

STATELESSNESS BRIEFING NOTE

DECEMBER 2021



AUTHORS

This Briefing Note was prepared by aditus foundation with the support of the European Network on Statelessness. It is available online here.

aditus foundation is a non-governmental organisation established in 2011 with a mission to monitor, report and act on access to human rights in Malta. Named for the Latin word for 'access', our work is focused on the attentive analysis of access to human rights recognition and enjoyment. Our work promotes a society where all persons are able to access and enjoy all their fundamental human rights, and access to justice and remedies should be provided in case of violations.

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aditus foundation
1A, Rhea Building,
Triq is-Santissima Trinitá,
Hamrun MRS 2280,
Malta

+35620106295 | www.aditus.org.mt | info@aditus.org.mt

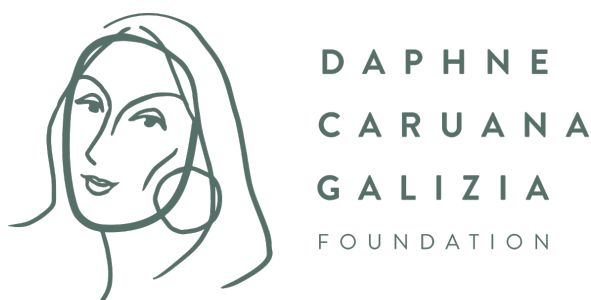
The European Network on Statelessness is a civil society alliance committed to ending statelessness and ensuring that stateless people living in Europe are protected. It aims to reach our mission through law and policy development, awareness-raising, and capacity-building.



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Statelessness

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ENDORSEMENTS



Everyone has the right to a nationality.

Article 15, Universal declaration of human rights

Every child has the right to acquire a nationality.

Article 24(3), International Covenant on Civil and Political Rights

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 7(1), Convention on the rights of the child

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INTRODUCTION

In 2019 Malta acceded to the 1954 Convention Relating to the Status of Stateless Persons. This was a welcome development, confirming Malta's commitment to resolving the situation of stateless persons in Malta. Yet, to date, Malta has not taken the legislative or administrative steps necessary to fulfil its new Convention obligations. Specifically, Malta has not yet established a procedure accessible by stateless persons, or persons believing to be stateless, in order for their status to be determined.

As a result of this omission, stateless persons in Malta remain unidentified and vulnerable to violations of their fundamental human rights including, for example, the rights to education, employment, freedom from discrimination, housing, personal liberty, family and private life.

Furthermore, without a formal procedure mandated to determine statelessness, Malta is unable to gain the necessary insights into the nature and size of its stateless population, thereby preventing it from taking those steps that could remedy and prevent statelessness.

Whilst discussions with the Ministry for Home Affairs, National Security and Law Enforcement on Malta's statelessness determination procedure remain on-going, the need is felt to stimulate the process by providing technical input by way of informing the dialogue and, ultimately, its outcome.

The aim of this Briefing Note is to urge Government to establish a statelessness determination procedure that is accessible, fair and efficient, and that leads to a dedicated status with clear rights attached to it.

It is in this context and with this spirit, therefore, that this Briefing Note is being presented to the Ministry. We look forward to further engaging with the Ministry with a view to supporting Malta's fulfilment of its international obligations and upholding the fundamental human rights of stateless persons.

BACKGROUND

Information presented in this Briefing Note is largely adapted from the [Malta page](#) in the [Statelessness Index](#). This page is the most comprehensive and updated information on the situation of statelessness in Malta, covering a range of themes relevant to an in-depth understanding of the various legal and policy features of Malta's context.

As with all other country pages in the Index, information is presented under key headings:

- International and Regional Instruments;
- Statelessness Population Data
- Statelessness Determination and Status;
- Detention;
- Prevention and Reduction;
- Resources.



This Briefing Note puts forward a series of proposals relating primarily to the stateless determination procedure. In view of the fact that the 1954 Convention also stipulates the rights to be enjoyed by stateless persons, we are also presenting recommendations on how we feel Malta might most effectively protect, respect, and fulfil these Convention rights.

THE STATELESSNESS INDEX

The Statelessness Index is a comparative tool that assesses European countries' law, policy, and practice on the protection of stateless people and the prevention and reduction of statelessness, against international norms and good practice. It is a tool created for civil society, governments, researchers, the media, and other interested individuals, including stateless people and their communities.

The Index was developed and is maintained by the European Network on Statelessness (ENS). ENS is a civil society alliance of over 170 non-governmental organisations, academics, and individual experts in 41 countries, committed to addressing statelessness in Europe.

ENS underlines that everyone has the right to a nationality. In this regard, ENS believes this must be respected and that the human rights of people who lack a nationality — stateless people — must be protected. The Network is dedicated to working with stateless people in Europe to advocate for their rights. It aims to reach its goals through law and policy development, awareness-raising, and capacity-building.

As of November 2021, the Index contains comparative data for 27 countries: Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, North Macedonia, Malta, Moldova, Norway, The Netherlands, Poland, Portugal, Serbia, Slovenia, Spain, Switzerland, United Kingdom, and Ukraine. More countries will be added in early 2022.

The Index allows users to quickly understand which areas of law, policy, and practice can be improved by States and which can be looked to as examples of good practice in addressing statelessness. It is therefore an invaluable tool for sharing this good practice and raising awareness or focusing advocacy on areas that need improvement. There are other indexes examining nationality law and integration policies, for example, as well as thematic research on statelessness in specific countries, but the

Index is the first to provide comprehensive and accessible comparative analysis of European countries' efforts to address statelessness.

The Index assesses how countries in Europe perform against international norms and good practice for the protection of stateless people and the prevention and reduction of statelessness. A country's performance is assessed against a set of benchmarks drawn from international and regional human rights standards, soft law, relevant reports, and consultation with experts.

The norms and good practices against which performance is benchmarked, as well as their respective sources, are compiled in this [List of norms and good practices](#). A summary of the benchmarks can also be viewed by clicking on each sub-theme heading, or in more detail in the country surveys available for download from each country page.

There are of course limitations to the Index. It is intended to provide an indicative assessment to help monitor and compare State law, policy, and practice on statelessness. The assessment categories are intentionally broad, recognising that it is not an exact science.

Country experts were selected for their expertise and ability to research and provide accurate data. However, they have to work within a relatively limited timeframe and budget, and in some cases, little data or information on statelessness is available at national level.

In all countries, a second country expert reviews and verifies the data, to increase validity. Alongside the final country analysis and assessment, the raw data is available to download for transparency and to provide more detailed information for those with a specific technical or research interest.

Statelessness status should include a residence permit, access to economic, social, civil, and political rights, the right to administrative assistance, exemption from requirements they cannot meet because they are stateless, and other rights protected by international law.

States should also establish a facilitated route to naturalisation so stateless people can acquire a nationality and resolve their statelessness.

European Network on Statelessness, [Statelessness determination and protection in Europe: good practice, challenges and risks](#)

STATELESSNESS IN MALTA

...the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

Article 1(1), Convention Relating to the Status of Stateless Persons

...'stateless' means destitute of any nationality and 'stateless person' shall be construed accordingly...

Article 2, Maltese Citizenship Act

GENERAL COMMENTS

Malta acceded to the 1954 Convention in 2019, but it still provides very limited protection for stateless people, and is not party to the 1961 Convention. There is no mechanism to identify and determine statelessness, and no stateless protection status, although it has other routes through which some stateless people may regularise their stay, including temporary humanitarian protection.

Since 2020, Malta is no longer accepting new applications for a route to regularisation it had introduced in 2018 for people refused asylum and unable to leave the country or be returned.

Data on the stateless population is therefore limited, with figures available only for the very small number of stateless people who acquire Maltese nationality, and refused asylum-seekers recorded as having 'nationality unknown' who cannot be returned and may or may not be stateless. Attempts to include statelessness-related questions in the 2021 Census of Population and Housing, were only partially successful.

Maltese law provides some protections against arbitrary detention, but rights afforded to those detained for removal purposes are very limited and there have been recent reports of people detained on arrival on public health grounds or without legal basis, without sufficient safeguards.

There are some safeguards in Maltese law to prevent statelessness, but implementation is problematic and there are some key gaps. The law prevents statelessness in cases of adopted children and new-born foundlings whose parents remain unidentified. There is a provision granting children born stateless on the territory a conditional right to acquire nationality following five years' legal residence, but, although in line with the 1961 Convention, the provision does not prevent statelessness in all cases and is not currently implemented in practice.

Discriminatory provisions in both law and practice relating to conferral of nationality by descent remain in force despite a European Court of Human Rights judgement ruling against Malta on this matter in 2011. Malta has only partial safeguards to prevent statelessness as a consequence of provisions for deprivation of nationality.

Furthermore, whilst Maltese law does refer to statelessness within the meaning of the 1954 Convention, the Maltese Citizenship Act defines statelessness as "*destitute of any*

nationality", and does not provide a definition of a 'stateless person' in line with the 1954 Convention definition.

STATELESSNESS DETERMINATION AND STATUS

Since Malta acceded to the 1954 Convention in 2019, the Government has made some progress towards the introduction of an SDP. However, currently, there is no mechanism to identify or determine statelessness in Malta nor any dedicated protection status for stateless people.

The International Protection Agency may grant Temporary Humanitarian Protection (THP) where someone has been refused asylum, but obtains protection for exceptional humanitarian reasons (for example, unaccompanied minors, people who are terminally or seriously ill, family reunion). The THP was a discretionary policy, which in 2020 was converted to law and embedded in the International Protection Act. It is possible for stateless persons to be granted international protection, also on the basis of them being stateless.

A person granted THP can access a renewable residence permit for one year, healthcare, and the labour market.

A regularisation route was introduced between 2018 and 2020 for refused asylum seekers who entered Malta before 2016 and who were unable to be returned, could show at least five years' residence, and efforts to integrate: the Specific Residence Authorisation (SRA). This provided a two-year residence permit with access to a range of socio-economic rights, but it has now been discontinued and new applications are not permissible.

Although these alternative routes to regularisation may provide some form of protection for some stateless people, no rights are granted to stateless people in Malta purely based on their statelessness.

Within this context, statelessness is not formally identified or assessed in any of the procedures available to stateless people to regularise their stay in Malta. Furthermore, there is no published guidance for decision-makers on how to identify or determine statelessness. This despite the fact that the Maltese Citizenship Act makes ample reference to stateless persons, including in the context of them seeking Maltese nationality.

The Act specifies that a stateless person (who has always been stateless i.e. from birth) born in Malta may apply for naturalisation after five years' residence in Malta if they can meet other general eligibility requirements and have not been convicted of a crime punishable by more than five years imprisonment.

Additionally, a stateless person who has always been stateless and has a parent who is a Maltese national may naturalise after three years' ordinary residence subject to conditions. Yet in the absence of a definition compliant with international law, a formal procedure to determine statelessness or — as a minimum — guideline or training on the matter, we question how these provisions could be applied in practice.

Remaining unidentified, stateless persons are unable to enjoy the rights and protection enshrined in the 1954 Convention.



A MALTESE STATELESSNESS DETERMINATION PROCEDURE

Without a formal procedure to determine who is and who is not stateless, Malta is simply unable to meet its Convention obligations. This has been underlined by UNHCR, the UN Human Rights Committee, and the European Court of Human Rights.

Yet, as with refugee status determination under the 1951 Convention Relating to the Status of Refugees, the 1954 Convention does not contain any information or guidelines on the procedure necessary to assess whether an applicant falls within its own definition of statelessness.

Following Malta's accession to the Convention, the next step is for the authorities to establish such a procedure. Our recommendations on how we envisage Malta's statelessness determination procedure are presented hereunder.

It is noted that our input is largely based on the UNHCR Handbook and replicating aspects of the asylum procedure, where relevant. The latter point is relevant not only due to the similarities between the two regimes, but also from an interest in maximising existing resources.

The 1954 Convention relating to the Status of Stateless Persons establishes a standard of treatment which can only be applied by a State party if it knows who the recipients of this treatment should be.

As such, it is implicit in the 1954 Convention that States parties identify who qualifies as a stateless person under Article 1 of the Convention for the purpose of affording them the standard of treatment set forth in the Convention.

UNHCR, Statelessness Determination Procedures and the Status of Stateless Persons

THE STRUCTURAL APPROACH

In order to give true effect to Malta's Convention obligations, and to guarantee a satisfactory degree of legal certainty, we recommend that Malta's statelessness regime be enshrined in a specialised Act of Parliament: a Statelessness Act.

This Act would be a comprehensive law containing all aspects of statelessness in Malta, including:

- A definition that conforms to that found in the Convention, overriding all other existing variations in Maltese law;
- The designation of the Determining Authority, listing its duties in relation to statelessness;
- An explanation of the statelessness determination procedure. Whilst it is possible to envisage a scenario where technical procedural details are included in subsidiary legislation, we do underline the need to include – as a minimum – the following elements in primary legislation:
 - the right for all persons to access the procedure in an indiscriminate manner;
 - modalities of access to the procedure, including eligibility criteria;
 - the right to access legal aid and legal assistance;
 - rights and obligations pending the procedure, including the provision of documentation to confirm the status as a person pending the procedure, protection from administrative detention, protection from removal, reception conditions allowing for a dignified life throughout the procedure.
- An appeals procedure that fulfils the requirements of the right to an effective remedy;
- The right to a personal interview;

- Evidentiary requirements, including that the burden of proof should be shared between the applicant and the Determining Authority, and the standard of proof must take into consideration the difficulties inherent in proving statelessness;
- Rights and obligations attached to a statelessness status;
- Harmonising amendments to existing legislation, in particular the Maltese Citizenship Act.

1. Enshrine Malta's statelessness regime in an Act of Parliament.

Other rights, however, are conferred on stateless persons, conditional upon whether an individual is “lawfully in”, “lawfully staying in” or “habitually resident” in the territory of a State party. States may thus grant individuals determined to be stateless more comprehensive rights than those guaranteed to individuals awaiting a determination.

Nevertheless, the latter are entitled to many of the 1954 Convention rights. This is similar to the treatment of asylum-seekers under the 1951 Convention.

UNHCR, [Statelessness Determination Procedures and the Status of Stateless Persons](#)

THE STATELESSNESS DETERMINING AUTHORITY | CONNECTION WITH THE ASYLUM PROCEDURE

Statelessness determination is an extremely complex and technical exercise that should only be undertaken by persons suitably trained in the matter. It requires in-depth knowledge of legislation, jurisprudence and interpretations relating to the definition of the term “stateless person” (in terms of the Convention), as well as a high level of analytical skills necessary for researching and examining information about the nationality laws and practices of countries with which applicants have relevant links.

Furthermore, as with asylum determination, this process also relies on establishing a cooperative relationship with applicants in order for them to disclose all relevant information and trust the system’s integrity and capacity to deliver concrete results.

We believe the International Protection Agency (IPA) is best-suited to be Malta’s Statelessness Determining Authority. It has been operational for several years, conducting and gaining expertise in similar activities and having a solid administrative set-up that is based on the particularities of its mandate. The Agency’s officials are regularly trained in interviewing techniques, are familiar with UNHCR guidelines and publications, and research and study country of origin information (albeit with a different objective).

Furthermore, the Agency has already established significant protocols, guidelines and internal systems that could be relevant for a statelessness determination procedure.

Practice in other EU Member States that have a functioning determination procedure also reveals the advantages of the two determination procedures to be closely linked, mainly since applicants are very often referred from one procedure to the other. Asylum and statelessness are governed by strictly distinct legal frameworks but may often intersect in individual cases: the reasons for someone being stateless are often embedded in persecution and discrimination by the authorities of the country of habitual residence.

It is therefore advisable that an applicant is permitted to introduce applications for both procedures at the same time. In such a case, the statelessness procedure should be suspended pending conclusion of the asylum procedure. This is because the

statelessness procedure usually involves direct contact between the Determining Authority and countries with which the applicant has relevant links.

Furthermore, in order to prevent undue administrative burden and prolonged procedures, it is also advisable that IPA is enabled to grant the specific status of 'stateless refugee', if the risk of persecution is established and the statelessness is credible, even if not formally evidenced in a statelessness determination procedure. This is the practice adopted in France, generally cited as a good practice by UNHCR.

Additionally, given the highly complex and legal nature of a statelessness determination procedure, often more technical than the asylum procedure, the procedure must be conducted by specialised and trained personnel.

In order for them to effectively detect and refer potential cases, officials responsible for asylum, migration and naturalisation should also receive regular adequate training, ideally conducted by the Determining Authority itself with the assistance of entities such as UNHCR and civil society experts such as ENS and its members.

2. Establish the International Protection Agency as Malta's Statelessness Determining Authority

3. Ensure the possibility of IPA granting a 'stateless refugee' status.

4. Provide initial and on-going training to Determining Authority personnel and to personnel of the IPA, Identity Malta, Community Malta Agency, Immigration Police.

ACCESS TO THE PROCEDURE

The procedure should be accessed in a formalised manner through a designated entry point, in principle this being the Determining Authority. Applications should be introduced through a specific form to be completed either by the applicant by themselves, in which case support should be provided if required) or during a registration interview with the Authority.

Applications should be immediately formally acknowledged, such as by issuing an individual attestation similar to the Asylum-Seeker Document currently used by the IPA.

5. Formalise the procedure's entry point through a designated procedure.

6. Provide all applicants with formal acknowledgement of their application and status.

REFERRAL PROCEDURES

As in several situations where an asylum-seeker's first contact with Maltese authorities might not be with the International Protection Agency, it is possible to envisage scenarios where stateless persons come in contact with State entities other than the Determining Authority. Such entities could include Identity Malta, the Police Force, Aġenzija APPOĠĠ, the International Protection Agency, the International Protection Appeals Tribunal and the Immigration Appeals Board.

In these cases, it is imperative that applicants are formally referred to the appropriate procedure. The referral should not be limited to giving oral information to the applicant but should take the form of a signed referral template that the applicant could present to the relevant authority.

For this to happen, appropriate training of key officials should be ensured in order to guarantee the prompt identification of persons who are stateless or at risk thereof.

7. Ensure the possibility of referrals from other governmental entities, through a formalised referral procedure.

8. Provide initial and on-going training to Determining Authority personnel and to personnel of the IPA, Identity Malta, Community Malta Agency, Immigration Police (Recommendation No. 4).

STATUS OF STATELESSNESS APPLICANTS

All registered applicants must receive formal evidence of their status as applicants. This is fundamental since, by definition, applicants will generally not possess any other form of documentation. In its Handbook, UNHCR provides an interpretation of the Convention that would require States to authorise the presence of applicants on their territory in order for them to be considered lawfully present and therefore entitled to the set of Convention rights.

These would include:

- Provision of documentation;
- Access to employment;
- Access to accommodation and social protection;
- Access to healthcare;
- Free movement;
- Protection from return and detention.

We therefore recommend that statelessness applicants are afforded, as a minimum, the same rights under the same conditions as asylum-seekers. The logic is that in both cases, applicants are persons claiming the Malta's administrative protection.

In particular, in view of the fact that the prospect of returning a stateless person to their former country of habitual residence is quasi null, their administrative detention should be strictly limited to serious cases enumerated in law and threatening national security. Procedural safeguards should always be guaranteed.

9. Provide all applicants with formal acknowledgement of their application and status (Recommendation No. 6).

10. Provide applicants with reception conditions.

11. Protect applicants from administrative detention, in accordance with international and European standards.

ASSESSMENT OF APPLICATIONS AND PROCEDURAL SAFEGUARDS AND GUARANTEES

Part 2 of UNHCR's Handbook provides in-depth guidance on how to establish and conduct statelessness determination procedures.

Generally, we recommend that the procedural safeguards and guarantees applicable to the asylum procedure are also applied *mutatis mutandis* to the statelessness determination procedure, including:

- Shared burden of proof between the applicant and the Authority, implying a duty of cooperation on good faith on the part of the applicant and the duty of investigation for the Authority;
- Standard of proof should be the same as in refugee status determination procedures, i.e. it should be established 'to a reasonable degree' that the applicant is not considered a national by any State under the operation of its law;
- A personal interview, with the availability of interpretation. It is of the utmost importance that applicants are given the opportunity to present their situation and provide in-person clarifications regarding the claim;
- Legal representation, translation and interpretation services;
- The procedure should foresee specific time limits, reasonable in the range of six to twelve months;
- Vulnerability screening and special guarantees, if applicable. In particular, measures to prevent discrimination and guarantee substantive equality for women, LGBTIQ+ persons, children, people with disabilities, and other groups at risk of being disadvantaged in the procedure — including a

greater share of the burden of proof on the Authority, prioritisation of claims, adequately trained professionals, and child rights-based procedures;

- Right to a reasoned decision in writing;
- Quality assurance mechanisms;
- Access to an effective remedy, including an appeal to an independent and qualified body.

12. Embed procedural safeguards and guarantees in legislation.

13. Provide the same level of safeguards and guarantees as those generally found in asylum procedures.

14. Ensure the identification and added protection of vulnerable applicants.

A STATELESSNESS STATUS

The Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons.

They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.

Article 32, Convention Relating to the Status of Stateless Persons

The recognition of statelessness should result in a formal and recognised Statelessness Status with corresponding rights and obligations. As such, the recognition is the acknowledgement by Malta that the status holder is unable to enjoy the protection of any other country and that, consequently, Malta will be extending them its national protection. The content of this protection is governed by the 1954 Convention, acceded to by Malta and therefore legally binding on the State.

We urge Malta to include this set of rights in a Statelessness Act, and for stateless persons to enjoy — as a minimum — the same set of rights enjoyed by recognised refugees in Malta.

In particular, we underline the need for Malta to revise the Maltese Citizenship Act in order to bring this in line with the above-captioned Article 32 of the Convention. In practice, this could mean a reduction of naturalisation requirements, exemption from application fees, shortening the minimum required period of residence, and including time spent in Malta prior to acquisition of formal status in such computation.

15. Establish in law a statelessness status, with associated rights and obligations.

16. Amend the Maltese Citizenship Act to ensure a proper implementation of Convention Article 32.



SUMMARY

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1. Enshrine Malta's statelessness regime in an Act of Parliament.
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2. Establish the International Protection Agency as Malta's Statelessness Determining Authority.
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3. Ensure the possibility of IPA granting a 'stateless refugee' status.
-
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4. Provide initial and on-going training to Determining Authority personnel and to personnel of the IPA, Identity Malta, Community Malta Agency, Immigration Police.
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5. Formalise the procedure's entry point by through a designated procedure.
-
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6. Provide all applicants with formal acknowledgement of their application and status.
-
-
7. Ensure the possibility of referrals from other governmental entities, through a formalised referral procedure.
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8. Provide initial and on-going training to Determining Authority personnel and to personnel of the IPA, Identity Malta, Community Malta Agency, Immigration Police (Recommendation No. 4).
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9. Provide all applicants with formal acknowledgement of their application and status (Recommendation No. 6).
-

10. Provide applicants with reception conditions.

11. Protect applicants from administrative detention, in accordance with international and European standards.

12. Embed procedural safeguards and guarantees in legislation.

13. Provide the same level of safeguards and guarantees as those generally found in asylum procedures.

14. Ensure the identification and added protection of vulnerable applicants.

15. Establish in law a statelessness status, with associated rights and obligations.

16. Amend the Maltese Citizenship Act to ensure a proper implementation of Convention Article 32.

ADDITIONAL RESOURCES

aditus foundation, European Network on Statelessness & Institute on Statelessness and Inclusion - [Joint Submission to the Human Rights Council at UPR31 - Malta](#) (March 2018)

aditus foundation - [Input to the Census of Population and Housing 2021](#) (May 2020)

ENS - [Summary guide of good practices and factors to consider when designing national determination and protection mechanisms](#) (2013)

ENS & aditus foundation - [Protecting Stateless Persons from Arbitrary Detention in Malta](#) (November 2015)

European Network on Statelessness - [Statelessness determination and protection in Europe](#) (September 2021)

UNHCR - [Mapping Statelessness in Malta](#) (August 2014)
