

**GUIDELINES ON STATELESSNESS NO. 2:
Procedures for Determining whether an Individual is a Stateless Person**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons*, held in Geneva, Switzerland in December 2010. These Guidelines are to be read in conjunction with the *Guidelines on the Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons* and the forthcoming *Guidelines on the Status of Stateless Persons at the National Level*. This set of Guidelines will be published in due course as a UNHCR Handbook on Statelessness.

These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

I. INTRODUCTION

a) Overview

1. The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) establishes the international legal definition of “stateless person” and the standards of treatment to which such individuals are entitled, but does not prescribe any mechanism to identify stateless persons as such.¹ Yet, it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment to comply with their Convention commitments. These Guidelines advise on the modalities of creating statelessness determination procedures, including questions of evidence that arise in such mechanisms.

2. Government officials might encounter the question of whether a person is stateless in a range of contexts, reflecting the critical role that nationality plays in everyday life. For example, consideration of nationality status is relevant when individuals apply for passports or identity documents, seek legal residence or employment in the public sector, want to exercise their voting rights, perform military service, or attempt to access government services. The issue of nationality and statelessness may arise when an individual’s right to be in a country is challenged in removal procedures. In refugee status determination, nationality is often key to identifying the country (or countries) in relation to which an individual’s allegations of a well-founded fear of persecution should be assessed. An assessment of statelessness will be necessary where an individual seeks the application of the safeguards set out in the 1961 Convention on the Reduction of Statelessness (1961 Convention). These examples illustrate that determination of statelessness is necessary in a range of judicial and administrative procedures.

3. These Guidelines address procedures that are aimed specifically, if not exclusively, at determining whether an individual is stateless. Moreover, the focus of these Guidelines is on the concept of stateless person as defined in the 1954 Convention and on the obligations of States that are party to the 1954 Convention. Some consideration is given to States not bound by this treaty and on the identification of *de facto* stateless persons. Although an individual can be a stateless person and a refugee as per the 1954 Convention and the 1951 Convention Relating to the Status of Refugees (1951 Convention) respectively, a stateless refugee will benefit from the protection of the 1951 Convention. The 1954 Convention was primarily developed to regulate the treatment of stateless persons who are not refugees.

4. Only a relatively small number of countries have established statelessness determination procedures, not all of which are highly regulated. There is growing interest in introducing such mechanisms. Statelessness is a juridically relevant fact under international law. Thus, recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the 1954 Convention.

5. It is also in States’ interests to establish statelessness determination procedures. Doing so enhances the ability of States to respect their obligations under the 1954 Convention. In countries where statelessness arises among mixed migratory movements, statelessness determination procedures also help governments assess the size and profile of stateless populations in their territory and thus determine the government services required. In addition, the identification of statelessness can help prevent statelessness by revealing the root causes and new trends in statelessness.

¹ The definition of a stateless person is found in Article 1(1) of the 1954 Convention: a “stateless person means a person who is not considered as a national by any State under the operation of its law”. For further information on interpretative issues relating to the definition in Article 1(1), please see UNHCR, *Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“Definition Guidelines”)* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

b) Determination of Statelessness and the Right to a Nationality

6. Statelessness determination procedures generally assist States in meeting their commitments under the 1954 Convention. Their use, however, may not be appropriate in relation to certain stateless populations. Statelessness can arise both in a migratory and non-migratory context and the profile of statelessness in a particular country may fit one or the other scenario or might be mixed. Some stateless populations in a non-migratory context remain in their “own country” and may be referred to as *in situ* populations.² For these groups, determination procedures for the purpose of obtaining status as stateless persons are not appropriate because of their long-established ties to these countries. Based on existing international standards and State practice in the area of reduction of statelessness, such ties include long-term habitual residence or residence at the time of State succession. Depending on the circumstances of the populations under consideration, States might be advised to undertake targeted nationality campaigns or nationality verification efforts rather than statelessness determination procedures.³

7. Targeted nationality campaigns are undertaken with the objective of resolving the statelessness situation through the grant of nationality, rather than identifying persons as stateless to provide them with a status as such. A number of States have undertaken such nationality campaigns with regard to longstanding stateless populations in their territory, in some cases with the assistance of UNHCR. Even where States undertake nationality campaigns, it is still beneficial to establish statelessness determination procedures for stateless individuals who do not fall within the *in situ* population as the profile of stateless persons in a particular country may be mixed or may change over time.

8. Nationality verification procedures assist individuals in a territory where they have difficulties obtaining proof of their nationality status. Such procedures often involve an accessible, swift and straightforward process for documenting existing nationality, including the nationality of another State.

9. The procedural requirements of both nationality campaigns and nationality verification procedures will be similar to those used in statelessness determination procedures in practice, as they need to reflect the forms of evidence available in a country and the difficulties faced by applicants in proving their nationality status. Documentary evidence may sometimes be dispensed with and the sworn testimony of community members that an individual meets the relevant criteria under the nationality laws, such as birth in the territory or descent from a parent who was a national may instead suffice.

II. STATELESSNESS DETERMINATION PROCEDURES

a) Design and Location of Determination Procedures

10. States have broad discretion in the design and operation of statelessness determination procedures as the 1954 Convention is silent on such matters. Local factors, such as the estimated size and diversity of the stateless population, as well as the complexity of the legal and evidentiary issues to be examined, will influence the approach taken. For such procedures to be effective, though, the determination of statelessness must be a specific objective of the mechanism in question, though not necessarily the only one.

11. Current State practice is varied with respect to the location of statelessness determination procedures within national administrative structures, reflecting country-specific considerations. States may choose between a centralized procedure or one that is conducted

² The phrase “own country” is taken from Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation by the UN Human Rights Committee.

³ Please see paragraph 50 of *UNHCR Action to Address Statelessness: A Strategy Note*, 2010 at <http://www.unhcr.org/refworld/docid/4b9e0c3d2.html> :

“... resources should not be dedicated to a formal determination of statelessness where a realistic, immediate goal is the acquisition, reacquisition or confirmation of nationality by such a population. This will usually be the case for those protracted situations in which an entire population has significant ties only with the State in which they are resident.”

by local authorities. Centralized procedures are preferable as they are more likely to develop the necessary expertise among the officials undertaking status determination. Ensuring easy access for applicants located in different parts of a country can be facilitated through various measures: for example, permitting written applications to be submitted to local offices for onward transmission to the central determination body, which can coordinate and guide the appropriate examination of relevant facts at the local level, including the personal interview with the applicant.

12. Establishing whether a person is stateless can be complex and challenging but it is in the interests of both States and stateless persons that determination procedures be as simple, fair and efficient as possible. To this end, some States might consider adapting existing administrative procedures to include statelessness determination. Factors to consider include administrative capacity, existing expertise on statelessness matters, as well as expected size and profile of the stateless population. In any combined procedure it is essential that the definition of a stateless person is clearly understood and properly applied and that procedural safeguards and evidentiary standards are respected.

13. Some States might elect to integrate statelessness determination procedures within the competence of immigration authorities. Other States may place statelessness determination within the body responsible for nationality issues, for example naturalisation applications or verification of nationality requests. This would be particularly appropriate where the individuals concerned are likely to be longstanding residents of the State.

14. As some stateless persons may also be refugees, States may consider combining statelessness and refugee determination in the same procedure. Confidentiality requirements for applications by asylum-seekers and refugees must be respected regardless of the form or location of the statelessness determination procedure.⁴

15. Resource considerations, both financial and human, will be significant in the planning of statelessness determination procedures. Countries with statelessness determination procedures have experienced low numbers of applicants. The costs involved can be balanced against savings made from freeing up other administrative mechanisms to which stateless persons may otherwise resort, such as requests for other forms of immigration status.

b) Access to Procedures

16. For procedures to be fair and efficient, access to them must be ensured. Dissemination of information, including through targeted information campaigns where appropriate and counselling on the procedures, facilitates access to the mechanism for stateless persons. Given that individuals are sometimes unaware of statelessness determination procedures or hesitant to apply for statelessness status, procedures can usefully contain safeguards permitting State authorities to initiate a procedure.

17. Everyone in a State's territory must have access to statelessness determination procedures. There is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State. Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully.

18. There is also no basis in the Convention to set time-limits for individuals to claim statelessness status. Such deadlines may arbitrarily exclude individuals from receiving 1954 Convention protection.

⁴ For further details on coordinating refugee and statelessness determination procedures, please see paragraphs 26-30.

c) Procedural Guarantees

19. Statelessness determination procedures should be formalized in law. Establishing procedures through legislation ensures fairness, transparency and clarity. Procedural guarantees are fundamental elements of statelessness determination procedures. The due process guarantees that are to be integrated into administrative law procedures, including refugee status determination procedures, are necessary in this context. States are encouraged, therefore, to incorporate the following safeguards:

- information on eligibility criteria, the determination procedure and the rights associated with recognition of statelessness is widely disseminated by the authorities in a range of languages; counseling regarding the procedures is provided to all applicants in a language they understand;
- there is a right to an interview with a decision-making official;
- applications are submitted in writing and assistance with this is provided if necessary;
- assistance is available for translation/interpretation in respect of written applications and interviews;
- it is the right of every member of a family to make an independent application;
- an adult may make an application on behalf of a dependent child and special procedural guarantees for unaccompanied children are also available;
- a child has the right to be heard where he or she has the capacity to form and express a view;
- applicants are to have access to legal counsel; where free legal assistance is available, it is to be offered to applicants without financial means;
- determinations are made on the individual merits of the claim with reference to country information regarding nationality law and practice in the relevant States, including information pertaining to the law and practice during periods in the past which are of relevance to the case under examination;
- if the determination is made in a judicial setting, the process is inquisitorial rather than adversarial;
- decisions are made in writing with reasons;
- decisions are made and communicated within a reasonable time;
- there is a right of appeal; and
- access to UNHCR is guaranteed.

20. To ensure that procedures are fair and effective, States are advised to refrain from removing an individual from their territory pending the outcome of the determination process.

21. The right to an individual interview, and necessary assistance with translation/interpretation throughout the process, are essential to ensure that applicants have the opportunity to present their cases fully and to provide and clarify information that is material to the claim. These procedural guarantees also permit the decision-maker to explore any ambiguities in an individual case.

22. It is in the interests of all parties that statelessness determination is conducted as expeditiously as possible, subject to reasonable time being available to gather evidence. Several countries have established time limits within which determination authorities are to

make a decision on a statelessness application. In applications where the immediately available evidence is clear and the statelessness claim is manifestly well-founded, fair and efficient procedures may only require a few months to reach a final determination.

23. In general, it is undesirable for a first instance decision to be issued more than six months from the submission of an application as this prolongs the period spent by an applicant in an insecure position. However, in exceptional circumstances it may be appropriate to allow the proceedings to last up to 12 months to provide time for enquiries regarding the individual's nationality status to be pursued with another State, where it is likely that a substantive response will be forthcoming in that period.⁵

24. An effective right to appeal against a negative first instance decision is an essential safeguard in a statelessness determination procedure. The appeal procedure is to rest with an independent body. The applicant is to have access to legal counsel and, where free legal assistance is available, it is to be offered to applicants without financial means.

25. Appeals must be possible on both points of fact and law as the possibility exists that there may have been an incorrect assessment of the evidence at first instance level. Whether an appellate body can substitute its own judgment on eligibility under the 1954 Convention or whether it can merely quash the first instance decision and send the matter back for reconsideration by the determination authority is at the discretion of the State. The choice will tend to reflect the general approach to such matters in its legal/administrative system. In addition, States may permit a further judicial review, which addresses questions of law only, and may be limited by the procedural rules of the judicial system concerned.

III. COORDINATING REFUGEE STATUS AND STATELESSNESS DETERMINATIONS

26. When an applicant raises both a refugee and a statelessness claim, it is important that each claim is assessed and that both types of status are explicitly recognised. This is because protection under the 1951 Convention generally gives rise to a greater set of rights at the national level than that under the 1954 Convention. Nevertheless, there may be instances where refugee status ceases without the person having acquired a nationality, necessitating then international protection as a stateless person.

27. As a stateless person may also be a refugee or be entitled to a complementary form of protection,⁶ States must ensure that confidentiality requirements for refugees who might also be stateless are upheld in statelessness determination procedures. Every applicant in a statelessness determination procedure is to be informed at the outset of the need to raise refugee-related concerns, should they exist.⁷ The identity of a refugee or an asylum-seeker must not be disclosed to the authorities of the individual's country of origin. As discussed below in paragraphs 44 - 47, statelessness determination officials might be required to make enquiries with foreign authorities regarding applicants, which could compromise the confidentiality to which refugees and asylum-seekers are entitled. When this is the case, refugee status determination is to proceed and consideration of the statelessness claim to be suspended.

28. Where refugee status and statelessness determinations are conducted in separate procedures and a determination of statelessness can be made without contacting the authorities of the country of origin, both procedures may proceed in parallel. However, to maximize efficiency, where findings of fact from one procedure can be used in the other, it may be appropriate to first conduct interviews and to gather and assess country information for the refugee determination procedure.

⁵ This highlights the importance of applicants receiving an appropriate standard of treatment during the determination process. This matter will be dealt with in the forthcoming *Guidelines on the Status of Stateless Persons at the National Level* ("Status Guidelines").

⁶ Please see UNHCR Executive Committee Conclusion No.103 (LVI) of 2005 on complementary forms of protection available at <http://www.unhcr.org/refworld/docid/43576e292.html>.

⁷ Similarly, applicants for refugee status are to be informed of the possibility of applying for recognition as a stateless person.

29. Similarly, in a procedure that combines refugee and statelessness determination and an applicant raises both claims, it is important that the examiner conduct refugee and statelessness determination together.⁸ If there is insufficient information to conclude that an individual is stateless without contacting the authorities of a foreign State, refugee status determination shall proceed.

30. In both separate and combined procedures, in certain circumstances it must be possible for an individual to re-activate a suspended statelessness claim. A statelessness claim may be re-activated in the event that:

- the refugee claim fails;
- refugee status is recognised but subsequently ceases;
- refugee status is cancelled because the inclusion criteria of Article 1A(2) of the 1951 Convention were not met;⁹ or
- if additional evidence emerges that an individual is stateless.

Similar considerations apply to individuals with claims to both statelessness status and a complementary form of protection.

IV. ASSESSMENT OF EVIDENCE

a) Types of Evidence

31. Statelessness determination requires a mixed assessment of fact and law. Such cases cannot be settled through analysis of nationality laws alone as the definition of a stateless person requires an evaluation of the application of these laws in practice, including the extent to which judicial decisions are respected by government officials.¹⁰ The kinds of evidence that may be relevant can be divided into two categories: evidence relating to the individual's personal circumstances and evidence concerning the laws and other circumstances in the country in question.

32. Evidence concerning personal history helps identify which States and nationality procedures need to be considered in determining an applicant's nationality status.¹¹ In any given case, the following non-exhaustive list of types of evidence may be pertinent:

- testimony of the applicant (e.g. written application, interview);
- response(s) from a foreign authority to an enquiry regarding nationality status of an individual;
- identity documents (e.g. birth certificate, extract from civil register, national identity card, voter registration document);
- travel documents (including expired ones);
- documents regarding applications to acquire nationality or obtain proof of nationality;
- certificate of naturalisation;
- certificate of renunciation of nationality;
- previous responses by States to enquiries on the nationality of the applicant;

⁸ Refugee status determination requires the identification of either an individual's country of nationality or, for stateless persons, the country of former habitual residence for the purposes of assessing an individual's fear of persecution. Please see paragraphs 87-93 and 101-105, UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

⁹ Please see UN High Commissioner for Refugees, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <http://www.unhcr.org/refworld/docid/41a5dfd94.html>.

¹⁰ This is discussed further in paragraph 41 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

¹¹ Please see paragraph 40 below.

- marriage certificate;
- military service record/discharge certificate;
- school certificates;
- medical certificates/records (e.g. attestations issued from hospital on birth, vaccination booklets);
- identity and travel documents of parents, spouse and children;
- immigration documents, such as residence permits of country(ies) of habitual residence;
- other documents pertaining to countries of residence (for example, employment documents, property deeds, tenancy agreements, school records, baptismal certificates); and
- record of sworn oral testimony of neighbours and community members.

33. Information concerning the circumstances in the country or countries under consideration covers evidence about the nationality and other relevant laws, their implementation and practices of relevant States, as well as the general legal environment in those jurisdictions in terms of respect by the executive branch for judicial decisions. It can be obtained from a variety of sources, governmental and non-governmental. The complexity of nationality law and practice in a particular State may justify recourse to expert evidence in some cases.

34. For such country-related information to be treated as accurate, it needs to be obtained from reliable and unbiased sources, preferably more than one. Thus, information sourced from State bodies directly involved in nationality mechanisms in the relevant State, or non-State actors which have built up expertise in monitoring or reviewing such matters, is preferred. It is important that country-related information is continuously updated so that changes in nationality law and practice in relevant countries are taken into account. That being said, the country-related information relied on should be contemporaneous with the nationality events that are under consideration in the case in question. In addition, where the practice of officials involved in applying the nationality laws of a State appears to differ by region, this must be taken into account with respect to the country-related evidence relied on.

b) Issues of Proof

35. Authorities undertaking statelessness determination procedures need to consider all available evidence, oral and written, regarding an individual's claim.

36. The stateless person definition in Article 1(1) of the 1954 Convention requires proof of a negative – that an individual is *not* considered as a national by any State under the operation of its law. This presents significant challenges to applicants and informs how evidentiary rules in statelessness determination procedures are to be applied.

Burden of Proof

37. The burden of proof in legal proceedings refers to the question of which party bears the responsibility of proving a claim or allegation. Typically in administrative or judicial proceedings, a claimant bears an initial responsibility in substantiating his or her claim. In the case of statelessness determination, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts. The procedure is a collaborative one aimed at clarifying whether an individual comes within the scope of the 1954 Convention. Thus, the applicant has a duty to provide as full and truthful account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status. This

non-adversarial approach can be found in the practice of a number of States that already operate statelessness determination procedures.

38. Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.¹²

Standard of Proof

39. As with the burden of proof, the standard of proof or threshold of evidence necessary to determine statelessness must take into consideration the difficulties inherent in proving statelessness, particularly in light of the consequences of incorrectly rejecting an application. Requiring a high standard of proof of statelessness would undermine the object and purpose of the 1954 Convention. States are therefore advised to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law.¹³

40. The lack of nationality does not need to be established in relation to every State in the world. Consideration is only necessary of those States with which an individual has a relevant link, generally on the basis of birth on the territory, descent, marriage, or habitual residence.¹⁴ The finding of statelessness arrived at on that basis will stand unless the determination authority is able to point to clear and convincing evidence that the individual is a national of an identified State. Such evidence of nationality may take the form, for example, of written confirmation from the competent authority responsible for naturalization decisions in another country that the applicant is a national of that State through naturalization or information establishing that under the nationality law and practice of another State the applicant has automatically acquired nationality there.¹⁵

41. Where an applicant does not cooperate in establishing the facts, for example by deliberately withholding information that could determine his or her identity, then he or she may fail to establish to a reasonable degree that he or she is stateless even if the determination authority is unable to demonstrate clear and convincing evidence of a particular nationality. The application can thus be rejected unless the evidence available nevertheless establishes statelessness to a reasonable degree.¹⁶ Such cases need, however, to be distinguished from instances where an applicant is unable, as opposed to unwilling, to produce significant supporting evidence and/or substantial testimony about his or her personal history.

c) Weighing the Evidence

42. Where authentic documentary evidence is presented regarding an individual’s personal history in a statelessness determination procedure, this evidence typically takes precedence over that individual’s testimony in reaching a conclusion on statelessness. Where limited or no documentary evidence regarding an individual’s personal circumstances is presented, however, additional weight will be given to an applicant’s written and/or oral testimony,

¹² Further flexibility is also warranted where it is difficult for individuals to obtain documents originating from a foreign authority properly notarized or fixed with official seals.

¹³ Please see paragraph 42, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. In the refugee status determination context, an individual can claim a well-founded fear of persecution by establishing “to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition.” Please also see UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (December 1998), available at <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

¹⁴ Please see paragraph 11 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

¹⁵ Please see paragraphs 20 to 37 of the *Definition Guidelines* on the treatment of evidence from other States, including from their consular authorities, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

¹⁶ Please see the section below on credibility.

available country information and any results of additional enquiries with relevant States. The guidance in the paragraphs below on the weight to be given to certain kinds of evidence that will commonly be under consideration in statelessness determinations must be read alongside guidance on this matter found in the *Definition Guidelines*.

Passports

43. Authentic, unexpired passports raise a presumption that the passport holder is a national of the country issuing the passport. However, this presumption may be rebutted where there is evidence showing that an individual is not actually considered to be a national of a State, for example where the document is a passport of convenience or the passport has been issued in error by an authority that is not competent to determine nationality issues. In such cases the passport is not a manifestation of a State's position that the individual is one of its nationals. No presumption is raised by passports that are counterfeit or otherwise fraudulently issued.¹⁷

Enquiries with and Responses from Foreign Authorities

44. Information provided by foreign authorities is sometimes of central importance to statelessness determination procedures, although not necessary in cases where there is otherwise adequate proof. Under no circumstances is contact to be made with authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is neither a refugee nor entitled to a complementary form of protection.

45. Flexibility may be necessary in relation to the procedures for making contact with foreign authorities to confirm whether or not an individual is its national. Some foreign authorities may accept enquiries that come directly from another State while others may indicate that they will only respond to requests from individuals.¹⁸

46. Where statelessness determination authorities make enquiries with foreign authorities regarding the nationality or statelessness status of an individual, they must consider the weight to be attached to the response or lack of response from the State in question.¹⁹

47. Where a response from a foreign authority includes reasoning that appears to involve a mistake in applying the local law to the facts of the case or an error in assessing the facts, the reply must be taken on face value. It is the subjective position of the other State that is critical in determining whether an individual is its national for the purposes of the stateless person definition.²⁰ Time permitting, statelessness determination authorities may be able to raise such concerns with the foreign authority in the hope of obtaining greater clarity about the individual's nationality status. Indeed, in some cases this may result in the foreign authority belatedly acknowledging that the individual is its national or accepting that he or she is entitled to acquire nationality.

¹⁷ On these issues, please see also paragraphs 38-39 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

¹⁸ States may wish to set up bilateral or multilateral arrangements for making nationality enquiries. An example of such an arrangement is the 1999 Convention on the Issue of a Certificate of Nationality, to which member States of the International Commission on Civil Status, the European Union or the Council of Europe can accede.

¹⁹ Guidance on this issue is provided in paragraph 34 of the *Definition Guidelines*, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

²⁰ Please see paragraphs 38-39 of the *Definition Guidelines* which note that an error as to the application of local law to an individual's case is irrelevant in determining the State's position, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

Interviews

48. An interview with an applicant is an important opportunity for the decision-maker to explore any questions regarding the evidence presented. Open-ended questioning, conducted in a non-adversarial atmosphere, can create a "climate of confidence"²¹ encouraging applicants to deliver as full an account as possible.²² Applicants must be reminded at the outset of the interview that they have a duty to cooperate with the proceedings. That being said, an applicant can only be expected to reply to the best of his or her abilities and in many cases even basic information may not be known, for example the place of birth or whether birth was registered. While one interview will normally be sufficient to elicit the applicant's history, it may sometimes be necessary to conduct follow-up interviews.

Credibility Issues

49. The credibility of an applicant will not be at issue during statelessness determination procedures where a determination can be reached on the basis of the available documentary evidence when assessed in light of relevant country-related information. Where, however, little or no documentary evidence is available, statelessness determination authorities will need to rely to a greater degree on an applicant's testimony and issues relating to his or her credibility might arise. In assessing whether statements can be considered credible, the decision-maker can consider objective credibility indicators, including the sufficiency of detail provided, consistency between written and oral statements, consistency of the applicant's statements with those of witnesses, consistency with country of origin information and the plausibility of the statements.

50. An applicant can only be expected to have a level of knowledge that is reasonable taking into account factors such as the applicant's level of education and age at the time of relevant events. Nationality laws and their application can be complex. An applicant will not necessarily be able to explain clearly why a particular decision was made by authorities or what the nationality practice is in countries under consideration. Where an applicant's ethnic identity is material to the determination, testing his or her knowledge of cultural practices or languages must take account of differing levels of education and understanding of traditions. Persistent unexplained evasiveness on key questions may legitimately raise concerns about an individual's credibility. This is even more so where an individual refuses, without giving any reason, to answer certain questions.

51. When determining whether an applicant's account is credible, a decision-maker must evaluate whether the story presented is internally coherent as well as consistent with reliable information about nationality law and practice in relevant countries and whether it is corroborated by any documentary or other evidence available.²³ Credibility is not undermined by minor inconsistencies in the applicant's account, particularly where these relate to immaterial matters or events that took place many years ago. Where the applicant's testimony appears to conflict with evidence regarding the country in question, it is important to verify that there are no regional divergences in the application of the nationality mechanism in question by officials of that State.

52. An applicant's demeanour is generally not a reliable indicator of credibility. A stateless person may have endured significant discrimination as a result of lack of nationality, rendering him or her anxious, reticent or defensive in any interview. Cultural differences between the applicant and the decision-maker also often preclude an accurate interpretation of specific forms of demeanour.

²¹ Please see paragraph 200, UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

²² Interviewing techniques are discussed more generally in UNHCR, *Interviewing Applicants for Refugee Status (RLD 4)*, 1995, available at <http://www.unhcr.org/refworld/pdfid/3ccea3304.pdf>.

²³ Please see generally paragraph 11 of UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (1998), available at <http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf>.

53. Negative inferences are not to be drawn where an individual has not had the opportunity, in an appropriate interview setting, to comment on any apparent gaps, contradictions or discrepancies in his or her account.

54. Even where material elements of the applicant's statements are found to lack credibility, this does not preclude a determination of statelessness. An individual's testimony must still be evaluated in the light of all other evidence, such as that relating to the countries concerned, which may still support a finding of statelessness.²⁴

V. ADDITIONAL PROCEDURAL CONSIDERATIONS

a) Group Determination

55. Given the nature of statelessness, individualised procedures are the norm as these allow for the exploration of the applicant's personal circumstances. Countries that have adopted statelessness determination procedures thus far have followed this approach. Most of them are parties to the 1954 Convention and are assessing nationality/statelessness in relation to individuals present in a migratory context.

56. It is possible, however, to grant stateless person status to individuals within a group on a *prima facie* basis,²⁵ that is, without undertaking a full individual status determination. This could be appropriate where there is readily apparent, objective information about the lack of nationality of members of a group such that they would *prima facie* meet the stateless person definition in Article 1(1) of the 1954 Convention. In the absence of contrary evidence, an individual's eligibility for protection under the Convention would therefore be based on whether he or she is a member of an identified group that satisfies the Article 1(1) definition.

57. *Prima facie* recognition is not a subsidiary category or lesser status, but rather reflects an efficient evidentiary assessment leading to recognition under the 1954 Convention. As stateless persons, they benefit from the rights attached to that status until such status ends. As with individual determination mechanisms, there must be an effective legal remedy for individuals in a group to challenge a negative *prima facie* finding on the question of status.

58. Group determination must allow for consideration of the exclusion clauses set out in Article 1(2) of the 1954 Convention on an individual basis. Persons falling within Article 1(2) would not be entitled to the protection of the 1954 Convention even though they meet the stateless person definition set out in Article 1(1) of that instrument.²⁶

²⁴ A similar approach applies in determination of refugee status. Please see paragraph 42 of UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. Given the nature of the statelessness definition, credibility issues are less likely to prevent a finding of statelessness than they are in a determination of refugee status.

²⁵ The *prima facie* technique is used in refugee status determination, usually in a group context. But it has also been applied in individual determinations.

²⁶ Article 1(2) is concerned with persons undeserving of protection either because they have an alternative route to protection or because of their behaviour:

"2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

b) Detention

59. Routine detention of individuals seeking protection on the grounds of statelessness is arbitrary.²⁷ Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons. Article 9 of the ICCPR, guaranteeing the right to liberty and security of person, prohibits unlawful as well as arbitrary detention. For detention to be lawful, it must be regulated by domestic law, preferably with maximum limits set on such detention, and subject to periodic and judicial review. For detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory. Indefinite as well as mandatory forms of detention are arbitrary *per se*.²⁸

60. Detention is therefore a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention. Alternatives to detention – from reporting requirements or bail/bond systems to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention. General principles relating to detention apply *a fortiori* to children who as a rule are not to be detained in any circumstances.

61. Where persons awaiting statelessness determination are detained they must not be held with convicted criminals or individuals awaiting trial.²⁹ Moreover, judicial oversight of detention is always necessary and detained individuals need to have access to legal representation, including free counselling for those without means.

62. For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Statelessness determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.

c) Role of UNHCR

63. UNHCR assists States in a variety of ways to fulfil its statelessness mandate.³⁰ Drawing on its comparative knowledge of statelessness determination procedures in a range of States and its own experience making statelessness and nationality assessments, UNHCR can

²⁷ Please see, in regard to immigration detention generally, the position taken by the UN Working Group on Arbitrary Detention:

“58...it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

59. If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.”

UN Working Group on Arbitrary Detention, Report to the Human Rights Council (A/HRC/13/30), 2010 available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx>.

In relation to stateless persons specifically, please see Executive Committee Conclusion 106 (LV1) of 2006, which “Calls on States not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law...”.

²⁸ Please see the UN Human Rights Committee’s decisions in *van Alpen v Netherlands* (Communication No. 305/1988), 1990, *A v Australia* (Communication No. 560/1993) 1997 and *Danyal Shafiq v Australia* (Communication No. 1324/2004), 2006 at paragraphs 5.8, 9.4 and 7.3 respectively. In the context of refugees, Executive Committee Conclusion 44 (XXXVII) of 1986 states that detention of asylum-seekers should normally be avoided but if necessary should only occur on grounds prescribed by law in order to determine the identity of the individual; in order to obtain the basic facts of the case; where an individual has purposely destroyed documentation or presented fraudulent documentation in order to mislead the authorities; and/or where there are national security or public order concerns.

²⁹ Please see similarly guidance in relation to detention of asylum-seekers, *ibid*.

³⁰ In particular, under paragraph 4 of Resolution 61/137 the UN General Assembly:

“...notes the work of the High Commissioner in regard to identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons, and urges the Office of the High Commissioner to continue to work in this area in accordance with relevant General Assembly resolutions and Executive Committee conclusions.”

advise on both the development of new statelessness determination procedures and the enhancement of existing ones.³¹ In addition, UNHCR can facilitate enquiries made by statelessness determination authorities with authorities of other States and can act as an information resource on nationality laws and practices.³² Access for applicants to UNHCR also plays a significant role in ensuring the fairness of determination procedures. Finally, UNHCR may conduct statelessness determination itself at an individual and/or group level if necessary.

d) Exploring Solutions Abroad

64. Some applicants in statelessness determination procedures may have a realistic prospect of admission or readmission in another State, in some cases through the acquisition or reacquisition of nationality. These cases, which tend to arise where individuals are seeking statelessness determination in a migratory context, raise the issue of cooperation between States to find the most appropriate solution. Efforts to secure admission or readmission may be justified but these need to take place subsequent to a determination of statelessness. Suspension of the determination proceedings, however, is not appropriate in this context as recognition of the individual's statelessness is necessary to ensure full protection of the rights to which he or she is entitled.

e) Additional Procedural and Evidentiary Safeguards for Specific Groups

65. Certain groups may face particular challenges in establishing their nationality status. Age, gender and diversity considerations may require that some individuals are afforded additional procedural and evidentiary safeguards to ensure that fair statelessness determination decisions are reached.

66. Children, especially unaccompanied children, may face acute challenges in communicating basic facts with respect to their nationality. States that establish statelessness determination procedures must follow the principle of pursuing the best interests of the child when considering the nationality status and need for statelessness protection of children.³³ Additional procedural and evidentiary safeguards for child claimants include priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters as well as the assumption of a greater share of the burden of proof by the State.

67. In certain circumstances, similar considerations may apply to persons with disabilities³⁴ who face difficulties communicating information about their nationality status. Decision makers need to take into account that owing to discrimination, persons with disabilities may be less likely to possess identity and other documentation.

68. It would be preferable if all claimants could be offered the choice to have interviewers and interpreters of the same sex as themselves. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education. As a result of discrimination, women might face additional barriers

³¹ As set out in Conclusion 106 (LVII) of 2006, the Executive Committee has requested UNHCR "to actively disseminate information and, where appropriate, train government counterparts on appropriate mechanisms for identifying, recording, and granting a status to stateless persons" and "to provide technical advice to States Parties on the implementation of the 1954 Convention so as to ensure consistent implementation of its provisions" (paragraphs (t) and (x)).

³² States are also advised to consult nationality databases available through sources such as UNHCR's Refworld database, available at www.refworld.org, or regional sources such as the European Union Democracy Observer (EUDO) nationality law database, available at <http://eudo-citizenship.eu/national-citizenship-laws> and the Africa Governance Monitoring and Advocacy Project (Afrimap), available at www.afrimap.org.

³³ All separated children are to have access to a procedure to determine their best interest. The outcome of a statelessness determination procedure, as with the result of an asylum determination, form part of best interests determination. With regard to asylum procedures and best interest determinations, please see UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008.

³⁴ The Convention on the Rights of Persons with Disabilities recognizes that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others", Preamble, paragraph (e).

in acquiring relevant documentation, such as birth certificates or other identification documents that would be pertinent to establishing their nationality status.

VI. STATELESSNESS DETERMINATION WHERE THE 1954 CONVENTION DOES NOT APPLY

69. Many stateless persons who meet the 1954 Convention definition find themselves in countries not bound by this treaty. Nevertheless, a number of non-contracting States have introduced some form of statelessness determination procedure to address the situation of such persons in their territories, given their commitments under international human rights law. With respect to the latter, statelessness is a juridically relevant fact, for example in relation to protection against arbitrary detention (Article 9(1) of the ICCPR), the right of women to equal treatment with men with regard to nationality (Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women) and the right of every child to a nationality (Article 24(3) of the ICCPR and Article 7(1) of the Convention on the Rights of the Child).

70. *De facto* stateless persons also fall outside of the protection of the 1954 Convention. There is no internationally-accepted definition of *de facto* statelessness, although there is an explicit reference to this concept in the Final Act of the 1961 Convention and an implicit reference in the Final Act of the 1954 Convention.³⁵ According to recent efforts to define the term, *de facto* stateless persons possess a nationality, but are unable, or for valid reasons are unwilling, to avail themselves of the protection of a State of nationality.³⁶ Some States have incorporated the concept of *de facto* statelessness (in substance, if not always in name) into their statelessness determination procedures, examining eligibility for protection on that basis alongside the 1954 Convention criteria.

71. States are encouraged to provide protection to *de facto* stateless persons in addition to 1954 Convention stateless persons. Often *de facto* stateless persons are in irregular situations or in prolonged detention because they are unable to return to their country of nationality. States will take a variety of factors into account when deciding the type of procedure in which *de facto* statelessness will be determined. One consideration is that it will not be clear at the outset, even in the view of the applicant, whether he or she is stateless as per the 1954 Convention or within the *de facto* concept. Irrespective of where *de facto* statelessness is determined, the procedure must not prevent individuals from claiming protection as a refugee or as a stateless person in terms of the 1954 Convention, as recognition as such would trigger greater obligations for the State under international law than recognition as a *de facto* stateless person.

³⁵ Paragraph 3 of the 1954 Convention's Final Act was drafted specifically to address the position of the *de facto* stateless. This recommendation requests that the benefits of the Convention be extended to individuals whom States consider to have had valid reasons for renouncing the protection of their State of nationality. As for the Final Act of the 1961 Convention, whilst not defining *de facto* statelessness, it sets out a recommendation that such persons benefit from the provisions in the 1961 Convention so as to obtain an "effective nationality".

³⁶ Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010, proposes the following operational definition for the term:

"*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality."

The full text of the Conclusions is available at: <http://www.unhcr.org/refworld/pdfid/4ca1ae002.pdf>.