

The “Unknown” Child – Zhao V. The Netherlands Brings to Light Problems with Statelessness Procedures

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By: Irit Weiser

Denny Zhao v. Netherlands [here] – a December 2020 decision of the UN Human Rights Committee - is being lauded as a significant advance towards ending childhood statelessness. The case reflects the strategic efforts of various advocates following a 2011 UNHCR report which revealed that 83,000 people in the Netherlands were registered as having an ‘unknown nationality’, a designation which left them in an ongoing state of limbo. Only 2,000 people were registered as ‘stateless’, allowing them to access relevant Dutch legislation for the purpose of determining citizenship eligibility. [here] The Zhao case was brought by a children’s rights NGO, the Dutch Refugee Council and Dutch lawyers in an

effort to advocate for children with an ‘unknown nationality’ registration to have access to a nationality, to more social-economic human rights, and to humane living conditions. [here]

Denny Zhao was born on February 18, 2010 in Utrecht, Netherlands to a mother who was herself registered with Dutch authorities as being of unknown nationality. Her birth in China in 1989 was not registered by her family in the civil records of that country and she was abandoned by them a few years later once her mother bore a son. In 2004, at age 15, she was trafficked to the Netherlands but was eventually able to escape. She unsuccessfully sought asylum there on several occasions. (para. 2.1)

Dutch legislation requires a person to provide conclusive proof of nationality, or of lack of nationality, in order to change his or her registered status from “unknown” to “stateless”. Only the latter designation triggers international protections afforded to stateless children, including the right to acquire the nationality of the state in which the child was born. Denny’s mother repeatedly attempted to confirm her nationality, or lack thereof, with Chinese authorities, the International Organization for Migration and the Red Cross. Her efforts were to no avail, in part because she did not possess identity documents. For these reasons, she was unable to change her son’s status in the Netherlands’ civil registry to “stateless”. (para. 2.3)

Efforts to redress Denny Zhao’s situation before Dutch courts were exhausted in May 2014 when the Administrative Law Division of the Council of State, the highest court of appeal in the Netherlands for administrative law questions, ruled that authorities were correct to conclude that the author had not adequately demonstrated that he was stateless. However, the Council of State acknowledged that the lack of a status determination procedure created a legislative gap through which individuals entitled to protection, including children, were falling. The Council concluded that it was for the legislature, and not the courts, to address this situation. (para. 2.6)

Thus, on November 23, 2016, Denny Zhao invoked the UN *International Covenant on Civil and Political Rights* (ICCPR) [here] and its *Optional* Protocol [here]. The latter document sets out a procedure whereby individuals can file complaints with the Human Rights Committee (the Covenant’s monitoring body) alleging a violation of their Covenant rights. The decisions or “views” of the Committee are neither binding, nor enforceable, however they carry significant weight and States Parties are expected to comply with them.

Denny Zhao’s complaint to the Human Rights Committee centered around article 24(3) of the ICCPR which guarantees the right of every child to acquire a nationality. In addition to an alleged breach of article 24(3) in and of itself, Zhao also claimed a violation of article 24(3) read together with the right to an effective remedy in article 2(3) of the Covenant. (para. 3.3)

In support of his allegations, Zhao noted the prolonged period during which he had been registered as “nationality unknown” in the Netherlands – the country of his birth and the only country in which he had ever lived. Documents from China and/or international organizations confirming his statelessness or

lack of citizenship were impossible for him (via his mother) to obtain. In the absence of these documents, no other procedure existed to establish whether Zhao was stateless and without a "stateless" designation, he could not acquire Dutch nationality. (para. 3.1)

[Notably, even if Zhao had been able to change his registration from "unknown nationality" to "stateless", he still would have been unable to acquire Dutch nationality because the Netherlands requires that children born stateless in the country hold a lawful residence permit for at least three years before applying for Dutch nationality. (para. 2.7)]

In its decision on the merits, the Human Rights Committee agreed with Zhao that the facts disclosed a violation by the Netherlands of article 24(3), read alone and also in conjunction with article 2(3) of the Covenant. The Committee relied heavily on the UNHCR Guidelines No. 4 'Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (the Guidelines) [here], noting that the Netherlands was a party to that Convention. In particular, the Committee highlighted paragraph 19 of the Guidelines, which states that a:

"… contracting state must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national." (para. 8.3)

In this regard, the Committee noted that repeated attempts by the complainant's mother to obtain documentation on nationality status from Chinese authorities had proven futile and that the Dutch government itself acknowledged it could not think of any possible further steps the author's mother could have taken to obtain official documents. (para. 8.5)

The Committee also referred to paragraph 20 of the Guidelines which provides that the burden of proof must be shared between the claimant and the authorities of the contracting state to obtain evidence and to establish the facts as to whether an individual would otherwise be stateless, due to the difficulties often associated with making such a determination. In contrast, Dutch legislation imposed the full burden of proof on claimants; domestic authorities made no efforts of their own to attempt to confirm the author's nationality status, or lack thereof. (paras. 8.3 and 8.5)

Finally, the Committee referred to para. 22 of the Guidelines which urges States not to prolong a child's status of undetermined nationality and to make a decision on statelessness as soon as possible, and in any event, within five years. (para. 8.3)

For the above reasons, the UN Human Rights Committee found in favour of Denny Zhao.

[Zhao put forward a third basis for his complaint: article 24(3) in conjunction with article 2(2). The latter provision obliges a State Party "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". This portion of the complaint was dismissed by the Human Rights Committee on admissibility grounds. Recalling earlier jurisprudence,

the Committee noted that article 2(2) could be invoked as a claim only when a State Party's failure to observe article 2 was the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. In Zhao's case, the allegation that the State party violated its general obligations under article 2(2), read in conjunction with article 24, was not distinct from the main complaint related to article 24 alone. (para. 7.4) All other admissibility criteria were met by Zhao, namely the same matter was not being examined under another procedure of international investigation and he had exhausted all effective domestic remedies available to him. (paras. 7.2 and 7.3)]

In terms of a remedy, the Committee concluded that the Netherlands was obligated to provide the author with adequate compensation, to review its decision on whether Zhao was stateless and its decision on Zhao's application to be recognized as a Dutch citizen. The Netherlands was also asked to review Zhao's living circumstances and residence permit, taking into account the principle of the best interests of the child and the Committee's findings. Additionally, the Committee stated that the Netherlands was obliged to take all steps necessary to avoid similar violations in the future, including a review of its legislation, to ensure that its procedure for determining statelessness status and its eligibility criteria for citizenship accord with the Covenant. (para. 10) The Committee requested information from the Dutch government about the measures taken to give effect to its views within 180 days. (para. 11)

With its decision in *Zhao v. the Netherlands*, the Committee joins other human rights bodies, such as the African Court of Human and People's Rights and the Inter-American Court of Human Rights, in addressing impediments faced by children at risk of statelessness to benefit from their right to a nationality. (Annex 2, para. 4) Such a right is not directly enshrined in the *European Convention on Human Rights* [here] although arguably, it may be subsumed within other protections such as the right to liberty and security (art. 5) and the right to respect for private and family life (art. 8), among others. [here] Perhaps the absence of an express provision in the European Convention influenced Zhao's counsel not to seek redress before the European Court of Human Rights despite the binding nature of that Court's decisions.

While the Netherlands was the focus of the UN Human Rights Committee decision in Zhao, it is by no means the only country in which some people born within their borders are designated as having "unknown nationality" and exist in an ongoing limbo. Most European Union Member States grant citizenship at birth, but this is done predominantly on the basis of descent from a citizen parent. [here] *Jus soli* – the right of anyone born in the territory of a state to nationality or citizenship (regardless of parentage) – is common in the Americas (including Canada) but much more rare elsewhere. Only five EU Member States have general laws granting citizenship to a child born in the country, irrespective of their parents' citizenship, and no Member State provides this unconditionally. [here]

The importance of having citizenship or nationality should not be underestimated. It can impact on one's identity and sense of belonging, as well as access to housing, education, health care and other services. The Denny Zhao decision of the UN Human Rights Committee is a significant step towards

addressing the disadvantages and injustices resulting from statelessness, particularly for children. It is to be applauded.

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About the author

Irit WeiserIrit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented papers on international human rights matters, the Canadian Charter of Rights and Freedoms, and health law. Since retiring, Irit has become involved in a number of pro bono activities, including providing legal assistance to private sponsors through the Refugee Sponsorship Support Program. She is also a member of the Research Ethics Board of the Ottawa Health Science Network, the Council of the Royal College of Physicians and Surgeons of Canada, and Royal College International.
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