness, *No Child Should be Stateless*, September 2015, <http://www.refworld.org/docid/5729b6d54.html>.

53 The UNHCR suggests that no child should live with an undetermined nationality for more than 5 years – UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness* (2012), Para. 22, <http://www.refworld.org/docid/50d460c72.html>.

54 The term 'refugee' for the purposes of this publication is used in a broader interpretation and includes other beneficiaries of international protection in a refugee-like situation in the EU, such as beneficiaries of a subsidiary protection status.

Scenario 1	The refugee parents cannot pass on their nationality to their child, because: <ul style="list-style-type: none"> » They are stateless (e.g. stateless Syrian Kurds, stateless Palestinians, etc.); » The mother cannot pass on her nationality to her child due to sex discrimination in the country of origin (she is Syrian, Lebanese, Somali, Sudanese or Iranian, for example) <i>and</i> the father is stateless or unknown; » Under the law of the country of origin, the acquisition of nationality at birth in case of children born to nationals abroad is not automatic, in order for the child to acquire the nationality of her/his parents, she/he first needs to be registered with the authorities of the country of origin, which is impossible in the case of refugees.¹ 	The child is born stateless. ²
Scenario 2	The refugee parents (or the refugee father in case of sex discrimination in the nationality law of the country of origin) pass on their nationality to their child <i>ipso facto</i> . Under the law of the country of origin, the child becomes a national as a matter of legal automatism, this not being conditioned on registration with consular authorities.	The child, <i>in principle</i> , acquires a nationality at birth.

1. This is atypical though among the main relevant countries of origin of refugees in the EU context.
2. Cf. UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, Para. 27, <http://www.refworld.org/docid/50d460c72.html>

Under the **first scenario**, the legal situation is clear: these children do not acquire their parents' nationality and will therefore **fall under the scope of the legal safeguards for 'otherwise stateless' children**. In these cases, problems may arise from:

- » Improper, or improperly applied legal safeguards for 'otherwise stateless' children;
- » The lack of a proper statelessness determination mechanism in the Member State, which will leave the parents' statelessness unidentified (and therefore the competent authorities may not see the need to activate the safeguards for the 'otherwise stateless' child);
- » The lack of awareness about the wide-spread discrimination against women that exists in nationality laws, especially in the Middle-East and parts of Africa. Authorities responsible for civil registration may not have the necessary knowledge about the exact rules applicable in all relevant countries of origins, and may wrongly attribute the mother's nationality to a refugee child without checking whether this is actually possible under the law of the country of origin.

At the same time, most refugee children in the EU fall under the **second scenario**, which – legally speaking – is the more challenging one, posing a number of **serious dilemmas and practical difficulties, which are far from being settled** (or even properly addressed) in international doctrine, jurisprudence or literature.

The majority of refugee children born in the EU will, in principle, acquire the nationality of their parents at birth. However, as they are not able to register with the authorities of the country of origin, they **do not obtain any proof or official recognition of their *ipso facto* acquired nationality**, at least for some time. Should there be a realistic prospect of voluntary return in the near future, this may only be a temporary gap, as the child's nationality can be registered back in the country of origin before she/he reaches school age, for instance. But the conflicts that are behind the majority of refugee arrivals in Europe – such as those of Afghanistan, Syria, Iraq or Somalia – are extremely protracted, similarly to the endurance of certain dictatorial regimes that force many to flee towards the EU. The impossibility to register the refugee child's nationality and obtain documentary proof thereof for many years or even decades, may result in the child's nationality being **reduced to a mere legal fiction**, which has little in common with how the International Court of Justice defined nationality ('a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties').⁵⁵ A 12-year-old Somali refugee child living in Europe, who has never been to Somalia, and has neither a chance to be registered as a Somali national by the competent Somali authority, nor she/he has a realistic perspective to ever return there to live, hardly has any social attachment or a genuine connection of existence, with reciprocal rights, with her parents' once homeland.

Depending on the host country's practices, such a refugee child may also be registered and remain – in the perception of the host country – a person of undetermined, unknown or unclear nationality. In case of protracted refugee situations, the child has no realistic perspective of clarifying her/his nationality status with the authorities of the country of origin; therefore, she/he will **remain of unknown nationality for several years or decades** in

⁵⁵ *Nottebohm case (Liechtenstein v. Guatemala)* (1955) ICJ.

all her/his official documents.⁵⁶ Under the second scenario (see above) two main outcomes are possible:

	Scenario 2, outcome A	Scenario 2, outcome B
Perception of the parents' country of nationality regarding the refugee child's nationality	As the child cannot be registered with the authorities of the parents' country of nationality, that country will have no information about the existence of the child, the child will not be entered into population registries, etc. ³	
Perception of the host country regarding the refugee child's nationality	<p>The host country authorities will automatically register the child with the parents' nationality.</p> <p>All authorities will consider that the child has a nationality, and therefore:</p> <ul style="list-style-type: none"> » no efforts will be made later on to clarify whether this nationality status is indeed valid; » no best interest assessment will be conducted; and consequently » no safeguards against statelessness will be activated. 	<p>The host country authorities will register the child as of unknown nationality.</p> <p>This condition may persist for several years or decades without any authority willing and having the competence to determine the real nationality or the statelessness of the child, plus no best interest determination will be conducted.</p> <p>In a more positive scenario, state authorities may perceive this as problematic in the long run, and initiate a nationality/statelessness (and best interest) determination procedure later.</p>

3. Millions of (non-refugee) children face a similar situation in the world, to the extent that their birth is not registered with the country of nationality and/or habitual residence, and/or they do not hold any official proof of their nationality. Most of them will still be automatically 'presumed' to be a national in most relevant situations (e.g. when attending school, accessing health care or other services, etc.), even if they cannot show particular papers proving this link. What makes refugee children's situation different in this respect is that they were born and live – often permanently – outside their country of nationality, with which they cannot establish any official contact. Under these circumstances it is much less likely that they will be automatically 'presumed' to be a national by the authorities of their country of nationality, lacking the necessary documentary evidence.

From a traditional nationality law perspective these factors are not really relevant; the nationality bond exists due to the legal automatism foreseen by the law of the country of origin. Looking at this issue from a **statelessness and best interest perspective** one may come to a different conclusion. International law defines a stateless person as someone 'who is not considered as a national by any State under the operation of its law'.⁵⁷ The definition does not merely say that a stateless person is not a national of any state under its law. 'Consider' is a transitive verb, referring to an action through which a state attributes a certain quality to a person. Also, the UNHCR clearly states in its relevant guidance that 'Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State *applies* its nationality laws *in an individual's case in practice*'.⁵⁸ Can a State 'consider' a person in a certain manner, can it apply its law in practice in a way that is adapted to the individual circumstances of the person, if it is not aware of this person's existence? This indicates a significant **discrepancy between the traditional approach towards nationality and the more 'practice and protection' oriented interpretation of the 1954 Statelessness Convention and UNHCR guidance**. The **best interest principle** (which binds all EU Member States both under the EU Charter when implementing EU law and the 1989 Convention on the Rights of the Child) should be evoked in support of the latter approach (see more details in the following section). In any case, further development in doctrine, jurisprudence and literature seems indispensable to properly clarify this issue, for instance by creating concrete benchmarks and indicators.

V. THE CHARTER AS A TOOL TO ENSURE THAT ALL REFUGEE CHILDREN ACQUIRE A NATIONALITY

WHERE THE CHARTER PROVIDES A CLEAR SOLUTION

With regard to the previously presented **scenario 1** (where the 'otherwise statelessness' of the child can be clearly established at birth), the majority of EU Member States **have explicit legal safeguards** in their

⁵⁶ A research study documented this problem in Hungary, particularly focusing on refugees: Gábor Gyulai, *Nationality Unknown? An Overview of the Safeguards and Gaps Related to the Prevention of Statelessness at Birth in Hungary*, Hungarian Helsinki Committee, January 2014, pp. 14-18, <http://www.refworld.org/docid/5310640b4.html>

⁵⁷ 1954 Convention relating to the Status of Stateless Persons, Article 1 (1).

⁵⁸ UNHCR, *Handbook on Protection of Stateless Persons* (2014), Para. 23, <http://www.refworld.org/docid/53b676aa4.html> – emphases added.

legislation against statelessness that are applicable to these cases, either directly at birth or through a non-discretionary procedure at a later stage. Nevertheless, these safeguards are **not sufficiently inclusive in all national frameworks**, for example because of limitations based on the parents' residence status or unduly limited timeframes.⁵⁹ The legal conclusion in these cases is clear:

Without the effective application of proper legal safeguards these refugee children are born and remain stateless.

Under the 1989 Convention on the Rights of the Child (ratified by all EU Member States), the 1961 Convention on the Reduction of Statelessness and the 1997 European Convention on Nationality and, even in several Member States not parties to the latter two, under domestic legislative rules Member States shall avoid statelessness in these cases by granting their nationality – and thus EU citizenship – to the 'otherwise stateless' refugee child at birth or within a reasonable time, giving primary consideration to the child's best interest.

If a Member State fails to do so:

In light of the jurisprudence of the European Court of Human Rights:

- » It may violate the child's right to private life, as protected in the ECHR;
- » If the non-application of safeguards is based on non-justifiable discriminatory grounds (race, religion, origin, residence status, domicile, parents' marital status, etc.), the Member State may also violate its equal treatment obligation under the ECHR, in conjunction with the right to private life;
- » If no proper appeal/judicial review is guaranteed against such treatment, the Member State may also violate its effective remedy obligation under the ECHR, in conjunction with the right to private life.

It wrongfully denies EU citizenship to a child who is entitled to acquire it, therefore acting 'in the scope of EU law'.

- » Looking at the parallel provisions in the ECHR and the EU Charter of Fundamental Rights, this may constitute the violation of the right to private life, to equal treatment and effective (in this case judicial) remedy as stipulated in the Charter;
- » The Member State can be held responsible for the breach of the right to good administration, as a general principle of EU law;
- » The Member State will violate its obligation to give primary consideration to child's best interest as defined by the Charter.

In order to challenge such practices, the following articles of the Charter apply and can be relied upon:

- » Article 7: Right to private life
- » Article 21: Non-discrimination
- » Article 47: Effective remedy
- » Article 24: Children's right to protection and best interest principle
- » Article 41: Right to good administration (indirectly, in order to interpret this general EU law principle)

WHERE MORE GUIDANCE IS NEEDED

In case of **scenario 2** (where the refugee child *ipso facto* acquires her/his parent's nationality at birth), the picture is less clear, since the children in question, in principle, are not born stateless. Therefore, the above line of arguments only become applicable if we can conclude that this acquisition of nationality is merely theoretical, and the child is, *in reality*, not considered as a national by any State under the operation of its law.⁶⁰ This is a complex analysis, for which currently **no authoritative guidance** exists. In any event, the application of 'otherwise stateless' safeguards **should not be automatic** in these cases. UNHCR alerts in its guidance that

[...] where the child of a refugee has acquired the nationality of the State of origin of the parents at birth, it is not desirable for host countries to provide for an automatic grant of nationality under Article 1 (1) of the 1961 Convention at birth, especially in cases where dual nationality is not allowed in one or both States. Rather, States are advised that refugee children and their parents be given the possibility to decide for themselves, whether or not these children acquire the nationality of the State of birth, taking into account any plans they may have for future durable solutions (e.g. voluntary repatriation to

⁵⁹ See more information in: European Network on Statelessness, *No Child Should be Stateless*, September 2015, <http://www.refworld.org/docid/5729b6d54.html> – Note that, interestingly, some states that offer most inclusive safety net against statelessness at birth (such as France, Italy or Spain) have not ratified either of the relevant two conventions.

⁶⁰ Cf. the definition of a stateless person under the 1954 Convention relating to the Status of Stateless Persons.

the State of origin).⁶¹

In this assessment, states should make sure that:

- » The **best interest of the child** is given a primary consideration, including the primacy of the child's right to safe and healthy development;⁶²
- » Nationality is not understood as a purely legal-technical link, but as a **key aspect of one's social identity** (with a major impact on one's ability to enjoy her/his right to private life), in light of the consequent jurisprudence of the European Court of Human Rights and the definition of nationality provided by the International Court of Justice in the *Nottebohm* case;⁶³
- » The determination of the refugee child's nationality will be conducted **with due diligence and in a reasonable time frame**, leaving the child with an unknown or 'under determination' nationality for as little time as possible (UNHCR recommends, evoking the 1961 Convention, that this process should never exceed 5 years);⁶⁴
- » The authority in charge of this determination process has the relevant **expertise, information, capacity and resources** for carrying out this task to a high professional quality;
- » Each case is examined **in an individualised manner**, considering a number of factors, such as:
 - The endurance of the circumstances that forced the parents to leave their country of origin and any prospective of return in the foreseeable future;
 - The time the parents already spent in the host country;
 - The parents' will;
 - The state or non-state character of the agent behind the persecution that forced the parents to leave their home (i.e. in case of a clearly non-state agent of persecution there may be some opportunities to register the child's birth with the consular authorities of the country of origin without exposing the family to a risk of persecution or losing their status, but this possibility should be examined in an extremely careful manner and only on an exceptional basis);
 - Whether or not the two States in question allow for multiple nationality;
 - State failure in the country of origin;
 - Experiences with similar cases (what happened with refugee families from the same country of origin in a comparable situation); etc.

For instance, the child of two refugee parents who fled from political persecution from a failed state with unresolved armed conflicts for decades, and who have been settled in the host country for several years with no intention and any foreseeable possibility of voluntary return, the child's *ipso facto* 'inherited' nationality may easily be reduced to a legal fiction of which no official evidence can ever be obtained, rather than 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.⁶⁵ In such a situation, it is likely to be in the child's best interest – and thus serve her/his safe and healthy development – to be identified as 'otherwise stateless' (not *considered* as a national by the parents country of origin under the *operation* of its law⁶⁶) and thus acquire the nationality of the host country soon after birth, following a careful assessment of her/his individual case. In such cases, the line of arguments applicable in the first (previous) scenario can be invoked in support.

While the EU Charter may impose different obligations depending on the two presented scenarios, it can, in any case, significantly support efforts to prevent statelessness among refugee children and the violation of their right to private life, as well as to ensure the primary consideration of their best interest in connection with this long-overlooked issue.

61 UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, Para. 28, <http://www.refworld.org/docid/50d460c72.html>

62 See Section I of this paper.

63 See detailed references earlier in this paper.

64 UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, Para. 22, <http://www.refworld.org/docid/50d460c72.html>

65 Cf. the previously cited definition of nationality provided by the International Court of Justice in the *Nottebohm* case.

66 See what has been said about the 'stateless person' definition of the 1954 Convention in Section IV of this paper.

