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Childhood Statelessness in European Courts: An Avoidable Crisis

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Abstract

In the face of claims that statelessness is an avoidable tragedy, millions still suffer from the deprivation of a nationality. Through no fault of their own, the children among these millions often are born into statelessness and thus a life of instability. Even though all European states have ratified the of the Child (CRC), which mandates immediate birth registration and the right to acquire a nationality, childhood statelessness persists as a problem in Europe. One means of confronting the human rights violations resulting from childhood statelessness is through litigation. Through interviews with legal experts and an analysis of 44 childhood statelessness cases from national and international European venues, this paper explored how certain elements of litigation may affect case outcome. The data suggests that the specifics of litigant choice, the availability of guardians for children, and the legal context of the jurisdiction were impactful factors to consider. More specifically, to respect a child's best interests, children's claims should be addressed separately from all other litigants, including their parents. To further protect stateless children throughout the litigation process, they should receive a special guardian dedicated to procedural guidance and educating the court about their best interests, akin to those provided to children in most family courts. Finally, a state's failure to incorporate the CRC and incorporate/ratify the 1961 Convention on the Reduction of Statelessness serves as an unnecessary barrier to nationality for stateless children and forces advocates to rely on more binding law that does not directly address childhood statelessness. Through targeted efforts lobbying for domestication of these treaties, respecting the individual claims of each child, and fighting for guardians at the onset of litigation, stateless children's chances of success may be heightened.

Keywords *childhood statelessness, strategic litigation, child rights, procedural safeguards*

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1. Introduction

"Unlike many of humanity's challenges, statelessness is solvable."[1]

"We know it is solvable."[2]

1.1 Research Context and Relevance

Statelessness exists as a crisis many states acknowledge and claim can be eliminated, yet it continues to affect millions of people, many of them children.[3] According to the Convention Relating to the Status of Stateless Persons, those who are "not considered as a national by any State under the operation of its law" fall into this category.[4] For the children impacted, almost always forced into statelessness through no fault of their own, the deprivation of nationality is accompanied by a denial of access to sufficient medical care, to education, and to an identity. In Europe specifically, childhood statelessness should be rendered nonexistent under the Convention on the Rights of the Child (CRC) to which all European states are parties, the Convention on the Reduction of Statelessness to which most are parties, and various other international and domestic obligations to which European states have committed themselves. However, tens of thousands of stateless children, and likely many more who are unaccounted for, are born every year.[5]

In Europe, litigation serves as one weapon with which to combat childhood statelessness and the resulting human rights violations. In a best-case scenario, litigation may facilitate the provision or protection of a child's nationality; in a worst-case scenario, children may become or remain stateless in addition to the creation of new and potentially damning precedent in that jurisdiction. This paper questions whether certain elements of litigation sway an outcome in either of these two directions. This research is not concerned with specific legal arguments or analysis set forth before or by a court; instead, it explores the practical construction of childhood statelessness cases and the legal characteristics of European jurisdictions that affect these vulnerable litigants. This paper intends to shed light on certain aspects of European childhood statelessness litigation with hope to benefit stateless child litigants and their advocates.

1.2 Research Questions

In order to accomplish the above goal, the primary research question this paper sought to address is: What lessons may be learned from existing European childhood statelessness litigation and applied or avoided in the future?

The secondary research questions proposed to examine this topic are:

1. Is there a particular litigation structure, process, or pattern that emerges in cases pertaining to childhood statelessness in Europe?
2. What correlations can be drawn between litigation outcome and the characteristics of a given European jurisdiction?

1 Global Alliance to End Statelessness (Global Alliance), 'Welcome to the Global Alliance to End Statelessness' (2024) <https://statelessnessalliance.org/blog/welcome-to-the-global-alliance-to-end-statelessness/> accessed 20 January 2025, para 1.

2 UNHCR, 'Statelessness Policy brief' (August 2024) <www.unhcr.org/ibelong/wp-content/uploads/Statelessness-Policy-Brief-2024-final.pdf> accessed 20 January 2025, 4.

3 UNHCR, 'Redoubling our efforts on ending statelessness: UNHCR's Strategic Plan 2023-2026' (2023) < www.unhcr.org/sites/default/files/2023-12/focus-area-strategic-plan-statelessness-2023-2026.pdf> accessed 20 January 2025.

4 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 177 (1954 Convention), para 1.

5 UNHCR, 'I am here, I belong' (November 2015) <www.unhcr.org/ibelong/wp-content/uploads/EN_2015_IBELONGReport_ePub17.pdf> accessed 20 January 2025.

This paper's initial hypothesis was that strategic litigation choices – such as representation structure – made within certain jurisdictions determine a child's level of ability to protect himself/herself from statelessness. The research intended to reveal what those elements were, and how they operated against the legal backdrop of European states. Employing a qualitative legal research methodology, this research assessed European judicial decisions concerning childhood statelessness supplemented by unstructured interviews with legal experts who provided candid context.

2. Literature Review

The phrase "strategic litigation" presents a complex concept without a universal definition. Typically, strategic litigation is pursued to effect political and social change by advancing a specific case, or set of cases, within carefully selected jurisdictions.[6] The term has been employed within settings including the tobacco industry, climate change, and human rights. Some equate this concept with "impact", "test case" or "public interest" litigation,[7] and many may craft their own definition of strategic litigation.[8] One of the most basic definitions – "going to court to protect human rights"[9] – provides an appropriate umbrella for the purposes of this paper.

Basic "litigation strategy" sometimes is confused with the broader concept of strategic litigation, as the former involves decisions attorneys face in every case, apart from any political or social movement.[10] This paper is not concerned with the linguistics of how litigation is defined. Instead, this research explores cases involving childhood statelessness and the characteristics pertaining to successful or particularly harmful elements of these cases that may emerge. At times that may concern "strategic litigation" intended to shift the law, or instead it may concern litigation strategy on a more individual level. From whatever angle the litigators approached case elements, the lessons learned may apply to all childhood statelessness litigation irrespective of categorization.

2.1 Child Rights Litigation in Europe

Considerable child rights litigation has been noted within the EU with an ever-increasing number of violations.[11] Although this paper is concerned with childhood statelessness, there are benefits to paying attention to other areas of child rights litigation. This may be in the context of climate change litigation,[12] access to education,[13] access to health services,[14] protection against discrimination,[15] or protection against various criminal offenses.[16] Child rights litigation also targets violations suffered by migrant and refugee children, many of whom are or become stateless.[17] Sometimes rooted in the CRC, the European Convention

6 Zolberg Institute on Migration and Mobility, 'Launching the Global Strategic Litigation Council for Refugee Rights. A Concept Note' (2021) <https://zolberginstitute.org/initiatives/gslc/> accessed 20 January 2025; Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experience' (October 2018) <www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience> accessed 20 January 2025.

7 Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38(4), CJQ, 407, 409.

8 Kris van der Pas, 'Conceptualising strategic litigation' 11 *Oñati Socio-Legal Series* 6(S) S116.

9 Guy S. Goodwin-Gill, 'Strategy and Strategic Litigation in the Protection of Refugees' (1 April, 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4307234> accessed 17 March 2025 (citing Amnesty International, 'Going to court to protect the rights of refugees and migrants: An overlooked tool for positive change' (18 August 2020) <https://www.amnesty.org/en/latest/research/2020/08/going-to-court-to-protect-the-rights-of-refugees-and-migrants/> accessed 7 March 2025).

10 Ramsden & Gledhill (n 7).

11 Aoife Nolan, Ann Skelton, and Karabo Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice Executive Summary' (2022) <https://www.acrisl.org/resources> accessed 17 March 2025; European Commission, 'EU Strategy on the Rights of the Child' (24 March 2021) <https://commission.europa.eu/document/86b296ab-95ee-4139-aad3-d7016e096195_en> accessed 11 March 2025; European Parliament, 'Children's rights in the EU: Marking 30 years of the UN Convention on the Rights of the Child' (November 2019) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644175/EPRS_BRI(2019)644175_EN.pdf> accessed 11 March 2025.

12 Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11 Transnational Environmental Law 263.

13 Filip Sys, 'D.H. v. Czech Republic: Roma Educational Equality and the Vulnerability of Strategic Litigation' (2020) 1 *Acta Universitatis Carolinae Studia Territorialia* 71; Open Society Justice Initiative, 'Strategic Litigation Impacts: Roma School Desegregation' (March 2016) <https://www.justiceinitiative.org/publications/strategic-litigation-impacts-roma-school-desegregation> accessed 17 March 2025;

14 Tamar Ezer, 'Legal advocacy as a tool to advance Roma Health' (2018) 13 Health Economics, Policy and Law 92.

15 Helen Stalford, 'The CRC in Litigation Under EU Law" in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child* (Springer 2015).

16 Geraldine van Bueren, "Children's Rights" in Daniel Moeckli and others (eds), *International Human Rights Law (Third Edition)* (OUP 2018).

17 Open Society Justice Initiative, '*Global Human Rights Litigation Report*' (8 March 2023) <https://www.justiceinitiative.org/publications/2023-global-human-rights-litigation-report> accessed 17 March 2025; Sarah Paoletti, 'Working Toward Recognition of the Rights of Migrant and Refugee Children' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (OUP 2020); Adam Weiss, 'Strategically Litigating Childhood Statelessness' <https://www.statelessness.eu/updates/blog/strategically-litigating-childhood-statelessness> accessed 17 March 2025; Richard Warren and Sheona York, 'How Children Become "Failed Asylum-Seekers": Reflections on the Experiences of Young

on Human Rights (ECHR), or other international treaties, an increasing number of child rights cases have gone before the European Court of Human Rights (ECtHR),[18] the Court of Justice of the European Union, and other international adjudicative bodies, although most are litigated before European states' domestic courts. This paper considers both national and international venues.

In the context of litigation involving childhood statelessness, this paper questions what correlations exist between certain elements of litigation such as jurisdiction, litigant choice, evidence of child participation, court rules, law relied upon, and the outcome of those cases. In Europe, statelessness "affects over half a million people", many of whom are children.[19] Reasons underlying this crisis include "complexities of conflicts in nationality laws, state succession, forced displacement, historical and contemporary migration, structural birth registration problems, access to nationality and related administrative practices."[20] Over 6 million children do not hold citizenship of their country of residence in the EU, and in January 2022, the number of stateless and non-EU citizen children was more than twice the number of EU citizen children.[21] Due to the nature of statelessness, no exact total can be assigned to the number of stateless children; however, this problem is evidenced in part through the court cases brought year after year. How these children are allowed to navigate the legal system to seek an end to their statelessness is dependent upon several factors.

2.1.1 Litigant Roles

There are well-established components of litigation regardless of subject matter, ranging from venue to litigant choice to legal strategy to potential third-party involvement. Regarding choice of litigant, in most cases concerning children, the child neither conceives of nor controls the decision to file a complaint or application before a judicial or administrative body. Parents, attorneys, international agencies, NGOs, legal clinics, or legal aid instead may take the lead. The dependence upon adults to assist children "in accessing justice where their rights have been violated" seems inescapable.[22] Unfortunately, that very reliance on others often hinders children from "playing a direct role in legal proceedings."[23] This role assignment is of "key" importance for any type of strategic litigation,[24] and the decisions surrounding these roles carry significant weight when children are involved.

Common litigant scenarios may present the child as the sole litigant (with an adult representative), or the child as co-litigant with a parent or other similarly-situated applicants, or the child's rights may be represented by an interested third party such as an NGO. Children often are viewed as "ideal sympathetic clients" and thus might be considered by some to be model primary litigants.[25] At times, litigators even select a child to represent a specific community as the "face of the case."[26] Questions may surround the level of choice exercised by these children to step into these given roles. As a result, sometimes those involved with child rights litigation are accused of "instrumentalizing and tokenizing" child applicants.[27]

With respect to child/parent co-litigants, the combination of a well-meaning parent and child may be perceived as a natural, safe strategy. One might presume a child's and parents' rights, needs, and goals are the

Unaccompanied Asylum-Seekers in Kent from 2006 to 2013, and How "Corrective Remedies" Have Failed Them (2014) 28 Journal of Immigration, Asylum and Nationality Law 123.

18 Claire Fenton-Glynn, 'Children, parents and the European Court of Human Rights' (2019) 6 European Human Rights Law Review 643.

19 European Network on Statelessness (ENS), 'Litigation Toolkit on Statelessness for Legal Practitioners, (7 June 2024), Vol II, 2 <https://www.statelessness.eu/updates/publications/litigation-toolkit-statelessness-legal-practitioners> accessed 11 March 2025.

20 European Committee on Legal Co-operation, 'Statelessness and access to nationality' (2025) <https://www.coe.int/en/web/cdcj/statelessness-and-access-to-nationality> accessed 31 March 2025.

21 Eurostat, 'Children in migration – demography and migration' (14 June 2024) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_demography_and_migration> accessed 12 March 2025.

22 Child Rights International Network (CRIN), 'CRC in Court: The Case Law of the Convention on the Rights of the Child' (2012), p. 28 <https://archive.crin.org/docs/CRC_in_Court_Report.pdf> accessed 11 March 2025

23 Aoife Nolan and Ann Skelton, '"Turning the Rights Lens Inwards": The Case for Child Rights-Consistent Strategic Litigation Practice' (2022) 22 HRL Rev 1, 14.

24 Amnesty (n 9) para. 21.

25 Weiss (n 17) Step 3.

26 Ramsden and Gledhill (n 7) 412.

27 Donger (n 12) 285. *See also* Stephanie Rap, '"A Test that is about Your Life": The Involvement of Refugee Children in Asylum Application Proceedings in the Netherlands' (2022) 41 Refugee Survey Quarterly 298.

same, when sometimes they not only differ but must be examined separately. Failing to consider a child's claims independently may lead to violations of a child's rights and offend the best interests of the child principle.[28] Further, "overly strict requirements that a child act through his or her parents are common and can seriously stymie children's access to the courts."[29] Some courts have recognized this danger and underscored the obligation of a court to consider a child's claims and personal circumstances separately from the parents;[30] others have failed to do so.[31]

One response to "the potential conflict of interest between parents and children" is representation by a third party, which can bring neutrality to the litigation in addition to potentially providing more support for a child's claims.[32] If not direct representation, many courts allow third parties to participate in other ways including as an amicus party or an intervenor, which "will enable the broader, more strategic issues, to be taken up."[33] The type of involvement impacts the use and balance of resources in an intervention by an NGO, which is always a significant concern.[34] The distribution of cost and effort spread between litigants may benefit a child applicant. Nevertheless, these children remain at the mercy of all those involved. Further, in the end, some courts may refuse the participation of non-party organizations.

Another response to child protection and advocacy in the context of litigant roles is the idea of a dedicated, often court-appointed, representative to guide the child through the process while protecting his/her interests. This role boasts several names – guardian, guardian ad litem, safeguarder, representative, litigation friend, next friend – and the existence and the effect of this representative differs based upon what jurisdiction the litigation takes place. No matter the label, "[t]here is an international consensus in the literature that children need representation, particularly in public law proceedings affecting their care, welfare or liberty."[35] Despite this consensus, such representatives or advocates are not always present. Notably, there are different rules pertaining to different types of courts. Family courts, for example, may pay significantly more attention to child advocacy than criminal courts or administrative bodies dealing with issues of immigration, asylum or statelessness.[36]

Underlying all else, legal standing guides how a child's complaint may come before a court. These rules determine who has the right to be a litigant, how an initial application or complaint shall be filed, through whom a child may file a complaint, and at what age an individual may proceed without required representation. Likewise, standing dictates the level of participation that may be enjoyed by interested third parties. For example, in venues such as the CJEU, third-party rules are "strict" and involvement "requires a thorough knowledge of both EU law and procedure before the CJEU."[37] Litigators thus may base their choice of venue on these rules, if different jurisdictions are available to them. Some consider bringing actions before international courts "notoriously difficult to pursue for any private individual, let alone children."[38] Whether national courts present an easier path to justice depends upon the state.

2.1.2 Child Participation

Intertwined with litigant choice is child participation. This paper attempts to understand the correlation between such elements and case outcomes. It seems evident that children should be recognized as a spe-

28 Fenton-Glynn (n 18).

29 Child Rights International Network (CRIN), 'Rights, Remedies & Representation: Global Report on Access to Justice for Children' (January 2016) 17. <https://archive.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf> accessed 11 March 2025.

30 *See, e.g., Fabio Arlyn Timogan and Others v. Evan Ruth and Another* (2020) HKCA 971, CACV 32/2020; *Case No. LVwG-2018/14/1219-1* (2019) Austria Tirol Administrative Court; *Case No. 898/2009* (2024) Montenegro, Administrative Court.

31 *See, e.g., A,B,C,D,E gegen Staatsekretariat für Migration, F-6073/2014* (2017) Switzerland Federal Administrative Court (Bundesverwaltungsgericht).

32 Fenton-Glynn (n 18) 650-51. *See also* ENS (n 19), Vol I.

33 Goodwin-Gill (n 9).

34 Amnesty (n 9).

35 Andy Bilson and Sue White, 'Representing children's views and best interests in court: an international comparison' (2005) 14(4) Child Abuse Review 220, 233.

36 *See, e.g.,* Cafcass, 'How Cafcass can help you' (2024) <https://www.cafcass.gov.uk/about-us/how-cafcass-can-help-you> accessed 11 March 2025.

37 ENS (n 19) Vol 1, 27-28.

38 Stalford (n 15) 217.

cial social group.[39] States, through their judiciary, must ensure all children are guaranteed the right to be heard.[40] The litigant strategy must assure "the views of the child" are "given due weight" and the child is "provided the opportunity to be heard" in any relevant proceedings.[41] The CRC Committee has stressed an urgency for adherence to the right to be heard for those children involved with immigration proceedings which often encompass stateless children.[42] Some argue that certain courts' procedural rules – such as the ECtHR – should be revised to prevent the abuse of child rights and to better ensure children's views are genuinely represented in each case.[43]

Legal instruments are in place in Europe to protect this vulnerable population and these rights. The EU Charter of Fundamental Rights, for example, provides the right for children's views to be "taken into consideration on matters which concern them in accordance with their age and maturity."[44] Perhaps the most significant instrument, however, is the CRC. One hundred ninety-six countries are parties to the CRC, including all UN members except for the United States. Thus, all Council of Europe and EU Member States are parties to the CRC. The "EU is bound to adhere to the CRC's principles and provisions in relation to any EU activity affecting children."[45] Several articles within the CRC protect child litigants, notably those pertaining to discrimination, the best interests of the child, the right to a nationality, the right to be heard, and the right to be protected from maltreatment.[46]

The best interests of the child, which encompasses a right to be heard, is a principle enshrined in CRC Article 3, EU Charter Article 24(2), ECHR Article 8, and the International Covenant on Civil and Political Rights (ICCPR). The CRC Committee considers the principle to be a "substantive right", a "fundamental, interpretative legal principle", and a "rule of procedure."[47] This principle obliges states to ensure that both the judiciary and the private sector – "including those providing services"[48] – prioritize and examine a child's best interests, which include having a voice in proceedings. The CRC Committee underscored this point by observing that "there can be no correct application of article 3 [best interests] if the components of article 12 [the right to be heard] are not respected."[49]

To meet children's best interests within their right to be heard, "they should receive information about the proceedings and what is expected from them."[50] Stateless children specifically must be "included in decision-making processes."[51] In many cases involving childhood statelessness, however, litigants often are infants or toddlers and incapable of articulating their views. Nevertheless, these "very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children."[52] Despite this pledged protection of a child's right to be heard, allegations of violations persist.

2.2 Particularities of Childhood Statelessness

In addition to child protection laws, there are obligations to which several European states must adhere pertaining specifically to statelessness under the 1954 and 1961 Statelessness Conventions, the 1997 Euro-

39 Nolan (n 23).

40 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 12; UN Committee on the Rights of the Child (CRC Committee), 'General comment No. 12 (2009): The right of the child to be heard (20 July 2009) <https://www.refworld.org/docid/4ae562c52.html> accessed 17 March 2025.

41 CRC (n 40) arts 12(1), 12(2).

42 CRC Committee (n 40).

43 Fenton-Glynn (n 18).

44 Charter of Fundamental Rights of the European Union [2007] 2012/C 326/02, art 24(1).

45 Stalford (n 15) 215.

46 CRC (n 40) arts 2, 3, 7, 12, 19.

47 UN Committee on the Rights of the Child (CRC Committee), '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 6.

48 CRC Committee (n 47) para 14(c).

49 CRC Committee (n 40) para 74.

50 Rap (n 27).

51 CRC Committee (n 40) para 124.

52 ibid para 44.

pean Convention on Nationality, the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, and the Universal Declaration of Human Rights. Protection against statelessness also falls under the ICCPR (art 24)[53] and the ECHR (art. 8).[54] The ICCPR and the CRC – again, to which all European states are parties – explicitly protect the right to nationality and mandate immediate birth registration, in addition to obliging states to prevent any circumstances in which a child would become stateless.[55]

With respect to the 1961 Convention to which most European Council Member States are a party, the first four articles exist specifically to prevent childhood statelessness. States who are parties to both the CRC (all European Council Member States) and the 1961 Convention must interpret these articles "in light of the provisions of the CRC."[56] Thus, children's best interests (Article 3) and the right to acquire a nationality (Article 7) should be taken into consideration in conjunction with the 1961 Convention and manifest in domestic laws. To complicate matters, however, how states implement the CRC and other international obligations varies greatly. For example, "[i]n some states such as Norway, incorporated treaties take precedence over national laws; in others, such as Germany, the CRC is subordinate to the Constitution and may be altered by subsequent federal law."[57] Litigation strategy depends upon these complexities of implementation.

Childhood statelessness differs from other refugee or migration hardships because it is "thoroughly preventable" through birth registration and state law prevention.[58] Indeed, CRC Article 7 mandates immediate birth registration and advances the right to "acquire a nationality" in addition to requiring states "ensure the implementation of these rights…in particular where the child would otherwise be stateless." Nevertheless, UNHCR once reported "that a stateless child is born somewhere in the world every 10 minutes."[59] Pursuant to the CRC and other above-mentioned treaties, states should implement the requisite legal safeguards to comply with their obligations. Despite this expectation and perceived acceptance by Europe that every child deserves the right to nationality, state action often falls short of genuine conformity with international law.[60] Violations may result from a birth state refusing to bestow nationality, failure to identify and protect stateless children, failure to provide adequate safeguards, discrimination resulting in statelessness, or an arbitrary deprivation of nationality.[61]

2.3 Unanswered Questions

Stateless children are at the mercy of states and multiple decisionmakers involved in litigation pertaining to violations of their rights. Growing attention is being given to child rights litigation strategies, but the "broader literature is silent" regarding if these choices made are actually "disempower[ing]" children.[62] Although the psychological journey of the child through litigation is outside the scope of this research, it is important to underscore the negative impact "on a child's sense of personal identity, and children may be denied entitlements to basic health, education and social welfare."[63] Further, these stateless children

53 *See also Communication No. 2498/201* CCPR/C/125/D/2498/2014 (HRC, 24 May 2019).

54 *See, e.g., Hoti v. Croatia* App no 63311/14 (ECtHR, 26 April 2018); *Ramadan v. Malta* App no 76136/12 (ECtHR, 21 June 2016).

55 CRC (n 40) art 7; International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 24(2).

56 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 9 <www.unhcr.org/sites/default/files/legacy-pdf/5465c9ff9.pdf> accessed 17 March 2025.

57 Donger (n 12) 275.

58 European Network on Statelessness (ENS), 'Preventing Childhood Statelessness in Europe: Issues, Gaps and Good Practices' (April 2014), 3 <https://www.refworld.org/reference/regionalreport/ens/2014/en/103556> accessed 11 March 2025.

59 UNHCR, 'I am here, I belong' (November 2015), 1 <www.unhcr.org/ibelong/wp-content/uploads/EN_2015_IBELONGReport_ePub17.pdf> accessed 20 January 2025; European Network on Statelessness (ENS). (2024) *ENS joins 22 child rights organisations calling on European election candidates to champion children's rights and #VoteforChildren* (27 March 2024), para 3 <https://www.statelessness.eu/updates/news/ens-joins-22-child-rights-organisations-calling-european-election-candidates-champion> accessed 11 March 2025.

60 ENS (n 19), Vol I, 29; ENS (n 58), 12.

61 William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 204.

62 Donger (n 12) 285.

63 UN Committee on the Rights of the Child (CRC Committee), 'General comment No. 7 (2005): Implementing child rights in early child-

likely fall "outside a State's protection system in the case of harmful practices such [as] child abduction or abuse."[64] Given "the devastating psychological toll of statelessness" on children is avoidable, it becomes necessary to ask why it continues.[65]

In the face of the prohibition derived from states' legal obligations, childhood statelessness remains a problem. "There should be no stateless children in Europe."[66] When courts confront childhood statelessness, the resulting interpretation of legal instruments and state duties either strengthens or weakens the opportunity to prevent statelessness in the future. This research endeavors to examine existing jurisprudence to identify connections between particular elements of litigation and a court's treatment of the child(ren) at issue, and to determine whether certain combinations of elements may lead to certain outcomes.

hood (20 September 2006), para 25 <https://www.refworld.org/legal/general/crc/2006/en/40994> accessed 27 March 2025; *Zhao v. Netherlands* CCPR/C/130/D/2918/2016 (HRC, 19 Dec 2020).

64 Jill Stein, 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 International Journal of Children's Rights 599, 619.

65 UNHCR (n 59) 1.

66 ENS (n 58) 3.

3. Methodology

Data explored in childhood statelessness cases include venue, litigant choice, a child's age, factual/procedural history, application of law, and third-party involvement. These aspects of litigation combine to affect both the legal and the practical outcome for children. To address the Research Questions, this paper employed a qualitative legal research methodology encompassing both analytical and empirical components. Data was gathered from primary resources such as courts' decisions and rules, as well as relevant legislation. The data was given additional color through selective, unstructured interviews with legal practitioners experienced with the protection of child rights. The goal was to analyze this data and determine what lessons could be learned in the context of childhood statelessness litigation.

3.1 Court Data Collection Method

3.1.1 Step One: Initial Analysis of Cases

Court decisions and rules from 17 European and international jurisdictions were collected online from databases and court websites. Most of the court decisions analyzed may be found in the Statelessness Case Law Database (SCLD), managed by the European Network on Statelessness (ENS). The "Childhood statelessness" filter under "Key aspects" of the SCLD produced a return of approximately 50 cases from both international and national venues. Other relevant cases were discovered through literature review and interviews. The cases range in date from 1999 to 2023. Of all the cases collected, data from 44 were analyzed for the purposes of this research.

Data gathered from these 44 cases included: jurisdiction, date of decision, litigants, age(s) of the child(ren) involved, relevant laws, legal topics, notable mentions regarding child participation (or lack thereof), outcome, and any third-party involvement. These cases were then categorized as positive or negative. For the purposes of this research, a positive outcome meant the decisionmakers found in favor of the child applicant(s) and/or the state was forced to rectify its error(s) and child statelessness was avoided. A negative outcome meant statelessness resulted or remained, and/or produced a state of limbo in which the child faced ongoing uncertainty or additional, protracted litigation.

Data from the 14 cases with a negative outcome (Annex A) were then organized by the following characteristics: multiple litigants, presumed or original nationality associated with litigants (if applicable), stateless outcome, court acknowledgment the CRC, court acknowledgment the ECHR, court acknowledgment of a child's right to be heard, court acknowledgment of the child's best interests, if litigants were infants or toddlers, third party involvement, and if the child was a victim of an arbitrary administrative or governmental error. Data captured from 30 cases with a positive outcome (Annex B) included the following: multiple litigants, presumed or original nationality associated with litigants (if applicable), court acknowledgment the CRC, court acknowledgment the ECHR, court acknowledgment of a child's right to be heard, court acknowledgment of the child's best interests, if litigants were infants or toddlers, LGTBQ+ rights issues, issues of surrogacy, and third-party involvement.

3.1.2 Step Two: Targeted Analysis of Jurisdictions

Of the 44 cases, the focus was narrowed to eight cases that stood out as arguably unjust or as model decisions of fairness to children that led to protected or secured nationality (Annex C). The cases chosen were a mix of both domestic and international venues, and sometimes included both a positive and negative result from the same venue. These jurisdictions included: the CRC Committee, Ireland, the Netherlands, Serbia and the UK. The details of these jurisdictions were then compared, taking into account: legal specifics unique to each state and/or court, relevant court rules, and relevant domestic law. To capture this data, additional research was conducted using official court and government websites, Lexis and Westlaw databases, and Google searches. Data from this analysis was brought into consideration in the findings when

appropriate to expand upon targeted areas of interest.

3.2 Interview Data Collection

Six experts participated in this research anonymously through unstructured interviews. Interviewees were selected based upon their legal experience with child rights protection and/or statelessness, and included judges, attorneys, and scholars. Interviews with these practitioners were conducted via online video conference platforms. The interviews were each approximately 30 minutes in length and the data gathered from these attorneys were rooted in European jurisdictions, although other jurisdictions were examined or discussed if relevant. The direction of the interview was based upon the specific expertise of the interviewee but centered around questions related to litigant choice, a child's right to be heard, the involvement of third parties, the use of special representatives, and relevant international and domestic law in the EU.

3.3 Ethical Concerns and Limitations

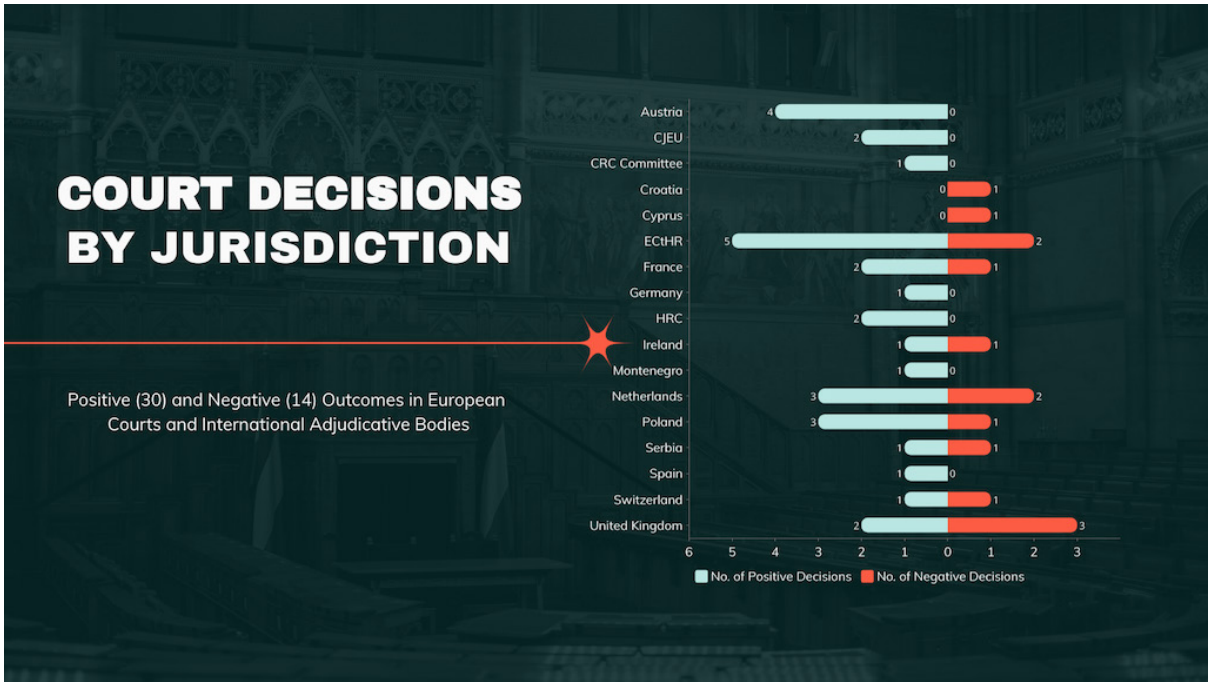
With respect to expert interviews, due to the sensitive nature of statelessness and children involved in litigation, it was important to acknowledge that questions may trigger unpleasant memories of past cases or clients for the experts. Any particular line of questioning or the interview itself would have been halted immediately at any sign of distress or discomfort; fortunately, no interviews needed to be abandoned. All participation was anonymous, and interviewees are named only by general job title and interview date. No questions regarding specific cases or individuals were asked, although some experts volunteered specifics about their experiences. Any questions that would prompt participants to breach attorney-client privilege were forbidden. All recordings and notes have been stored confidentially in anonymized computer files under password protection. All participants confirmed their consent to these conditions set forth in writing prior to interviews.

With respect to the legal research, this paper was not intended to be a universal sweep of all childhood statelessness cases in Europe. This research gratefully relied upon ENS's curation of the SCLD and the ability to filter and review childhood statelessness cases in both English and non-English speaking jurisdictions. With respect to the latter, there were limitations with respect to this research's reliance upon the translations and summaries found in the SCLD. Certain judgments from countries such as Austria, France, the Netherlands, and Serbia were published only in the country's official language; however, the data points were not reliant upon nuance or complicated interpretation. The 44 cases selected encompassed a broad range of domestic and international courts, but there were several European jurisdictions not included in the study. This was not a conscious choice, but a result of the filter applied in the search over the cases within the SCLD database.

4. Findings

On the surface, it was somewhat encouraging that the majority of cases fell into the "positive" category. The breakdown of positive and negative cases within each jurisdiction may be seen in Figure 1 below. The negative cases range in date from 1999 to 2023 (Annex A); the positive cases from 2007 to 2023 (Annex B). Perhaps it was predictable that the CRC Committee and the Human Rights Committee (HRC) did not present any negative cases, but not all the findings were straightforward. As seen below, several jurisdictions, including the ECtHR, landed on both sides, and some did not present any positive outcomes (Croatia, Cyprus). Observing only the outcome, however, is one piece of a complex puzzle, albeit the most important to a stateless child litigant. To better understand what lessons may be learned and to address the secondary Research Questions, three areas of focus became: (1) the examination of litigant choice, (2) the existence of a special representative, and (3) the relevant law of the jurisdiction.

Figure 1



4.1 Multiple Litigants

For strategic purposes, many litigators indeed consider children to be ideal litigants due to the softer reactions they may evoke. "If you want to change the law, you want a sympathetic plaintiff, and children are excellent from that point of view."[67] This echoes the tactics and approach noted by Weiss and Ramsden & Gledhill.[68] At the same time, often the child is not the only individual involved in specific situations with a need to litigate. Other children, parents, and adults may be linked to a particular set of circumstances that lead to litigation. To complicate matters further, in the context of statelessness, the affected child is often an infant or a toddler whose age suggests innocence, but the child could be coupled with a representative or other litigants who might not be as sympathetic. This paper considered the importance of how children are presented before a court and with whom they are joined.

67 Human Rights Scholar A, Solicitor, International Authority on Nationality Law and Statelessness (Video Conference, 13 August 2024).

68 Text to n 7, n 10, n 17, n 24, n 25.

4.1.1 Parent and Child as Co-Litigants: Blurred Lines

Experts interviewed underscored the dangers inherent in co-litigant children and parents. "Often children are just treated in line with their parents, as part of their parents' procedures", when they should be addressed separately.[69] Experts believe that child litigants should distance themselves from parents and demand separate legal representation.[70] Reasons for this might be the parents have a fundamental disagreement as to what the best interests of their child are,[71] or the parents believe certain legal actions run counter to family and cultural values.[72] A problem specific to statelessness is that small children are unable to make decisions for themselves regarding nationality, and parents may be against their child obtaining certain citizenships which impedes their journey.[73]

This expert commentary reflects the above findings of Nolan & Skelton, Fenton-Glynn, CRIN, and their concern that a failure to separate the child from parents will lead to violations of a child's rights.[74] Some litigators thus do take care to identify and accept cases in which there is a situation specific to children that cannot be subsumed by the parents' case.[75] In some cases, however, that power is not held by the litigator. "The biggest problem is when judges say 'unfortunately the child cannot come and therefore I'm using the parents'. Some find it too unpleasant and a waste of time to work with children."[76] As discussed in Section 4.3, part of the risk assessment that accompanies each case is gauging the level of sympathy held by the court and judge.[77]

Despite these risks posed by multiple litigants noted in the Literature Review and in expert interviews, this particular sample of cases initially appeared to tell a different story. Considering the possibility of potential conflicts of interest between parent and child, and/or being faced with an adjudicator who fails to separate the claims as required, these findings were unexpected. Not only did half of the positive cases include multiple litigants, but the majority of those cases presented a parent/child combination (Figure 2). Within those cases, some courts even acknowledged the importance of separating a child's claims from parents.[78] Upon peeling back the layers, however, some commonalities among these positive cases emerged.

69 Human Rights Scholar B (Video Conference, 3 September 2024).

70 Executive Director A, Human Rights NGO (Video Conference, 16 November 2023); Human Rights Barrister (Band 1) (Video Conference, 3 April 2024).

71 Executive A (n 70).

72 Executive Director B, Child Rights NGO (2024) Video Conference, 11 January 2024).

73 Former Chair of the UN Committee on the Rights of the Child (Video Conference, 27 November 2023).

74 Text to n 22, n 27, n 28, n 31.

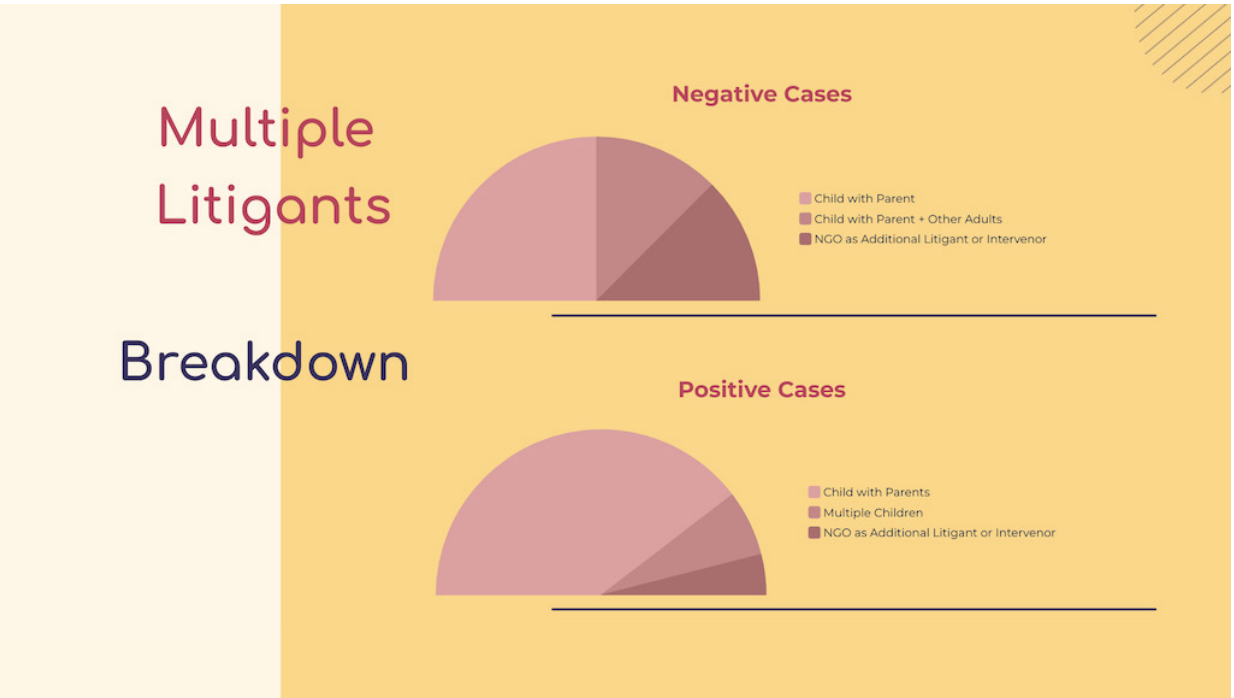
75 Executive A (n 70).

76 CRC Chair (n 73).

77 Scholar A (n 67).

78 *Case No. LVwG-2018/14/1219-1* (2019) Austria Tirol Administrative Court; *Case No. 898/2009* (2024) Montenegro, Administrative Court.

Figure 2



Forty percent of cases with multiple litigants addressed topics of surrogacy and/or LGBTQ+ parents. Courts face an increasing number of cases involving reproductive rights and children born through circumstances controversial in certain jurisdictions. One consequence of the legal confusion surrounding these delicate issues may be statelessness for the children in question.[79] Within this sample of cases, the ECtHR, the CJEU, and courts in Austria, France, Poland, Spain all ruled in favor of these children and their parents, "interpret[ing] the relevant laws so as to ensure children's access to their legal identity and nationality."[80] There were no negative cases from this sample involving reproductive issues. Perhaps regarding reproductive matters in which litigation is rooted in how a child came to exist it is impossible to avoid linking that child litigant with his or her parent(s). Notably, these are not matters of asylum, at least not in this sample of cases.

Not being matters of asylum or forced migration, it follows somewhat predictably that an additional similarity among these surrogacy and/or LGBTQ+ cases that emerged was that all litigants involved were either from Europe or North America – the Global North. It is worth noting that 100 percent of the negative cases with multiple litigants all present litigants associated with the Global South (*e.g.*, Cameroon, Ghana, Sierra Leone, Nigeria, Bangladesh). Such a statistic might be expected, as the reality that statelessness often results from the volatility and violence in countries of origin and several of those conflicted states are considered to be within the Global South.[81] What should not be expected, however, is for children's cases to be disregarded in light of their parents' cases, or for their cases to be blurred with their parents to the point that their individual claims become lost.

In the three cases with a parent/child litigant combination and negative outcome, the children's cases were not analyzed separately and/or the principle of best interests of the child was not genuinely considered or discussed.[82] In *K.A*, the court stated that because the applicant (born in Ireland) was an infant, "the application was made on her behalf by her father and why the substantive claims made on her behalf relate to the

79 Marianna Iliadou, 'International Surrogacy and Stateless Children: Article 7 UNCRC and the Harmful Effects of Statelessness' (2024) 5 Amicus Curiae 474.

80 Katja Swider, 'The Statelessness Case Law Database: LGBTQ+ families, surrogacy and the legal identity of unsanctioned babies' (7 October 2021), para 5 <https://www.statelessness.eu/updates/blog/statelessness-case-law-database-lgbtq-families-surrogacy-and-legal-identity> accessed 17 March 2025.

81 UNHCR, 'Statelessness Policy brief'(August 2024) <www.unhcr.org/ibelong/wp-content/uploads/Statelessness-Policy-Brief-2024-final.pdf> accessed 20 January 2025.

82 *K.A. v. Refugee Appeals Tribunal and Another* (2014) IEHC 223; *A,B,C,D,E gegen Staatsekretariat für Migration, F-6073/2014* (2017) Switzerland Federal Administrative Court (Bundesverwaltungsgericht); *E3, N3 and ZA v. Secretary of State for the Home Department, (2022) EWHC 1133* (2022) UK High Court of Justice Queen's Bench Division Administrative Court.

experiences of her parents", and does not explore the child's best interests.[83] In *E3,* the court acknowledged that "the upshot for ZA [born in the UK] is somewhat harsh and that she is an entirely blameless party", after being left without citizenship due to a governmental error regarding her father's legal status.[84] In a judgment from Switzerland, three children born in Switzerland were left stateless due to their parents' alleged lack of credibility without any discussion of the children's welfare.[85]

In these cases, the dangers of combining parents and children in litigation warned of by practitioners, judges, and academics indeed manifested and children remained stateless. However, it is difficult not to recall the point made by CRIN that a child's dependence upon adults to access justice is unavoidable;[86] since those adults frequently are parents, the question remains how to allow that dependence to work to the benefit and not the detriment of a child litigant. One response, as noted above by ENS, Goodwin-Gill, Amnesty International, and Fenton-Glynn, is the involvement of a neutral third party.[87]

4.1.2 Third-Party Litigants: Positive Influence, No Guarantee

A third party is defined as "[s]omeone other than the principal parties in a matter; someone who is not a party to a lawsuit…but who is somehow implicated in it."[88] In what capacity a third party may participate in litigation depends upon the jurisdiction. Standing and court rules dictate the ability, the requirements, and the roles of third parties who wish to engage in litigation. If an NGO clears those hurdles, a collective duty remains that the other litigator(s), the litigants, and the NGO(s) all must be on the same page to move forward in a meaningful way. Based on expectations that additional assistance boosts chances of success, one might expect to find more third-party involvement in the successful cases than in those with negative outcomes. This sample, however, appeared indifferent to third-party participation – 30 percent of positive cases included third party involvement, compared to 29 percent of negative cases.

Neither litigators nor the NGOs follow precise rules when weighing third-party participation in cases of childhood statelessness.[89] If an NGO deals with a constant stream of individual cases, then perhaps its name will not always appear as a primary litigant; on the other hand, if the NGO is attempting to shift a legal paradigm, it may act differently.[90] Thus, strategy is developed based upon the political context of the jurisdiction, the demographics of the litigant(s), and the desired outcome. For example, "is this 'strategic litigation' intended to change the law, or just helping one individual – where will this case end up?"[91] At the same time, it is difficult to predict exactly what consequences may result as a result of NGO involvement; thus, it is of utmost importance to assess each situation on a case-by-case basis.[92]

In general, NGOs have contributed positively to statelessness litigation, but whether litigants should seek or accept their involvement is a situation-specific determination.[93] For stateless litigants, they often have already endured a multitude of procedures and may experience hopelessness, which could result either in welcoming anything suggested by litigators or instead closing themselves off to additional exhausting measures.[94] NGOs specialized in statelessness might be able to ease the burdens of litigation. Reasons for including a third party to act as a primary litigant could be to protect the stateless child from active participation in a confusing courtroom. For example, once a child's statement is produced (which could happen outside the courtroom) they may be spared from enduring the proceedings.[95] Or perhaps the NGO will act as an amicus party to submit pleadings with hope to add an objective perspective,[96] as also noted by

83 *K.A.* (n 82) para 23.
84 *E3* (n 82) para 92.
85 *A,B,C,D,E* (n 84).
86 Text to n 21.
87 Text to n 31, n 32, n 33.
88 'third party', *Black's Law Dictionary* (12th edn, 2024).
89 Scholar A (n 67).
90 ibid.
91 Ibid.
92 Scholar B (n 69).
93 Scholar B (n 69); Executive A (n 70).
94 Scholar B (n 69).
95 Executive A (n 70).
96 Executive B (n 72).

Goodwin-Gill.[97]

The participation of a third party, however, does not guarantee a positive outcome. One of the arguably most egregious negative cases not only had an NGO as appellant (in addition to the child appellant), but had an additional well-known NGO as intervenor.[98] Likewise, when an NGO acted as sole litigant before the Serbian Constitutional Court to oppose Serbia's birth registration procedures, its initiative was rejected.[99] However, when this same NGO litigated on behalf of 3 Roma children in a lower court in 2011, the NGO and thus the children prevailed.[100] Most recently regarding birth registration in Serbia, two NGOs partnered to intervene in a case before the ECtHR.[101] In this case, the applicant is a child and the NGO is an intervenor, not the sole litigant as in the 2019 case. With a child – instead of a straight constitutional challenge – at the forefront, perhaps chances for success may improve. The difference of venue between a national Serbian court and the ECtHR also must be noted as an arguably positive factor weighing in favor of the child litigant.

Thus, whether third-party involvement categorically is a good or bad thing is difficult to say.[102] One expert noted the most success in litigation occurs when NGOs with different expertise collaborate. For example, a child litigant benefits from an NGO focused on the public interest combining efforts with an NGO dedicated to assisting the stateless through legal and social work.[103] Partnership encourages representation of different perspectives and a greater chance that litigants comprehend the ramifications of the legal road ahead. NGO participation also proves useful through expert pleadings educating the court about complex circumstances,[104] which was also noted by Fenton-Glynn.[105] Whatever the approach, each step and potential consequence must be explained thoroughly to all litigants.[106] The involvement of an NGO should be an informed choice made by the litigant after contemplating the benefits and risks of all options.[107] As warned by Donger, these choices should affect children positively and not "disempower" them.[108]

In the case of small children, litigant choices – such as a combination with a parent or NGO – are made for them. To whom information is given to determine how to initiate litigation on behalf of a small child and to navigate all subsequent decisions is dependent upon the jurisdiction's law, culture, and the dynamics of the family at issue. Younger children carry a different set of considerations demanding special care by litigators and the courts.[109] The next section explores the involvement of special representatives for children in litigation attempting to protect the child in this environment.

4.2 Special Representatives: Influence of Procedure on a Child's Right to Be Heard

CRC Article 12 provides that "every – I repeat every – child has the right" to participate in all proceedings if their rights are directly or indirectly at issue.[110] It is "absolutely essential" that a child litigant is involved in decisions regarding whether, how, and by whom a case is brought before an adjudicative body.[111] These views certainly are aligned with CRC Article 12 and the CRC Committee's General Comment No. 12,[112] but

97 Goodwin-Gill (n 9).

98 *PRCBC & O v. Secretary of State for the Home Department, (2022) UKSC 3* (2022) UK Supreme Court.

99 *Inicijativa za pokretanje postupka ocene ustavnosti i zakonitosti propisa koji onemogućuju upis u matičnu knjigu rođenih odmah po rođenju, Case No., IUo-190/2018* (2019) Constitutional Court of the Republic of Serbia (UStavni sud Srbije).

100 *Tužba zbog diskriminacije, Case No. P 56984/2010* (2011) Basic Court in Novi Sad, Serbia (Osnovni sud u Novom Sadu).

101 European Network on Statelessness (ENS), 'Submission to the ECtHR on Ramadani v. Serbia' (4 June 2024) <https://www.statelessness.eu/updates/publications/submission-ecthr-ramadani-v-serbia> accessed 11 March 2025.

102 Executive A (n 70).

103 Scholar B (n 69).

104 Executive B (n 72).

105 Text to n 31.

106 Scholar B (n 69).

107 Executive A (n 70).

108 Donger (n 12), 285.

109 Executive B (n 72).

110 CRC Chair (n 73).

111 Executive B (n 72).

112 Text to n 39.

exactly how these good intentions manifest in litigation remains in question. This is especially true when the litigant is a child too young to be heard in the traditional sense, reliant upon an adult representative to be their voice. As noted by Bilson & White, there is "international consensus" that "children need representation."[113] Of course, being heard and being represented are two distinct concepts.

A child "being heard" in litigation "should be empowering and sustained" without any kind of "tokenistic approach."[114] This quote directly addresses the fears of Donger that litigators may be "instrumentalizing and tokenizing" children;[115] however, questions surround how this genuine participation looks in practice. Very few attorneys and judges receive training on how litigators and courts should proceed in an age-appropriate manner specific to each child.[116] On one hand, under the CRC, any child who can reason and express views "has to be, not might be, but has to be heard" personally and not through an adult.[117] On the other hand, "what are the questions we need to ask in order to determine" a child's ability to steer through litigation – "what is the cutoff point?"[118] The experts noted, as also set forth in Section 2.1.2, this decision making happens against the backdrop of the child's best interests as mandated by CRC Article 3, EU Charter Article 24(2), ECHR Article 8, and the ICCPR.

Taking into consideration that 42 percent of negative cases and 33 percent of positive cases of this sample presented child litigants under the age of 5, the involvement in these litigation decisions clearly did not come from the children themselves. Many children are born into statelessness and then grow into a place where they may enjoy a genuine right to be heard, but before that time the state must confirm someone is protecting the rights and best interests of the child.[119] It is necessary to recall the CRC Committee's observation that these "very young children have the same rights as all children…even if they cannot express their views", yet the problem appears to remain in finding the means and methods necessary to accomplish respect for this principle.[120] Experts identified dedicated guardians or special representatives as a necessary yet oftentimes missing response to this problem.[121]

CRC Article 3 obliges states to guarantee all those involved in litigation prioritize children's bests interests and the right to be heard. How a state may – or may not – provide this protection for stateless children varies with each jurisdiction. Adopting the experts' presumption that a dedicated representative enables children's voices to be heard, this paper attempted to recognize correlations between the existence of special representatives and the outcome. "Special representative" for the purposes of this paper is broadly interpreted and used interchangeably with "guardian"; in sum, representatives dedicated solely to an individual's child's best interests legally and/or socially.

4.2.1 Concerns Encountered in Practice

One obstacle in finding connections between the lack of a special representative and a negative outcome, is that most of the court decisions in this sample are at an appellate level. It is unknown exactly what transpired at first instance or at the outset of the litigation process. In an appeal or request for judicial review, typically a court reviews only questions of law, not fact, and it is common for the child at issue to be physically distant from the proceedings. A special representative arguably is most needed when a child first enters into litigation. Despite this reality, if a state has ratified the CRC and incorporated it into its law, then unsuccessful litigants at first instance "absolutely can base an appeal on Article 12" if a child's right to be heard was disregarded in those original proceedings.[122] Thus, if children's lack of a guardian or the conflicted nature or incompetence of an existing guardian violated their CRC Article 12 right to be heard and resulted in a negative outcome, they may argue that point on appeal.

113 Text to n 34.
114 Executive B (n 72).
115 Donger (n 12) 285.
116 Executive A (n 70).
117 CRC Chair (n 73).
118 Executive A (n 70).
119 ibid.
120 CRC Committee (n 40) para 44.
121 CRC Chair (n 73); Executive A (n 70); Barrister (n 70).
122 CRC Chair (n 73).

All of Europe has ratified the CRC – although whether states have implemented it is an issue discussed in Section 4.3 – therefore it was unexpected to find that only in two of the 44 cases in this sample a court addressed a child's right to be heard.[123] The fact those two cases emerged from the ECtHR and CRC was perhaps not as unexpected. At the same time, the one case that presented a litigant challenging (unsuccessfully) a lack of guardianship for a stateless unaccompanied minor in the context of refugee status was the same ECtHR case that contributed to discussion concerning the right to be heard. Notably, in that case the ECtHR held it did not have to rule on the guardianship issue, so there was no genuine guidance on the matter.[124]

Unfortunately, these low statistics do not stem from every child being heard in a CRC Article 12 sense in all cases, or every child being appointed a special representative to protect his/her rights and best interests throughout the litigation. "This is a problem we constantly see. Even though this is the 35th anniversary of the CRC, the mindset hasn't changed that children remain passive subjects of protection rather than right holders in their own right."[125] In some states outside of this sample, children's voices are not heard because children are considered the property of their parents.[126] Europe may not encompass those states, but even in European states that support a child's right to be heard, if a child is from a family that places similar beliefs ahead of a child's rights, it may not be possible for that child's voice to be expressed, even in a European jurisdiction.[127]

In these situations, the concern is not only with small children, but also older children capable of expressing their views. Several problems might arise if children are not asked questions or not allowed to answer freely. For example, if a child has a sexual orientation that parents disagree with, or there is violence within the family, those serious issues likely will never be admitted and the child will not receive protection.[128] Where such differences exist and are discovered between the interests of the child and the family, "then a guardian ad litem must be given to the child."[129] Children must have a representative acting on their behalf when their best interests do not align with their family – the child should be at the center of all considerations.[130]

Children not only need a representative to insist their voices to be heard, but also to help them navigate procedure. One expert found judges often consider teenagers to have understood their instructions when in fact the trauma they have endured and their lack of legal knowledge stands in the way of genuine instruction.[131] Minors need guidance through the process, support going to interviews with psychiatrists, and assistance constructing their case chronologically – "guardians are much better at this than most lawyers."[132] These guardians may also ensure that everyone speaks in a language the child understands, and that no one is asking open-ended questions or questions children of a certain age cannot understand.[133] Without this special representative, procedure is inexplicable to most children who do not understand where they fit into the system, why they are meeting certain individuals, or what they have to accomplish.[134] It thus appears clear that children need a special representative, yet also appears through this sample and interviews that such representation is often lacking in the context of childhood statelessness, and most immigration contexts.

It is not possible to understand the lengths the existing advocates went for their clients in this sample. In one negative case coming from the Court of the Hague, for example, the child applicant was the sole litigant with an attorney acting specifically on his behalf (the existence of an additional guardian is unknown), and the types of action that attorney took beyond legal arguments and procedure cannot be gathered

123 *A.J. v. Greece* App no 34298/18 (ECtHR, 26 April 2022); *A.M. (on behalf of M.K.A.H.) v. Switzerland* (2021) CRC/C/88/D/95/2019.
124 *A.J. v. Greece* (n 123).
125 Executive B (n 72).
126 CRC Chair (n 73).
127 Executive B (n 72).
128 Executive A (n 70).
129 CRC Chair (n 73).
130 Executive A (n 70).
131 Barrister (n 70).
132 ibid.
133 CRC Chair (n 73).
134 Barrister (n 70).

from the face of the case.[135] Two positive case examples present "litigation friends" as children's representatives, but in one case the litigation friend was a parent[136] and in the other it is not clear what role the litigation friend played.[137] Therefore, most findings regarding special representatives required more reliance upon expert communication than the sample of cases. Whether special representatives would have made a difference in the outcomes of the sample cases cannot be predicted from the data.

That said, several negative cases appear to lack neutral, dedicated protection for the litigant child, or such advocacy existed but was ignored by the courts. For example, in *K.A. v. Refugee Appeals Tribunal,*[138] K.A.'s "Next Friend" and representative was her father, whose credibility had been rejected by the lower tribunal. There was no mention of any other guardian ad litem in the court's decision for K.A., who held no nationality. The court stated that because K.A. was an infant, "the substantive claims made on her behalf relate to the experiences of her parents."[139] It thus followed for the tribunal that if the "parents' claims are determined to be without substance, it necessarily follows that this was a matter to which the tribunal would have [to] regard as a matter of logic and commonsense."[140] Further, the only discussion of best interests was to say that "the grounds do not identify with any degree of precision what aspects of the child's best interests were not considered by the tribunal" and how that affected the related refugee determination proceedings.[141] There was no discussion of the effects of potential statelessness for the child.

In this case of *K.A.*, even though this child was the sole litigant, the court did not consider the child separately from her parents, who had "a considerable history in the asylum/immigration process" and seemingly without credibility in the eyes of the judge.[142] This lack of separation arguably led to an infant remaining stateless. If someone had been dedicated to acting in the child's best interests in addition to the attorney, perhaps stronger arguments could have been communicated on K.A.'s behalf regarding the child's best interests, or the issue of statelessness and its specific dangers to children would have been better understood by the court and thus discussed. Although the court listed the matter on the next term's docket, acknowledging that "great care should be taken to ensure" the child's case is heard, this research could not locate any subsequent records of any further hearings or judgments on the matter.[143]

Conversely, in another judgment with analogous facts from Ireland eight years after *K.A.*, the Supreme Court held in favor of a sole child litigant whose case was tied to a father who lost his refugee status as a result of fraudulent behavior, threatening the ability of his child to obtain Irish citizenship.[144] This positive outcome came without mention of a special representative beyond the child's attorney or "Next Friend" father, and without specific references to the child's best interests. In this case, the court relied primarily upon Irish law to support its decision, without reference to Statelessness Conventions or the CRC. Beyond the differences between judges and specific legal arguments of this case and *K.A.*, it is difficult to pinpoint additional factors that might justify why one child was left stateless and the other succeeded in his claims despite the connections with the fathers.

Similar to the findings involving third parties above, these differences point to the unpredictable nature of litigation and the abstract nature of an appeal. Perhaps an outcome would not be improved automatically by a dedicated special representative beyond the attorney. A court is expected to be bound by the laws of the state and/or international agreement regardless of the presence or absence of guardian figures. There are ethical guidelines encapsulated in those laws "you must respect always when you are working with children in whatever position."[145] As championed in the Literature Review and by experts, these mandates include the right to be heard which seems better enabled by guardians. One area of litigation in which these special representatives play a significant role to empower that right is found within family courts.

135 *Case No. ECLI:NL:RBDHA:2019:7638* (2019) Netherlands Court of the Hague.

136 *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v. Secretary of State for the Home Department, JR/2471/2016* (2016) UK Upper Tribunal Immigration and Asylum Chamber.

137 *MK (India) v. Secretary of State for the Home Department. Case No., CO/4812/2016, (2017) EWHC 1365 (Admin)* (2017) UK High Court of Justice, Queen's Bench Division.

138 *K.A.* (n 84).

139 ibid, para 23.

140 ibid.

141 ibid.

142 ibid, para 5.

143 ibid, para 24.

144 *U.M. v. The Minister for Foreign Affairs and Trade & Others* (2022) IESC 25.

145 CRC Chair (n 73); *see, e.g.,* CRC (n 40) arts 2, 3, 6, 12.

4.2.2 Family Courts: A Model

In the context of family courts, guardians are provided to children on a reliable basis in many European jurisdictions.[146] Several experts noted that the "most developed thinking" and meaningful procedural guidance with respect to child rights is generally found in family law.[147] In domestic family proceedings, a court appointed guardian is often mandatory, while many international forums and other courts (such as immigration/asylum tribunals) are unaccustomed to guardians and no framework exists to provide similar protection.[148] One such framework can be found in The Family Justice System of England and Wales and its Children and Family Court Advisory and Support Service (Cafcass). Qualified social workers work with children involved in litigation and then advise the court about their welfare and best interests.[149] This service is not found in UK asylum, immigration or statelessness application procedures, which are regulated by a different set of rules.

Similar approaches persist throughout Europe.[150] Reasons underlying the differences between courts are multifaceted, including the expensive nature of guardianship and potential discriminatory treatment of foreigners as opposed to children who are citizens.[151] Without procedural guidance, an attorney may negotiate with the parent to bring someone such as an NGO or expert into the litigation to protect the child's interests.[152] In the end, if it is discovered a child has not been heard, then that decision should be overturned: "That is the answer. If the child should be heard and is not heard, the decision concerning the child is void."[153]

Whether or not something akin to a Cafcass professional would have made a difference in a negative case such as *E3, N3 and ZA v. Secretary of State for the Home Department* discussed in Section 4.1.1,[154] appears questionable. As stated above, appeals focus on questions of law and often are intellectually crafted by attorneys. The judge in *E3* noted his appreciation of the high-quality legal representation in this particular case, which included the private attorneys for the claimants.[155] Under these circumstances of appeals, perhaps litigants cannot hope for much better than excellent attorneys in their corner. On the other hand, the *E3* judge acknowledged that the innocent child left without British citizenship due to UK government error was a victim, which makes one wonder what more could have been done to prevent this outcome.[156] Notably, there were three litigants in this case: the child, the father, and a similarly-situated man, and the child did not appear to have her own dedicated attorney. Taking all of this into consideration, if separate legal representation or a dedicated guardian was not offered when this child first entered into litigation, perhaps it should have been.

One expert painted a first-hand picture of the differences between an immigration tribunal and a family court. Without genuine guidance, a mother applied for asylum with her child as dependent, without an application in the child's own capacity. The immigration tribunal ruled against the mother, mistaking her procedural misunderstandings for untruthfulness, and barely mentioning the child in its decision. The child was not an actual party to the case, yet the immigration tribunal ruled against the child as well. A proactive state department of education, concerned with the child's mental health, obtained expert advice about the child's situation and brought the case before the jurisdiction's family court. The mother received a litigation friend/protector and the child received a special counsel appointment, and the mother and child

146 Bilson & White (n 35).

147 Executive A (n 70).

148 Executive B (n 72); Rap (n 27).

149 Cafcass, 'How Cafcass can help you' (2024) <https://www.cafcass.gov.uk/about-us/how-cafcass-can-help-you> accessed 11 March 2025.

150 *See, e.g.,* Anna Kaldal, 'Children's Participation in Legal Proceedings – Conditioned by Adult Views of Children's Capacity and Credibility?' in Rebecca Adami, Anna Kaldal, Margareta Aspán (eds), *The Rights of the Chil*d (Brill/Martinus Nijhoff 2023); Cathy Donnelly, 'Reflections of a *Guardian Ad Litem* on the Participation of Looked-after Children in Public Law Proceedings' (2010) 16 Child Care in Practice: Northern Ireland Journal of Multi-Disciplinary Child Care Practice 181; Maria Ruegger, 'Seen and Heard but How Well Informed? Children's Perceptions of the Guardian ad Litem Service' (2001) 15 Children & Society 133.

151 Executive A (n 70); Barrister (n 70).

152 Executive B (n 72).

153 CRC Chair (n 73).

154 *E3* (n 82).

155 ibid, para 3.

156 ibid, para 92.

ultimately were successful. "This is a classic example showing what needs to be in place to enable a child's case to be properly represented."[157] Other experts agree that family court protections should be replicated in immigration courts and tribunals. "We need to say – hey, in this very jurisdiction, here is how you [the state] are handling children in family courts, so the same respect should be given to children in this context."[158]

4.3 International Obligations in Domestic Law

Each jurisdiction's law determines the parameters of litigant choice and how a stateless child's voice will be heard. How a state incorporates human rights treaties into its domestic law plays a major role in how courts confront these issues. European states may be bound by many of the same treaties, but they may implement them differently in their societies, as noted above by Donger.[159] Similarly, courts "give their own interpretation of the legal provisions involved, and take their own decision on the compatibility of the applicable national legal provision with the human rights treaty in question."[160] This paper questioned how these legal complexities could be connected to case outcomes.

Almost every expert interviewed communicated some version of "it depends upon the court and what treaties the state has ratified" in response to questions concerning both procedural and substantive matters. Domestic context is important at first instance, and arguably even more so upon appeal. The farther litigation advances through a state's court system, generally the more binding the precedent. Considering ramifications of negative precedent, decisions to appeal prove far riskier; no one wishes to detract from the legal arsenal combatting childhood statelessness. Not only the state's legal environment, but the court itself is of utmost importance. When weighing whether to litigate, experts investigate if judges in the jurisdiction are sympathetic to issues of statelessness, or whether the court is "packed with government friends" unfriendly to migrants.[161] One expert recalled a former judge who championed child rights and the welfare of all children in litigation before him. "As soon as he finished his term, it went out the window again."[162]

Of the sample's 17 jurisdictions, 13 represent European states, while the others represent the CJEU, the CRC Committee, the ECtHR, and the HRC. Setting aside the international adjudicative bodies, the sample invited exploration of certain European states' legal environments. As there are innumerable combinations of international treaties ratified, interpreted, and implemented by a state throughout Europe, this research focused primarily on two specific areas and their effect on litigation: the CRC and the Statelessness Conventions.

4.3.1 The CRC: Lacking Domestic Power

Stateless child litigants should benefit from the universal ratification of the CRC in Europe. Under CRC Article 4, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation" of the CRC. The CRC Committee considers one "test" of successful implementation as "whether the applicable rights are truly realized for children and can be directly invoked before the courts."[163] Although the expectation might be for states to incorporate the CRC directly into their domestic law (*e.g.,* Sweden), some may implement the CRC by incorporating it by reference within their constitutions (*e.g.,* The Netherlands, Serbia), and some may not take any meaningful legislative action. In some jurisdic-

157 Barrister (n 70).

158 Executive A (n 70).

159 Donger (n 12).

160 Venice Commission, European Commission for Democracy through Law, 'Report on the implementation of international human rights treaties in domestic law and the role of the courts' (10-11 October 2014), para 4 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)036-e> accessed 17 March 2025.

161 Scholar A (n 67).

162 Barrister (n 70).

163 UN Committee on the rights of the Child (CRC Committee), 'General Comment No. 5, General measures of implementation of the convention on the Rights of the Child' (27 November 2003), para 21 <https://www.refworld.org/legal/general/crc/2003/en/36435> accessed 17 March 2025.

tions, only pieces of the CRC appear in domestic law and apply to citizen children, not foreign or stateless children involved in immigration matters.[164]

Ensuring safeguards guaranteeing a child's CRC Article 3 best interests are observed is key to ensuring children's rights in litigation.[165] This is consistent with the CRC Committee instructing those best interests be taken into consideration procedurally and as it pertains to substantive rights, such as securing nationality.[166] As noted in Section 2.2, however, most states fall short in fulfilling these obligations. In this sample of cases, courts often relied more upon other sources of "best interests" legal arguments such as the ECHR, the EU Charter and a state's own domestic law. Thirty-six percent of negative cases and only 30 percent of positive cases analyzed or acknowledged the CRC. Taking a closer look at certain jurisdictions may assist in understanding why the CRC appears to be an underutilized resource.

In the Netherlands, for example, Dutch and international law together comprise one legal order, without legislating separate implementation of international treaties. Articles 93 and 94 of the Netherlands Constitution state that provisions of treaties may be "binding" after publication, and that domestic law shall not conflict with international law.[167] Normally an explanatory memorandum explains which provisions are binding on all persons. For those not included, the Dutch still must abide by the international law, but an individual will not be able to invoke non-binding provisions in court. With respect to the CRC, not all provisions are binding. As a workaround, litigants may rely upon the ECHR or the EU Charter, both of which are accepted as legally binding and thus Articles 93 and 94 are not necessary to confront.[168] However, neither of those binding instruments bestow a direct right of nationality to a child.

Comparable circumstances may be found in several other European member states. The UK has "not directly incorporated [the CRC] into domestic law," but its provisions "are often referred to by the courts when interpreting obligations imposed by human rights and other legislation."[169] The ECHR, on the other hand, has been incorporated into UK law through the Human Rights Act 1998. Similar to The Netherlands, Serbia provides in Article 16 of its Constitution that "ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly."[170] However, when the Serbian Constitutional Court was pressed on the constitutionality of its birth registration procedures as required by CRC Article 7, the court failed to acknowledge the argument.[171] Examples of European states that incorporated the CRC into domestic law include Norway and Sweden; there were no childhood statelessness cases in the SCLD from these jurisdictions.

4.3.2 Statelessness: Jurisdictional Matters

Litigation discussed in this paper resulted from children unable to acquire a nationality. The experts interviewed echoed the literature and the "thoroughly preventable" nature of childhood statelessness,[172] stating that a child without a state should not exist, and at the very least European states should give provisional nationality to stateless children in need.[173] Nevertheless, the sample presents 71 percent of the negative cases resulting in children remaining stateless. At times this is due to states being "a little behind in understanding what statelessness means" which negatively affects litigation.[174] In almost one-third of the negative cases, the child was a victim of an arguably arbitrary administrative rule or government mistake.[175] There is a trickle-down effect from a state's lack of process surrounding statelessness upon the court sys-

164 Executive A (n 70).

165 Executive B (n 72).

166 CRC Committee (n 47).

167 Constitution of the Kingdom of the Netherlands (2008).

168 Scholar B (n 69).

169 UK Joint Committee on Human Rights, 'The UK's Compliance with the UN Convention on the Rights of the Child: Eighth Report of Session 2014-15' (18 March 2015), para 16 <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf> accessed 17 March 2025.

170 Constitution of the Republic of Serbia (2006).

171 *Case No., IUo-190/2018* (n 99).

172 ENS (n 58) 3.

173 CRC Chair (n 73).

174 Executive A (n 70).

175 *See, e.g., E3* (n 82), *PRCBC &O* (n 98), *Case No. 4 Usl-491/15-8* (2017) Croatia Administrative Court of Rijeka; *Case No. II OSK 894/14* (2015) Poland Supreme Administrative Court.

tems, despite most of these states being parties to the 1954 and 1961 Statelessness Conventions.

As a result, litigants must take into consideration several factors when deciding whether to go forward with a child statelessness case. "A huge part of litigation is risk assessment."[176] All risk is assessed within a legal and cultural context that varies by jurisdiction. In this sample of cases, setting aside the international cases, Croatia, Cyprus, France, Ireland, The Netherlands, Poland, Serbia, Switzerland, and the UK presented negative cases. Of those nine states, almost half either have not acceded to either the 1954 or 1961 Statelessness Conventions or have failed to accede to the 1961 Convention (Cyprus, France, Poland, Switzerland). Considering the first four articles of the 1961 Convention are dedicated to preventing childhood statelessness, and none of these states have committed themselves to this Convention, litigators and courts were forced to rely upon other laws (Figure 3).

Figure 3

Countries	1954 Convention	Charter of Fundamental Rights	CRC	ECHR	ICCPR	UDHR	Domestic Law
Cyprus		X	X	X			X
France	X						
Poland					X		
Switzerland							X

It is not that simple, of course, to conclude that a state's non-accession to the 1961 Convention means stateless child litigants are likely to fail. Of the nine negative states, seven of them also present positive cases. Further, Croatia is a party to both Conventions without reservations, and it did not present any positive cases. Similarly, the UK is a party to both Conventions, but its negative cases outweigh its positive outcomes.

Sometimes litigators may weigh whether to even argue statelessness in certain jurisdictions. "Do you argue statelessness or do you talk about discrimination?"[177] In the context of statelessness, oftentimes "common language isn't there in certain jurisdictions – it seems so fundamental, but it doesn't exist."[178] In some states, statelessness may have a local meaning entirely separate from the Conventions – "a more popular meaning that is political."[179] In 33 percent of the positive cases, the case involved the 1954 and/or the 1961 Conventions in party arguments or a court's reasoning, while 36 percent of negative cases cited the Conventions. The parties and courts in the positive cases relied more heavily upon broader and perhaps more binding human rights instruments such as the ECHR.

Taking The Netherlands again as an example, in June 2023 this state passed two amendments to the Dutch Nationality Act, creating a statelessness determination procedure and an ability for stateless children born in the Netherlands to obtain Dutch nationality.[180] The most recent case from the SCLD sample is in fact from

176 Scholar A (n 67).

177 Scholar A (n 67).

178 Executive A (n 70).

179 Scholar A (n 67).

180 Wet vaststellingsprocedure staatloosheid (Netherlands Parliament Statelessness Determination Procedure Act) (2023); Intrekking voorbehouden Verdrag status van staatlozen in verband met de vaststelling van staatloosheid (Netherlands Parliament Withdrawal of Reservations to the Convention on the Status of Stateless Persons in connection with the determination of statelessness) (2023).

a District Court in The Netherlands, holding the state in violation of the 1961 Convention, considering the Convention to be universally binding law in an Article 94 sense, noting the 2023 amendments, and confirming the child litigant's Dutch citizenship.[181] In comparison, in an earlier case from 2019 which invoked the 1961 Convention yet left a child stateless, the Court of the Hague deemed itself unable to grant Dutch nationality.[182] In many statelessness cases in the Netherlands prior to 2023, many courts "shied away from touching statelessness" while awaiting Parliament's amendments on statelessness procedures.[183] This example underscores the significance of domestic law and its impact on litigation – when the law is adhered to in court.

In an international law context, treaties bind European states only to the extent a sovereign European state allows itself to be bound. Without domestic incorporation of the CRC and the Statelessness Conventions, stateless children and their advocates face difficulties in court when fighting for these children's rights to be recognized, despite other legal instruments upon which one may rely (*e.g.*, ECHR, EU Charter, ICCPR). Children might be sympathetic litigants, but perhaps only within certain jurisdictions or certain courts. Even within those jurisdictions responsive to issues of statelessness, how a child is represented, with whom, and by whom are all variables that determine the outcome of a case.

181 *Case No. BRE AWB 23/2442 RWNL* (2023) Netherlands District Court Zeeland-West-Brabant, para 10.

182 *Case No. ECLI:NL:RBDHA:2019:7638* (n 135).

183 Scholar B (n 69).

5. Conclusion

This paper questioned whether "a particular litigation structure, process or pattern" within childhood statelessness cases could be found (Section 1.1). Taking the findings from Section 4.1 into consideration, certain impressions emerged. With respect to litigant structure, children indeed should be separated from other litigants and supported by a dedicated representative, both legally and emotionally however possible in the given jurisdiction. Even if the statistics of the sample at first glance suggest multiple litigants do not harm a child's chances of success, a deeper dive suggests that may only occur if children are from the Global North and/or if the case is not related to issues of asylum or forced migration. If allowed to participate, third parties may serve as expert voices in complex matters of statelessness, yet their involvement unfortunately promises neither a welcome reception by a court nor a positive outcome.

Moving one step beyond litigant choice and representation in Section 4.2, this research suggests a child's voice will be heard only if the state's law, court, and family allow it to be. Although the mandate of CRC Article 12 seems straightforward – and according to experts should be straightforward – a child's age and the lack of appropriate advocacy may stand in the way. Most courts and immigration tribunals are not equipped with protection measures such as special representatives found in family courts within the same jurisdiction. Stateless children suffer from their lack of citizenship and resulting lack of rights. Challenges present themselves in every layer of litigation, from a first instance court in which a child might not be given appropriate support or attention through to appeals courts in which the child is far removed from abstract legal arguments.

With respect to the secondary research question regarding correlations between litigation and the characteristics of the jurisdiction, this research in Section 4.3 presents a circular pattern for negative cases. Stateless children's journeys begin with a denial of their rights to birth registration and/or acquisition of nationality bestowed through the CRC, the ICCPR, the 1961 Statelessness Convention, among other legal instruments depending upon the state. This denial is facilitated by the failure to incorporate the CRC and/or the 1961 Statelessness Convention into a state's law. The child may then be brought into court by a parent, guardian, third party, or a lawyer, making decisions and determining how or if the child will be heard. These wide-ranging decisions are strategic and attached to unpredictable outcomes. The child's case may not succeed for any number of reasons, but many (a child's views ignored, a failure to advocate separately for the child's rights) can be tied back to the inability for litigants and courts in certain European states to sink their teeth into relevant treaties. The child's journey thus begins and ends with a state's failure to genuinely implement treaties such as the CRC and the Statelessness Conventions.

In sum, this research shows that children may have the best chance of success if they are separated from other litigants, appointed a special representative, and their arguments are rooted in indisputably binding law. The apparent simplicity of this conclusion is deceiving, as the research showed how rarely such a trifecta occurs despite substantial efforts by children's advocates. Thus, whether the rights of stateless children are being respected in European courtrooms receives an unsatisfying answer: it depends upon the courtroom. Data from the sample presented more positive cases than negative, yet this data and expert interviews demonstrate much more could and should be done. Negative cases should not exist; children should not be stateless. The path forward for litigators, litigants, and advocates encourages a focus both in and out of the courtroom.

6. Recommendations

Conclusions drawn from this research invite two recommendations: (1) litigator-generated safeguards, and (2) targeted lobbying for legislative change. "Statelessness is what makes these children unique."[184] The approach to representation then should educate the court about the special nature of what each child faces if deprived of nationality, while ensuring the child is heard and protected. This approach can be successful if litigators command the protection necessary for their clients and the international treaties intended to protect a child's rights are domesticated and respected.

6.1 Litigator-Generated Safeguards

The literature and this research underscore the importance of each child receiving separate representation both legally and emotionally while navigating a court system. Dependent upon the jurisdiction, this might mean an attorney capable of providing both, or a dedicated attorney and a separate guardian. It would be unfortunately unrealistic to recommend all jurisdictions establish guardianship in immigration/asylum-related cases. Certain jurisdictions may never be motivated to do so for political reasons and others may not be able to afford to do so – "guardianship is expensive."[185] What appears more reasonable is to recommend litigators take on the safeguarding role despite the lack of domestic law.

Litigator-generated safeguards could take on several forms: a commitment to only represent one child and avoid conflict of interest with parents and others; to ensure the child has a guardian trained in issues of statelessness; to ensure pleadings advocate for the specific best interests of the child despite a parent's facts entwined with a child's case, or; to partner with an expert or NGO on statelessness issues. However, many litigators in child rights cases are volunteer attorneys, court appointed, or working within an organization overwhelmed with workload. Many do not have the luxury to engage with only one client for certain cases in which perhaps they deal with entire families or classes of children. Further, many stateless families and children do not know their rights, or do not feel free to make litigation requests. "I can count on one hand the firms who can put in the time" to give the necessary attention to child rights cases.[186]

One area of safeguarding precedent that could be better established would be an official fight for equal treatment of children across courts. If allowed under a court's procedural rules, litigators could petition the court for a guardian and cite to the benefits bestowed by the analogous family court in the same jurisdiction. If denied, litigators may argue discrimination as an additional violation against their minor clients under the state's law or multiple international agreements. Litigators may cite to family law cases within their jurisdiction in their pleadings on issues of best interests and the right to be heard, with hope the court or tribunal adopts the more protective practice and procedures. Litigators within the given immigration framework could demand their minor clients receive the same safeguards as those provided in family courts.

This paper does not intend to create best practices. In fact, such standards already are encompassed within the CRC and set forth by the CRC Committee. CRC Articles 2 (no discrimination), 3 (best interests), 6 (right to development), and 12 (right to be heard) are the "main ethical guidelines that you have to respect always when you are working with children in whatever position."[187] There are additional best practices and ethical standards pertaining to child rights litigation not only available but obligatory in several jurisdictions.[188] This recommendation instead is to invoke a consciousness and creativity to representation that will benefit child litigants and may better the chances of a successful outcome, or at least a stronger record upon which one may appeal.

184 Executive A (n 70).

185 Barrister (n 70).

186 ibid.

187 CRC Chair (n 73).

188 Executive A (n 70).

6.2 Lobbying for Domestication of the CRC and the 1961 Convention

A genuine contribution to ending childhood statelessness begins by building positive legal precedent, which begins by giving litigators and courts the laws to do so. This paper recommends actions to better a stateless child's chances in any given jurisdiction, but not all actions can be taken in a courtroom. The way to ensure litigation complies with international obligations is by having child-friendly proceedings at the national level.[189] This can be achieved through domestication of international treaties, in this case the most important being the CRC and the 1961 Convention. Litigators and courts must be able to rely upon binding law. Thus, stateless children would benefit from renewed, targeted lobbying efforts advocating complete incorporation of the CRC and the 1961 Convention.

"Litigation has to be seen in an eco-system of other ways of trying to change things."[190] Shifting the law involves legislators, courts, executive powers, and the will of society. A state in which these moving parts are in alignment on any issue may never exist, but a solid first step will be found in a state's national law. Strategic litigation is difficult to participate in,[191] and is even harder without binding law. One expert noted that often "the working premise seems to be you pay lip service to international law, but it rarely is a key component of a court's decision making."[192] If that international law becomes national law, however, it is decidedly more difficult to ignore.

This recommendation to lobby for domestication is not the first of its kind, but UNHCR's #IBelong campaign and its "redoubling efforts" have shown the louder and more frequent the voices, the better.[193] Although statelessness still exists, the efforts of UNHCR's campaign have resulted in some success: additional ratification of the Statelessness Conventions; legislating stronger law to protect the stateless; granting nationality to resolve certain dire statelessness situations, and; "enact[ing] laws to help ensure that no child is born stateless."[194] There is no reason that targeted lobbying for domestication of the CRC and the ratification/domestication of the 1961 Convention cannot also be met with some success.

Acknowledging that a 100 percent incorporation by states is unlikely, a verbatim adoption of CRC Article 7 and the first four articles of the 1961 Convention would be a solid start. Even a state-crafted law clearly mandating nationality for all children would help prevent ambiguity or misinterpretation in courts. "It's not difficult. It's one sentence in the law. It can be done."[195] Actions 2 and 7 of UNHCR's Statelessness Policy brief consider ensuring no child is born stateless and birth registration to be vital, and this recommendation if heeded fulfills these directives.[196] What this lobbying looks like depends upon the jurisdiction, but the participation of NGOs, attorneys, and stateless persons can further shape this specific conversation.

Although presently other national and international instruments such as the ECHR are relied upon by litigators and courts, they often do not directly bestow a right to nationality. Reliance upon ECHR Article 8 is promising;[197] however, the CRC and the 1961 Convention spell out in clear, black-letter law a state's obligations to combat statelessness specifically and safeguard children. These treaties – that all (CRC) or most (1961 Convention) of Europe has already ratified – should be domesticated by states so they can be enforced by the courts. "[U]nder domestic law, the judiciary is the ultimate guarantor of fundamental rights."[198] Relevant laws therefore must be available to the judiciary to fulfill that role.

189 Executive B (n 72).

190 Scholar A (n 67).

191 Executive B (n 72).

192 Barrister (n 70).

193 UNHCR (n 2); UNCHR (n 3).

194 UNCHR (n 2) 3.

195 CRC Chair (n 73).

196 UNHCR (n 2).

197 European Court of Human Rights (ECtHR), 'Guide on Article 8 of the European Convention on Human Rights' (31 August 2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng> accessed 11 March 2025; *Genovese v. Malta* App no 53124/09 (ECtHR, 11 Oct 2011).

198 Venice Commission (n 160) para 115.

7. Final Thoughts

Childhood statelessness litigation combines the crisis of statelessness with the vulnerability of being a child litigant. This paper sought to understand how children and their advocates in Europe could benefit from analyzing caselaw. In the process of drawing correlations between litigation elements and outcome, the research revealed that actions taken outside the courtroom might carry as much weight as those within the courtroom. These actions include: separating children from other litigants; ensuring each child has a special representative, and; ensuring each European jurisdiction domesticates its obligations owed to these children.

This paper touched upon matters that invite more research. One area would be a study of how best to lobby effectively for domestication of the CRC and the 1961 Convention (in some cases also ratification). Another area could be a study of which legal pleadings or vehicles a litigator could effectively utilize to fight for the same benefits and procedures that exist in the family court of the given jurisdiction. Lastly, more research could be done on strategies surrounding how to appeal or reopen cases in which children were not heard in the first instance.

At the center of this paper existed a hope that this research could benefit stateless children and their advocates. Although the majority of power may rest with the sovereign states – a common theme in international law – there are still meaningful courses of action to be pursued that could make an impact. Whether the strategy behind childhood statelessness litigation focuses on one individual child or on a broader attempt to shift the law, the goal in either case remains for nationality and its accompanying rights to be given to each child. Although Europe already boasts the law to eradicate childhood statelessness, the lesson learned from this research is that a resourcefulness in approach is necessary to bring meaning to that law. This resourcefulness will find success if the underlying motivation remains rooted in the best interests of these children who must be protected.

8. ANNEX A

Negative Case List

Croatia

Case No. 4 Usl-491/15-8 (2017) Croatia Administrative Court of Rijeka

Cyprus

ECLI:CY:AD:2023:D266 (2023) Cyprus Supreme Court

ECtHR

A.J. v. Greece App no 34298/18 (ECtHR, 26 April 2022)

Karassev v. Finland App no 31414/96 (ECtHR, 12 Jan 1999)

France

Judgment no. 14N01490 (2015) France CAA de Nantes, 4ème chambre

Ireland

K.A. v. Refugee Appeals Tribunal and Another (2014) IEHC 223

The Netherlands

Case No. ECLI:NL:RBDHA:2019:7638 (2019) Netherlands Court of the Hague

Case No. ECLI:NL:RVS:2016:2912 (2016) Netherlands Council of State (Raad van State)

Poland

Case No. II OSK 894/14 (2015) Poland Supreme Administrative Court

Serbia

Inicijativa za pokretanje postupka ocene ustavnosti i zakonitosti propisa koji onemogućuju upis u matičnu knjigu rođenih odmah po rođenju, Case No., IUo-190/2018 (2019) Constitutional Court of the Republic of Serbia (UStavni sud Srbije)

Switzerland

A,B,C,D,E gegen Staatsekretariat für Migration, F-6073/2014 (2017) Switzerland Federal Administrative Court (Bundesverwaltungsgericht)

UK

E3, N3 and ZA v. Secretary of State for the Home Department, (2022) EWHC 1133 (2022) UK High Court of Justice Queen's Bench Division Administrative Court

PRCBC & O v. Secretary of State for the Home Department, (2022) UKSC 3 (2022) UK Supreme Court

JM & R v. Secretary of State for the Home Department, (2018) EWCA Civ 188 (2018) UK Court of Appeal (Civil Division)

9. ANNEX B

Positive Case List

Austria

Ra 2022/21/0093 (2022) Supreme Administrative Court of Austria (Verwaltungsgerichtshof, VwGH)

Case No. LVwG-2018/14/1219-1 (2019) Austria Tirol Administrative Court

Case No. U2131/2012 (2014) Austria Constitutional Court (Verfassungsgerichtshof)

Case No. B99/12 ua (2012) Austria Constitutional Court (Verfassungsgerichtshof)

CJEU

Case C-2/21 *Rzecznik Praw Obywatelskich* (2022) ECLI:EU:C:2022:502

Case C-490/20 *V.M.A. v. Stolichna Obsthina* (2021) ECLI:EU:C2021:1008

ECtHR

C v. Italy App no 47196/21 (ECtHR, 31 Aug 2023)

Hashemi and Others v. Azerbaijan App no 1480/16 and 6 others (ECtHR, 13 Jan 2022)

Mennesson v. France App no 65192/11 (ECtHR, 9 Sept 2014)

Genovese v. Malta App no 53124/09 (ECtHR, 11 Oct 2011)

D.H. and Others v. Czech Republic App no 57325/00 (ECtHR, 13 Nov 2007)

France

Judgment no. 19-50.043 (2020) France Cour de Cassation, Civile, Chambre Civile 1

Judgment no. 261305 (2007) France Conseil d'État, Section du contentieux

Germany

Case No. 5 C 32/07 (2008) Germany Federal Administrative Court

HRC

Communication No. 2498/201 CCPR/C/125/D/2498/2014 (HRC, 24 May 2019)

Zhao v. Netherlands CCPR/C/130/D/2918/2016 (HRC, 19 Dec 2020)

Montenegro

Case No. 898/2009 (2024) Montenegro, Administrative Court

Netherlands

Case No. BRE AWB 23/2442 RWNL (2023) Netherlands District Court Zeeland-West-Brabant

Case No. ECLI:NL:RBOBR:2016:2818 (2016) Netherlands East-Brabant Court

Case No. AWB 09/2212, ECLI:NL:RBZLY:2010:BN6394 (2010) Netherlands District Court Zwolle

Poland

Case No. II OPS 1/19 (2019) Poland Supreme Administrative Court

Case No. III SA/Kr 233/19 (2019) Poland Provincial Administrative Court in Kraków

Case No. II OSK 2552/16 (2018) Poland Supreme Administrative Court

Serbia

Tužba zbog diskriminacije, Case No. P 56984/2010 (2011) Basic Court in Novi Sad, Serbia (Osnovni sud u Novom Sadu)

Spain

Sentencia 341/2022 (Appeal No. 2209/2022) (2022) Sección 2 de la Audiencia Provincial de Gipuzkoa, Spain

Switzerland

A, B and C gegen Staatsekretariat für Migration, F-6147/2015 (2017) Switzerland Federal Administrative Court (Bundesverwaltungsgericht)

UK

MK (India) v. Secretary of State for the Home Department. Case No., CO/4812/2016, (2017) EWHC 1365 (Admin) (2017) UK High Court of Justice, Queen's Bench Division

The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v. Secretary of State for the Home Department, JR/2471/2016 (2016) UK Upper Tribunal Immigration and Asylum Chamber

UN Committee on the Rights of the Child (CRC Committee)

A.M. (on behalf of M.K.A.H.) v. Switzerland (2021) CRC/C/88/D/95/2019

10. ANNEX C

Targeted Cases and Jurisdictions

Ireland

U.M. v. The Minister for Foreign Affairs and Trade & Others (2022) IESC 25 (Positive)

K.A. v. Refugee Appeals Tribunal and Another (2014) IEHC 223 (Negative)

Netherlands

Case No. BRE AWB 23/2442 RWNL (2023) Netherlands District Court Zeeland-West-Braban (Positive)

Case No. ECLI:NL:RVS:2016:2912 (2016) Netherlands Council of State (Raad van State) (Negative)

Serbia

Inicijativa za pokretanje postupka ocene ustavnosti i zakonitosti propisa koji onemogućuju upis u matičnu knjigu rođenih odmah po rođenju, Case No., IUo-190/2018 (2019) Constitutional Court of the Republic of Serbia (UStavni sud Srbije) (Negative)

Tužba zbog diskriminacije, Case No. P 56984/2010 (2011) Basic Court in Novi Sad, Serbia (Osnovni sud u Novom Sadu) (Positive)

UK

E3, N3 and ZA v. Secretary of State for the Home Department, (2022) EWHC 1133 (2022) UK High Court of Justice Queen's Bench Division Administrative Court (Negative)

UN Committee on the Rights of the Child (CRC Committee)

A.M. (on behalf of M.K.A.H.) v. Switzerland (2021) CRC/C/88/D/95/2019 (Positive)