

JUDIT TÓTH*

The Social Rights of Stateless Persons in Hungary

I. Introduction

Everyone has the right to a nationality. This right was already spelled out in the Universal Declaration of Human Rights (Art.15), in the UN Covenant on Civil and Political Rights (Art.24) and then repeated in several specialised treaties including the European Convention on Nationality (1997). This also means that no one should be arbitrarily deprived of his or her nationality or denied the right to change nationality. The right to a nationality has often been described as the right to have rights in fact. This is because the attachment to a state entitles citizens to enjoy human rights in a more concrete and effective way than with reference to international human rights system alone. In theory, yet nationality is not a pre-condition to enjoying human rights thus stateless persons are rights holders under international human rights instruments. In practice the social rights are also interpreted and implemented by national authorities. Without a picture in each detail of national legal practice a general overview of regulation is given from Hungary.

This analysis covers on the national law concerning stateless persons' rights that was applicable in 2015. It means that one can see a *fragmented picture* for at least two reasons: the municipal decrees have to be neglected although the accession of social benefits and supports would be relevant for local resident including stateless people; the speed of law-making excludes an academic time-frame research nowadays. Moreover, the legal position of stateless persons is derivative to migrants and non-nationals' rights so an isolated research of measures and regulation promises limited results.

Hungary is a party state in all important agreements that intend to prevent statelessness and to provide protection for stateless persons, such as the UN Convention on the Reduction of Statelessness (1961), the European Convention on Nationality (1997), the UN Convention on the Legal Status of Stateless Persons (1954), and the European Convention on the Avoidance of Statelessness in relation to State Succession (2006).¹ The Recommendation No.R.(99) 18 of the Committee of Ministers of the Council of Europe on the avoidance and the reduction of statelessness (1999) and the UN General Assembly Resolution 50/152 (9 February 1996) on invitation of state accession to the UN Convention (1954) also has influenced legislation because those textually and some

* University of Szeged

¹ Published in the Act III of 2002, Act II of 2002, Act XCVIII of 2008, Act XV of 2009.

principles are referred in the Explanatory Report to the Bill (Act I of 2007 on Free Movement of Union Citizens; Act II of 2002 on ratification of the UN Convention).

The issue of statelessness was upgraded in preparatory work to the European integration looking at the *acquis communautaire* but without recognition that genuine protection of stateless persons would require systematic efforts in impact assessment, administrative, budgetary measures and training of law practitioners. Despite of the supports of the UNHCR² the *formal acceptance and strict interpretation of legal obligations* has become universal in Hungary³. It proves that Hungary made *reservations* to Art 23 (Public relief), Art 24 (Labour regulation and social security) and Art 28 (Travel documents) in UN Convention on the Legal Status of Stateless Persons (1954). Accordingly, national treatment in Art 23-24 will be implemented only for permanent resident stateless persons because it is in harmony with the principle that stateless persons are non-national, their legal position is subjected to alien law (Act on entry and residence of foreign persons) requiring lawful and stable life (permanent residence authorisation) while *sui generis* rights, such as accession to travel document (Art.28) will be available for lawfully residing stateless persons. Moreover, the right of entry is not ensured in the UN Convention for stateless persons, consequently their legalisation in Hungary depends on whether they meet the requirements of alien law⁴. Not surprisingly, when procedure of recognition of statelessness was regulated, only lawfully entered and resided foreigners could access to the whole protection (in Act II of 2007).⁵

The *outlaw status of stateless persons*⁶ has been criticized⁷ claiming accession to the recognition procedure for all stateless applicants in harmony with UNHCR's interpretation of the Convention (1954) without the condition of their "lawful stay". Moreover, the applicants shall be protected against removal and detention during the procedure providing a temporary status. It would include a proper identity document, the right to self-employment, to limited wage-earning employment, freedom of movement and assistance to meet basic needs as for asylum-seekers because these may reduce pressure on resources in Hungary and contribute to self-sufficiency and dignity of the applicants.⁸

The *requirement of "lawful stay" was ceased* from 30 September 2015 due to a constitutional complain of a refused stateless applicant. The Constitutional Court put an end to nearly eight years of advocacy struggle. Its judgment⁹ concludes that the lawful stay requirement is unconstitutional. Moreover, this requirement is not merely a

² For instance, the UNHCR translated and distributed among the decision-makers the booklet in 2007 (UNHCR and IPU: *Nationality and Statelessness. A handbook for parliamentarians*, Geneva, 2005).

³ TÓTH, JUDIT: *Migration law in Hungary*. Monograph in the *International Encyclopaedia of Laws* (ser.ed: DIRK VANHEULE), Kluwer Law International, 2012, The Netherlands p. 348.

⁴ See in the Proposal No. H/4808 from the Minister of the Interior, July 2001 to the Parliamentary Decision.

⁵ LŐRINCZ ARANKA: *A hontalan státus megállapítására irányuló eljárás nemzetközi és magyar aspektusai. [The international and national legal aspects of the statelessness recognition procedure]* *Közjogi Szemle*, 4/2014.: pp. 44–52.

⁶ TÓTH, JUDIT: *Státuszjogok*. Kisebbségkutatás Könyvek, Lucidus Kiadó, Budapest, 2004. pp. 1–328.

⁷ Hungarian Helsinki Committee, European Network on Statelessness and Institute on Statelessness and Inclusion Joint Submission to the Human Rights Council at the 25th Session of the Universal Periodic Review (21st September 2015).

⁸ See UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014), para. 69, paras. 144–146 available at <http://www.refworld.org/docid/53b676aa4.html>.

⁹ Constitutional Court Decision No.6 of 2015, 25 February.

procedural rule (as argued by the OIN), but a material one that modifies the definition of a stateless person as compared to the one included in Article 1 of the Convention (1954) an article for which no reservations or modifications are allowed. However, the rights of stateless persons are not fully guaranteed (e.g. the non-penalization closure for unlawfully entered or residing applicant is absent or the social and medical assistance of claimant does not exist).¹⁰ These facts together may explain why the annual number of applicants has remained 10-15 for years but the burden of proof is fully on the applicants also in future while the level of probability of arguments as well as legal practice of relevant states would be respected¹¹.

II. Components of the status of stateless persons in Hungary

The legal status of stateless persons can be divided at least into *four aspects on the grounds of the legal provisions concerning statelessness*:

- (a) the sources of regulation: international (including bilateral) treaties and soft-law, EU law and domestic rules;
- (b) the aims of the regulation: prevention of statelessness (addressing to the international community and party states of treaties), acquisition and loss of legal status of recognition, changes of legal status (becoming other status of migrant or acquisition of nationality) and rights of stateless persons (general human rights, fundamental rights, sui generis rights);
- (c) the subjects of the regulation: de facto or de jure stateless persons;
- (d) or relationship to another legal status or the level of protection: certain rights of stateless persons as to rights of all/preferential foreigners, as to the rights of nationals, or persons with specific rights.

Describing the main character of the status of stateless persons in the Hungarian law¹² it can be said that their rights are regulated at least in *161 national (non-municipal) legal sources* including the publication of international agreements (57 percent of these applicable legal sources) inserting them into the dualistic legal system. The rate of legislative sources was extremely high (83 percent) comparing to the governmental rules. It means that the most important rights cannot be demolished by the public administration and administrative provisions.

¹⁰ GÁBOR GYULAI, Refugee Program Coordinator at the Hungarian Helsinki Committee <http://www.statelessness.eu/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness-determination#sthash.oN0J6lbQ.dpuf>

¹¹ UNHCR, Guidelines on Statelessness No. 1 and No 2: Procedures for Determining Whether an Individual Is a Stateless Person, Geneva, 2012.

¹² According to expert estimation the total number of applicable domestic, national legal sources is 10 000 not including the municipal decrees that add up to 70 000 in force.

The distribution of the *regulated topics* is more diverse than the traditional categories of the Convention (1954),¹³ they are as follows¹⁴:

- (a) rules on alien policing and removal (24 percent),
- (b) on social security, benefits (17 percent),
- (c) on registration and data process (12 percent),
- (d) on tax and fees (10 percent),
- (e) on penalization (9 percent),
- (f) on civil and employment law (7 percent),
- (g) on child's rights and education (5 percent),
- (h) sui generis rights (9 percent),
- (i) other protection (7 percent).

As a member state of the EU the *acquis communautaire* on statelessness and protection of stateless persons shall be complied. Since 1999 it has gradually increasing indirectly through the rules or preferences for third country nationals¹⁵ (e.g. in readmission agreements, visa-free provisions) or extending the rights of union citizens on them, for instance in social security. The implementation of *acquis* in the Hungarian law has been mainly formal without development of proper human, administrative and physical infrastructure.

Analysing the *legal subjects in the Hungarian law* we can find the following categories without clean principles:

- (a) certain rights are applicable for de facto stateless persons: national provisions refer on the absence of citizenship or the mere fact of statelessness. These mainly file-keeping rules provide equal treatment for them (for instance, in register of motor vehicle the data of operators¹⁶). The provisions of anti-discrimination law should cover on protection of stateless if they were discriminated for absence of nationality for a ground of "belonging to other social group".¹⁷
- (b) other rights are available for stateless persons with authorised permanent residence in Hungary: for instance, mandatory readmission or transfer of non-nationals shall be implemented on persons that were illegally moved from Hungary in possession of this permit.¹⁸

¹³ Art. 12–32 of the 1954 Convention divides these rights into the following categories: juridical status (including personal status, property rights, right of association, and access to courts); gainful employment (including wage-earning employment, self-employment, and access to the liberal professions); welfare (including rationing, housing, public education, public relief, labour legislation, and social security); and administrative measures (including administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, expulsion, and naturalization).

¹⁴ TÓTH JUDIT: *Hontalanul Magyarországon. [Legal status of stateless persons in Hungary]* Conference paper on BCE-UNHCR Conference, . Conference paper (21 May 2015, Budapest).

¹⁵ Art. 67(2) in the TFEU defines that stateless persons shall be considered third country nationals in accordance with the definition of the Convention (1954).

¹⁶ Government Decree No.304 of 2009, Dec 22, Section 3.

¹⁷ Act CXXV of 2003 that considers itself as an implementation rule of Dir.2011/95/EU providing protection for stateless persons, too.

¹⁸ See e.g. the bilateral readmission agreement with Ukraine (Act XXIV of 1995, Art.4,7 and 8).

- (c) a few rights are provided for stateless persons with habitual or registered residence in Hungary (for instance, right to state compensation for a damage caused by crime, domicile in Hungary is required to apply the prevention of dual taxation or to apply the right to valuable cultural heritage).¹⁹
- (d) many rights are ensured for de jure stateless persons in possession of recognition by the OIN (for instance, right to become self-employed, entrepreneur or to be readmitted in Hungary removed from other state).²⁰
- (e) majority of social rights are available for recognised (de jure) stateless persons if they have registered residence/residing address in Hungary;
- (f) some rights are ensured for either living, working or settled stateless persons in Hungary (for instance, persons subjected to the protection of victims in organised crime or recognition of voluntary activities by qualified workers in health care),²¹
- (g) the applicant for recognition of stateless (de jure) status has certain rights, for instance s/he is eligible to free legal aid in this administrative procedure.²²
- (h) stateless persons living abroad would be subjects (for instance, if they belong to the Hungarian minority living across the borders may access to certain benefits, or judicial cooperation covers on charges of stateless persons regardless their place of living).²³
- (i) There is a further level of stateless persons' status in Hungary because they are excluded from certain rights as prerogatives of nationals (for instance in the public sector their employment or data process is prohibited).²⁴

III. Specificities in social rights

In the angel of rights and subjects of law we can define only four different positions in the social rights of stateless persons:

- (a) Applicants for recognition are eligible to free legal assistance and contact with the representative of the UNHCR while the recognition procedure is free of charge. In a tight meaning social supports and benefits (e.g. accommodation, allowances) are not available for them as needless because the recently accelerated procedure shall be finished within 150 days issuing a final decision after remedy.²⁵

¹⁹ Act CXXXV of 2005 (Art.1), Act XIV of 2012 (Art.4 and 25 in the Treaty with Georgia), Law-Decree No. 2 of 1979 (Art. 4).

²⁰ Act CXV of 2009 (Art.3 requires not only recognition but clean criminal record and full capacity of stateless person), Act XXXV of 2003 (Art. 2 in the Treaty with Croatia).

²¹ Act LXXXV of 2001 (Art. 29 in that stateless person can access to a new identity), Government Decree (Section 1 and 21 on recognition of qualifications in health care).

²² Act LXXX of 2003 (Art. 5 provides free legal advocacy during the procedure while Art.4 allows other legal advice for him/her after recognition).

²³ Act LXII of 2001 (Art. 21 allows to access to cultural/minority benefits in possession of ethnic Hungarian card), Law-Decree No.27 of 1976 (Art IV on criminal charge against apartheid felonies).

²⁴ Act CXCIX of 2011 (Art. 39 on governmental official and Art 207 on file keeper in governmental administration), Act XXXIII of 1992 (Art. 20 on public servants), Act CXVII of 1999 and Act CXVI of 1999 (Art III on exclusion from NATO staff), Art XIX of 1999 (Art. 3.1. transferring qualified defence information from UK for stateless persons is prohibited).

²⁵ Act II of 2007 on entry and residence of third country nationals modified in 2015 (Art. 76–81).

- (b) Recognised (de jure) stateless persons are eligible to the majority of Convention (1954) rights, in particular the Art 23 and 24 because the declaration made to the ratification was withdrawn in 2012. Due to this fact national treatment is guaranteed for lawfully residing (recognised) stateless persons in the public relief and accession to social security connecting to employment.²⁶ However, the lawful staying is unstable due to the short expiry of the humanitarian residence, passport and employment authorisation.
- (c) Further social rights determined in sectoral agreements are available for mixture of persons staying or registered in Hungary as de facto/de jure statelessness (for instance stateless persons in ambit of social security treaties with USA or Switzerland, or the European Social Charter).²⁷
- (d) Finally, the standard social rights as defined in other sectoral national rules are applicable only for recognised resident stateless persons with valid Hungarian documents (for instance, support to housing, family care, non-contributory social benefits, allowance for disabled persons, child care).²⁸ These can be considered as implementation provisions of the non-self-executive rules of the Convention (1954).

Summing up, the recognised (de jure) stateless persons can enjoy the most relevant social rights as nationals if they are habitual resident in Hungary although their residence/employment authorisation is valid for one or two years maximum. In fact the government has intended to provide accession to social benefits equally with nationals if stateless persons have had a *permanent residence* (long-term migrant) status that includes the national treatment. The restrictive approach was packed in the condition of *domicile* (lawful and regular living place) in Hungary as it was declared to the Art.23-24 of the Convention (1954). The Explanatory Report to the Bill openly said: “Republic of Hungary these rights in Art.2-324 will provide for stateless persons with habitual residence and permanent staying in Hungary, it covers on stateless persons with settlement (immigration) authorisation.”²⁹ While the stateless status has been a competitor of the long-term migrant status including the national treatment in social rights and labour law, the long-term migrant status hardly can be accessed for (poor) stateless persons.

This contradiction was also targeted urging to stop the requirement of *domicile* of recognised stateless persons on access to the labour market and other socio-economic rights. Moreover, these obligations under the Convention (1954) are further strengthened and shaped by Hungary’s obligations under the International Covenant on Economic, Social and Cultural Rights. Recognised stateless persons have only limited access to the labour market, which imposes a substantial obstacle to the successful employment and integration

²⁶ Act LIII of 2012 on withdrawal of the reservation to the Convention (1954).

²⁷ Act XXIX of 2015 (Art. 1 on the personal scope of the bilateral agreements with USA), Act VI of 2009 (Appendix 3 of the Modified European Social Charter provides the most preferential treatment for recognised, lawfully residing stateless persons).

²⁸ Government Decree No. 256 of 201, Dec 6 (Section 5), Act LXXXI of 1998 (Art.2), Act III of 1993 (Art.3, 54), Government Decree No. 63 of 2006, March 27 (Section 1), Act XXVI of 1998 (Art. 23/F), Government Decree No. 102 of 2011, June 29 (Section 1), Act XXXI of 1997 (Art. 4, 139).

²⁹ Submission from the Government (Minister of the Interior) to the Parliament, H/4804 (July 2001) Resolution on accession to the Convention (1954) on Stateless Persons’ Status, Point 3.

of stateless persons. Stateless persons must obtain a work permit prior to their employment, but the procedures and conditions to receive such permits are particularly burdensome. First, a work permit can only be issued to stateless persons if there is no suitable Hungarian or EEA-citizen applicant for the same post³⁰. Moreover, the validity of a work permit cannot exceed the validity of the residence permit, which is now three years at first issuance, but has to be renewed on a yearly basis once the first three years have expired.³¹

The requirement of *lawfully staying* of the stateless persons is compatible to the Art.23-24 of the Convention (1954) but the *habitual residence or domicile* means a stable, on-going living for more than three years. This condition can be demanded only to the protection of artistic rights, intellectual property (Article 14) and rights pertaining to access to courts, including legal assistance and assistance in posting bond or paying security for legal costs (Article 16).³² In this way the requirement of permanent, habitual staying in Hungary was an intentional restriction in the Convention rights while other social rights are not available as a side effect of restrictions in employment. For example, stateless persons are excluded from public health care services (such as pre-natal and maternity care) because they are ineligible to apply for a domicile while they are usually lack access to gainful employment that would allow them to become eligible for general public health insurance included in social security services or to pay for private services. Without employment, they can only benefit from basic public health care services, the scope of which is very limited³³ as the critics explained.³⁴

IV. Conclusions

Although Hungary has been party state of all relevant international treaties concerning stateless persons they have had a fragile or a hardly visible legal status here. Although there is a specific procedure of stateless recognition the Office of Immigration and Nationality is not responsible for protection of the applicants' and recognised persons' human and social rights, only international and civil organisations as well as the ombudsman are improving their position. Stateless persons are in legal limbo because applicants are not eligible social benefits and recognised persons in fact cannot enjoy national treatment in social rights due to their documents (residence permit, passport) with short term expiration. They are candidates to a stable legal status (refugee, long-term resident, family member of union citizen or acquisition of nationality) getting off the limbo³⁵.

³⁰ Decree of the Ministry of Social and Family Affairs on the Employment of Foreigners in Hungary, No. 8 of 1999, Nov 10, Section 3 (1)-(2).

³¹ Act CXXXV of 2010 on the Amendment of Certain Acts Related to Migration, Section 41.

³² Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, published: July 2012, UNHCR, Geneva, para 17–20.

³³ Act CLIV of 1997 on Health Care, Art. 142, Act LXXX of 1997, Art. 4.

³⁴ Hungarian Helsinki Committee, European Network on Statelessness and Institute on Statelessness and Inclusion Joint Submission to the Human Rights Council at the 25th Session of the Universal Periodic Review (21 September 2015).

³⁵ *A harmadik országbeli állampolgárok szociális jogai. [Social rights of third country nationals in Hungary. Handbook.]* Kézikönyv. Szerk: GELLÉRNÉ LUKÁCS ÉVA. Tullius Kiadó, 2009. pp. 255.

As it can be seen the Constitutional Court is divided: some judges have concluded that lawful staying as precondition to accession of the recognition procedure is unconstitutional, but other judges can tolerate this restriction because derogation of the international treaties by the priority of the Constitution is part of the national sovereignty and state competence, or the claim for harmony of national legal rules with the international commitments (Article Q in the Fundamental Act) is not a legally binding provisions but a principle of public policy, and the scrutiny of compatibility can be considered neither a protection of the Fundamental Act nor of coherency in law.³⁶ This sovereign-dominant approach may project the fate of legislation concerning the human rights pending on the goodwill of the parliament that would give gestures for people, such as it happened in 2011 providing national treatment for lawfully staying stateless persons in public relief and accession to social insurance and labour relations.³⁷

In absence of a regular budget planning and monitoring system of human rights the migration strategy of the government means a piece of paper promising improvement of stateless recognition procedure and their better protection in 2009-2020.³⁸ At least the number of de jure stateless persons in Hungary within eight years has been altogether below 200 thus this progress is not visible.

The Commissioner for Human Rights of the Council of Europe appeals to states for mandatory protection of stateless persons' rights as subjects of all human rights. "Non-citizens tend to be marginalised. The exclusion of stateless persons from participation in the political process undermines the reciprocal relationship between duties and rights. Many face discrimination in their daily lives: they may be denied employment, housing or access to education and health care because they do not have personal identification documents that are valid"³⁹ or their documents are not widely known by local authorities. Instead of formal equality – as it has been provided for Union citizens, migrant workers and internationally protected persons⁴⁰ - a substantial chance in social conditions would be ensured for stateless people in Hungary.

³⁶ See the alternative opinions from DIENES-OHM EGON, BALSÁI ISTVÁN AND SALAMON LÁSZLÓ to the Constitutional Court's Resolution No. 6 of 2015, Feb 25.

³⁷ See the Parliamentary Resolution No.72 of 2011, Oct 5 on withdrawing the reservation to the Art. 23–24 in the Convention (1954) by the Parliamentary Resolution No.55 of 2001, Sept 7.

³⁸ See the Government Resolution No. 1057 of 2009, April 24 on the migration strategy of the country up to 2020 taking into account the relevant EU Funds and national priorities.

³⁹ Strasbourg, 17 December 2010 CommDH/Speech(2010)13 "The Rights of Stateless Persons must be Protected"; Statement by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, at the 4th Council of Europe Conference on Nationality "Concepts of Nationality in the Globalised World".

⁴⁰ TÓTH, JUDIT: *Enlargement of the EU and Title IV*. In: STEVE PEERS AND NICOLA ROGERS (Eds.) *EU Immigration and Asylum Law. Immigration and Asylum Law and Policy in Europe*, Vol. 12, Martinus Nijhoff Publishers, 2006. pp. 139–165.

TÓTH JUDIT

A HONTALANOK SZOCIÁLIS JOGAI MAGYARORSZÁGON

(Összefoglalás)

2015-ben a hazai központi jogszabályok elemzése alapján a hontalanokról másfélszáz jogszabályban rendelkeznek, ide értve a kihirdetett nemzetközi szerződéseket is, amelyek a szabályok nagyobbik részét alkotják. A hontalanok jogállása több rétegre bontható, nem csak a rájuk vonatkozó speciális egyezmények, különösen az ENSZ 1954. évi egyezmény minimumszabályai alapján és azok hazai átültetésével, a honosokra vagy a külföldiekre vonatkozó normákat követve, de a szabályok tartalma szerint is. Ebben a tekintetben a szociális jogokról szól a jogszabályok 17 százaléka, és kedvező fejlemény, hogy az állampolgárokkal azonos bánásmódot nyújtunk a közsegélyek, a társadalombiztosítási és foglalkoztatási szabályokhoz kötődő szociális ügyekben a de jure hontalanoknak, mivel visszavonta Magyarország a hontalanok jogállásáról szóló 1954.évi egyezmény 23-24.cikkéhez fűzött fenntartását 2012-ben. Összességében mégis elmondható, hogy sérülékeny a szociális biztonság a hontalanként elismerést kérelmezőknek és a hontalanként elismerteknek az állandó lakóhely hiányában, és stabillá csak a bevándorolt jogállás vagy az állampolgárság megszerzésével, azaz egy másik státus elnyerésével válik Magyarországon. Ezért bár az Alkotmánybíróság megsemmisítést kimondó határozata révén könnyebbé vált a hontalanként elismerési eljáráshoz hozzáférés 2015 szeptemberétől, kevésbé vonzó a hontalanoknak Magyarország.