



**Observations of the Office of the United Nations High Commissioner for Refugees
in the Case of**

██████████ v *Office of Immigration and Nationality* (17.K.32.297/2013)

before the Constitutional Court of Hungary

1. Introduction

1.1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ further to proceedings of the Constitutional Court (“the Court”) having been initiated by the Administrative and Labour Law Court of Budapest (“Administrative Court”) in the case of ██████████ v *Office of Immigration and Nationality* (17.K.32.297/2013).

1.2. The Administrative Court proposed in its order of 22 September 2014 that the Court rule that, with regard to the commencement of proceedings for the determination of statelessness status, the condition of “lawful stay” set out in Section 76(1) of Act II of 2007 on the Conditions of Entry and Stay of Third-Country Nationals (“Aliens Act”) is contrary to Articles Q(2) and XV(2) of the Fundamental Law, and accordingly should not be applied, either in general or in the present case.²

1.3. UNHCR has been mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people. UN General Assembly resolutions 3274 (XXIV) and 31/36 designate UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly further

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

² Section 76(1) of the Aliens Act provides: “*Proceedings for the determination of statelessness status shall commence upon an application submitted to the aliens police authority by an applicant lawfully staying in the territory of Hungary, which may be submitted by the person seeking recognition as a stateless person (hereinafter referred to as the “applicant”) orally or in writing.*” As regards Article Q(2) of the Fundamental Law, according to which Hungarian law must be in conformity with Hungary’s obligations under international law, the Administrative Court considers that Section 76(1) of the Aliens Act may not be in conformity with the 1954 Convention relating to the Status of Stateless Persons (“1954 Convention”). As regards Article XV(2) of the Fundamental Law, according to which Hungary shall guarantee fundamental rights to everyone without discrimination, the Administrative Court considers that Section 76(1) of the Aliens Act may unlawfully discriminate between stateless persons who are in possession of a travel document recognized by Hungary and who comply with the conditions for entry and stay in Hungary, and stateless persons who are not in possession of a travel document.

entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.³ This mandate has continued to evolve as conclusions of UNHCR's Executive Committee⁴ have been endorsed by the UN General Assembly. Over time, UNHCR has developed a recognized expertise on statelessness issues.⁵

1.4. Pursuant to its mandate responsibilities to address statelessness, UNHCR issues interpretative guidance on the protection of stateless persons, in particular under the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention"). Such guidance is included in the UNHCR Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons ("UNHCR Handbook on Protection of Stateless Persons").⁶ Guidance is also provided by way of making submissions to courts. In the past, UNHCR has intervened before the European Court of Human Rights on legal issues concerning the protection of stateless persons in the cases of *Kurić and Others v. Slovenia*⁷ and *Lakatosh and Others v. Russia*.⁸

³ UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995, available at: <http://www.refworld.org/docid/3ae68c443f.html>.

⁴ ExCom Conclusion No. 90 (LII), *Conclusion on International Protection*, 5 October 2001, para. (q), available at: <http://www.refworld.org/docid/3bd3e3024.html>; ExCom Conclusion No. 95 (LIV), *General Conclusion on International Protection*, 10 October 2003, para. (y), available at: <http://www.refworld.org/docid/3f93aede7.html>; ExCom Conclusion No. 99 (LV), *General Conclusion on International Protection*, 8 October 2004, para. (aa), available at: <http://www.refworld.org/docid/41750ef74.html>; ExCom Conclusion No. 102 (LVI), *General Conclusion on International Protection*, 7 October 2005, para. (y), available at: <http://www.refworld.org/docid/43575ce3e.html>; ExCom Conclusion No. 106 (LVII), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, paras. (f), (h), (i), (j) and (t), available at: <http://www.refworld.org/docid/453497302.html>.

⁵ See for example: *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <http://www.refworld.org/docid/50d460c72.html> and other recent documents of UNHCR on the topic including UNHCR, *Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia*, 2 March 2011, available at: <http://www.refworld.org/docid/4d6e09932.html>; UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note*, March 2010, available at: <http://www.refworld.org/docid/4b9e0c3d2.html>; UNHCR, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, available at: <http://www.refworld.org/docid/49a28afb2.html>.

⁶ UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html>. Please note that the *Handbook on Protection of Stateless Persons* was first published in the form of three UNHCR Guidelines but has now replaced them, namely: *Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, HCR/GS/12/01, available at: <http://www.refworld.org/docid/4f4371b82.html>; *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.refworld.org/docid/4f7dafb52.html>; *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, 17 July 2012, HCR/GS/12/03, available at: <http://www.refworld.org/docid/5005520f2.html>.

⁷ UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Kuric and Others v. Slovenia*, 8 June 2011, Application No. 26828/06, available at: <http://www.refworld.org/docid/4df9cd8c2.html>

⁸ UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Lakatosh and Others v. Russia*, March 2011, Application No. 32002/10, available at: <http://www.refworld.org/docid/4d74aec52.html>

1.5. UNHCR has an interest in ensuring a consistent and coherent interpretation and application of international law relating to stateless persons. As such, UNHCR's interest in this matter concerns the following two issues:

Issue 1: Whether Section 76(1) of the Aliens Act is in conformity with Hungary's obligations under international law, in particular the 1954 Convention. This issue will be dealt with in section 3 below.

Issue 2: Whether the definition of a "stateless person" in Section 2(b) of the Aliens Act is in conformity with the definition of a "stateless person" in Article 1(1) of the 1954 Convention.⁹ This issue will be addressed in section 4 below.

1.6. Although only the first of the above two issues has been raised by the Administrative Court, UNHCR respectfully invites the Constitutional Court to examine the second issue as well, pursuant to its power *ex officio* under Section 32 of Act CLI of 2011 on the Constitutional Court as regards the examination of the compliance of national law with Hungary's obligations under international law.¹⁰

2. General observations regarding the 1954 Convention

2.1. The 1954 Convention was adopted on 28 September 1954 and entered into force on 6 June 1960. Hungary acceded to the 1954 Convention on 21 November 2001.

2.2. Article 26 of the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention") codifies the customary international law principle of *pacta sunt servanda* and provides: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" Article 31(1) of the Vienna Convention similarly codifies the general rule of treaty interpretation that "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

2.3. As is clear from the 2nd and 4th preambular paragraphs of the 1954 Convention, the Convention's object and purpose is "*to assure stateless persons the widest possible exercise of [their] fundamental rights and freedoms*", and, in that regard, "*to regulate and improve the status of stateless persons by an international agreement*". The status of stateless persons as defined in Article 1(1) of the 1954 Convention is regulated by Articles 2 to 32 of the Convention.

3. Issue 1: Whether Section 76(1) of the Aliens Act is in conformity with Hungary's obligations under the 1954 Convention

3.1. Section 76(1) of the Aliens Act requires that an applicant for statelessness status be "lawful staying" in Hungary in order to be admitted to the statelessness determination procedure in Hungary.

⁹ Section 2(b) of the Aliens Act defines a "stateless person" as "*a person who is not recognized as a national by any State under its own law*", whereas Article 1(1) of the 1954 Convention defines a "stateless person" as "*a person who is not considered as a national by any State under the operation of its law*".

¹⁰ According to Section 32 of Act CLI of 2011 on the Constitutional Court: "*Based on Article 24(2)(f) of the Fundamental Law, the Constitutional Court shall examine national law upon initiatives by the authorized initiators or ex officio in any of its procedures.*"

3.2. However, as stated in paragraph 8 of the Handbook on Protection of Stateless Persons: “Whilst the 1954 Convention ... does not prescribe any mechanism to identify stateless persons as such ... it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments.” Thus as indicated in paragraph 69 of the UNHCR Handbook: “Everyone in a State’s territory must have access to statelessness determination procedures. There is no basis in the [1954] 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 stateless persons the very documentation that is necessary to enter or reside in any State lawfully.”

3.3. While Contracting States are afforded a considerable degree of autonomy in the procedures that they adopt for identifying stateless persons, those procedures may not be established in law and/or implemented in practice in a manner that is contrary to the object and purpose of the 1954 Convention, which, as stated above, is to ensure that stateless persons who fall within the Convention’s personal scope enjoy the status to which they are entitled under the Convention. In other words, statelessness determination procedures must not, either in law or in fact, undermine the effectiveness of the rights that the 1954 Convention confers on stateless persons.

3.4. While certain specific rights of stateless persons under the 1954 Convention are dependent on the lawfulness of their presence in the Contracting State concerned, others apply to all stateless persons irrespective of this condition.¹¹ For example, whereas Article 28 of the Convention provides that “[t]he Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory ...” (emphasis added), Article 27 of the Convention provides that “[t]he Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document” (emphasis added). However, the requirement in Section 76(1) of the Aliens Act that an applicant for statelessness status be “lawful staying” in Hungary in order to be admitted to the statelessness determination procedure prevents stateless persons who are not lawfully staying in Hungary from being identified as stateless, which in turn prevents such persons from benefitting from the right to be issued with identity papers as required by Article 27. Similarly, such persons are also prevented from benefitting from the other rights to which they are entitled under the 1954 Convention.¹²

3.5. Furthermore, under the 1954 Convention, only certain categories of stateless persons, exhaustively enumerated in the so-called “exclusion clauses” in Article 1(2), shall be denied Convention status. The exclusion clauses do not relate in any way to the lawfulness of the individual’s presence in the Contracting State concerned, as they 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;

¹¹ Those rights in the 1954 Convention which are triggered when an individual is subject to the jurisdiction of a State party include personal status (Article 12), property (Article 13), access to courts (Article 16(1)), rationing (Article 20), public education (Article 22), administrative assistance (Article 25) and facilitated naturalization (Article 32). Additional rights that accrue to individuals when they are physically present in a State party’s territory are freedom of religion (Article 4) and the right to identity papers (Article 27). See UNHCR Handbook on Protection of Stateless Persons, paras. 132 and 133.

¹² Please see the list in footnote 11 above.

(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.”*

3.6. In light of the above, in UNHCR’s view, the requirement in Section 76(1) of the Aliens Act that an applicant for statelessness status be “lawful staying” in Hungary in order to be admitted to the statelessness determination procedure is incompatible with Hungary’s obligations under the 1954 Convention.

4. Issue 2: Whether Section 2(b) of the Aliens Act is in conformity with Hungary’s obligations under the 1954 Convention

4.1. Article 1(1) of the 1954 Convention provides: “*For the purposes of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law*”. However, in Act II of 2002 on the promulgation of the 1954 Convention,¹³ Article 1(1) of the 1954 Convention reads as follows: “*For the purposes of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under its own law*”. The latter wording is reflected in Section 2(b) of the Aliens Act, which provides: “*For purposes of this Act ... ‘stateless person’ shall mean a person who is not considered as a national by any State under its own law.*”

4.2. Whereas the definition of a stateless person in the 1954 Convention uses the term “under the operation of its law”, the definition of a stateless person in the Act on the promulgation of the 1954 Convention and in the Aliens Act uses the term “under its law”. These two terms are not synonymous, and the difference in wording between the two results in the personal scope of the definition of a stateless person under Hungarian law being more limited than that under the 1954 Convention. Hungarian law is therefore not in conformity with Hungary’s obligations under the 1954 Convention.

4.3. The term “under the operation of its law” is central to the definition of a stateless person in the 1954 Convention. The UNHCR Handbook on Protection of Stateless Persons analyses “not considered as a national ... under the operation of its law” as follows:

¹³ Act II of 2002 on the promulgation of the Convention on the Status of Stateless Persons, established under the auspices of the United Nations on 28 September 1954, in New York.

“(a) Meaning of ‘law’

22. *The reference to ‘law’ in Article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.*

(b) When is a person ‘not considered as a national’ under a State’s law and practice?

23. *Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law.*

24. *Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual’s case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to ‘law’ in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.”*

4.4. Paragraphs 25 to 56 of the UNHCR Handbook on Protection of Stateless Persons provide further guidance on the interpretation and application of “not considered as a national ... under the operation of its law”.

5. Conclusions

Issue 1: UNHCR is of the view that the requirement in Section 76(1) of the Aliens Act that an applicant for statelessness status be “lawful staying” in Hungary in order to be admitted to the statelessness determination procedure is incompatible with Hungary’s obligations under the 1954 Convention.

Issue 2: UNHCR is of the view that the definition of a “stateless person” in Section 2(b) of the Aliens Act is incompatible with the definition of a “stateless person” in Article 1(1) of the 1954 Convention.

UNHCR, 30 November 2014

Annex

UNHCR Handbook on Protection of Stateless Persons (English version, Hungarian translation not yet available)