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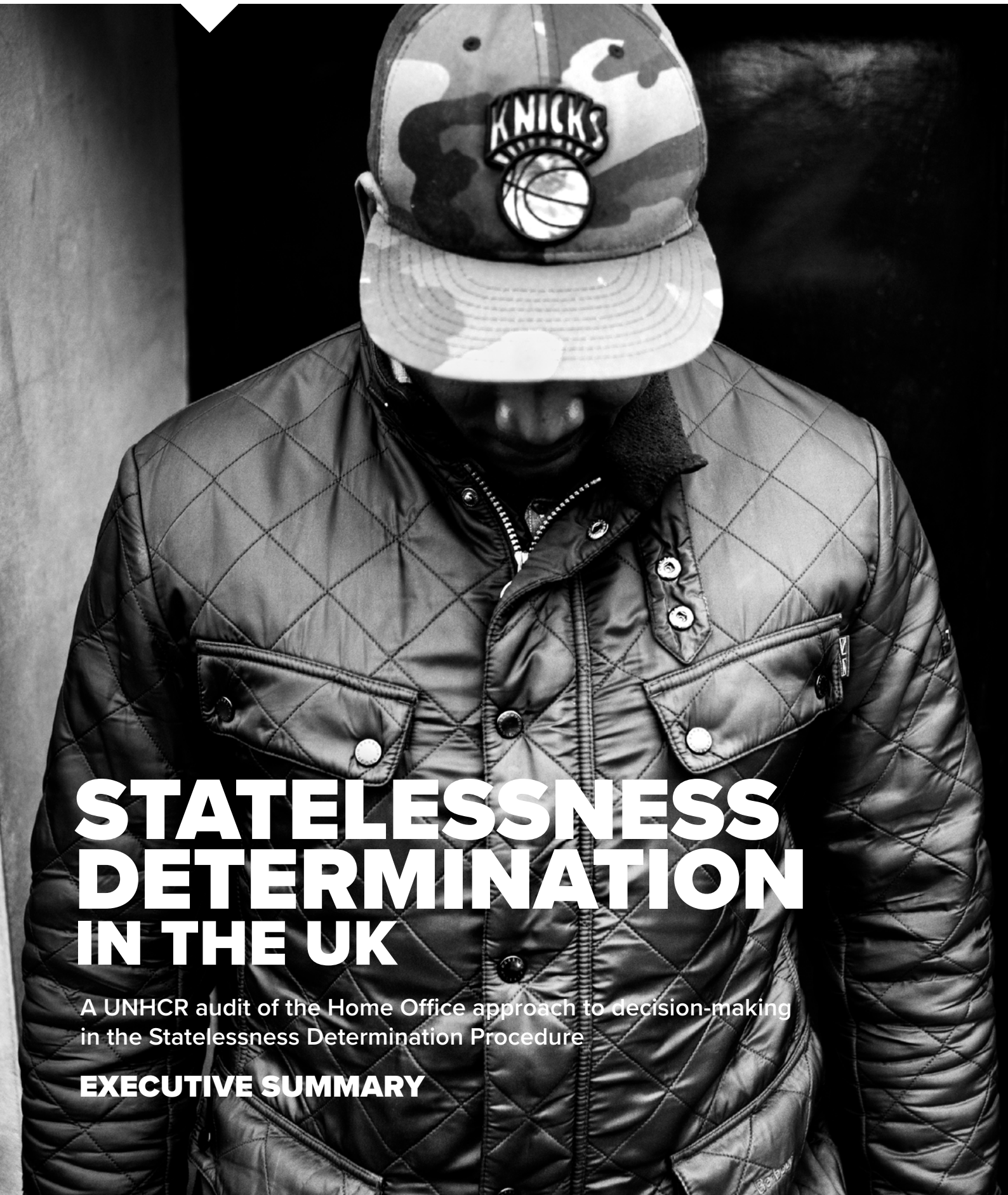

STATELESSNESS DETERMINATION IN THE UK

A UNHCR audit of the Home Office approach to decision-making in the Statelessness Determination Procedure

EXECUTIVE SUMMARY

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An estimated 10 million people around the world live without any nationality.[1] These people are stateless, and are arguably amongst the most vulnerable in the world because they do not have access to the basic rights associated with citizenship of a nation state.[2] Research indicates that the majority of stateless people in the UK are undocumented migrants, at risk of human rights violations due to their lack of an immigration status.[3]

In 2013, the UK Government introduced a Statelessness Determination Procedure (SDP)[4] enabling stateless people to apply for recognition of their status as people who are without a nationality and to be granted leave to remain, giving stateless people the right to work and access to public funds. The SDP has been accompanied by policy guidance, last updated in 2019.[5] The UK is one of fewer than 25 countries to have such a procedure – introduced to help ensure that the UK Government complies with its international obligations under the 1954 Convention relating to the Status of Stateless Persons (1954 Convention), to which it is a signatory. There are serious consequences to incorrectly rejecting an application for stateless status. Where these individuals cannot be returned to another country, but remain without a regular immigration status, they risk destitution, homelessness and prolonged immigration detention in the UK[6] as well as the denial of the right to identity documents, education, health services and employment.[7] It is for these reasons that UNHCR, the UN Refugee Agency, urges the UK government to continue to reinforce the protection function of the SDP in the design and improvement of this system going forward.

The United Nations General Assembly entrusts UNHCR with a global mandate for the identification, prevention and reduction of statelessness, and for the international protection of stateless persons.[8] In 2018 UNHCR undertook a review into the UK Home Office approach to decision-making on applications for leave to remain as stateless person, known as "statelessness leave". This review was carried out under the Quality Protection Partnership, a joint UNHCR and UK Government collaborative endeavour aimed at improving the quality of Home Office decision-making.

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1 UNHCR Global Trends report 2016 www.unhcr.org/globaltrends2016/
2 Foreword to the UNHCR Handbook on Protection of Stateless Persons under the 1954 Convention, 2014 available from: www.unhcr.org/uk/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html
3 UN High Commissioner for Refugees (UNHCR),"Mapping Statelessness in the United Kingdom", November 2011, available from: www.refworld.org/docid/4ecb6a192.html
4 Immigration Rules part 14: stateless persons www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons
5 Home Office Policy Guidance "Stateless leave", 30 October 2019, available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leave-guidance-v3.0ext.pdf.
6 UN High Commissioner for Refugees (UNHCR), "Mapping Statelessness in the United Kingdom", November 2011, see note 3 above.
7 Home Office Policy Guidance "Stateless leave", 30 October 2019, see page 5.
8 General Assembly Resolution 3274 (1974), General Assembly Resolution 50/152 (1996)

A report of the findings and recommendations was presented to the Government in late 2019. UNHCR would like to thank the Home Office for the positive collaboration on this audit.

Since the introduction of the SDP in 2013 and up to the end of 2019, there have been 161 grants of leave to remain on initial decisions.[9] This report reviews 36 decisions (both grants and refusals) by the Home Office under the SDP. Home Office case file reference numbers have been removed from this report for the purposes of data protection. This report aims to assess the quality of decision making in these cases and makes key recommendations seen as crucial for the strengthening and transparency of the SDP.

Recommendations are listed throughout the report and include the following:

- Comprehensive revision and development of training for decision-makers working in the SDP
- Amendments to the Immigration Rules and policy guidance concerning statelessness
- Introduction of a right of appeal on decisions on statelessness leave
- Introduction of legal aid for applications for statelessness leave
- Publication of statistics on applications and decisions made under the SDP
- Development of the quality assurance framework for the monitoring of the quality of statelessness leave decisions

9 This figure was provided by the Home Office and is revised down from 2018 because the previous annual figure combined grants of statelessness leave from both initial decisions and subsequent grants made after the initial period of leave had expired.

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KEY FINDINGS

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The Home Office approach to assessing and determining statelessness needs considerable strengthening

The definition in Article 1(1) of the 1954 Convention requires proof of a negative because the term "stateless person" is defined as **"a person who is *not* considered as a national by any State under the operation of its law."** This presents significant evidentiary and practical challenges for both the applicant and the decision-maker.

Central foundations to effective decision-making on statelessness were considered in the cases reviewed. These were specifically the application of the burden and standard of proof as well as the credibility assessment. This highlighted several shortcomings in the current approach.

BURDEN AND STANDARD OF PROOF

UNHCR recommends that in statelessness determination the burden of proof should in principle be *shared* between the applicant and the decision-maker and that a low standard of proof - "to a reasonable degree" - should be applied in determining if a person is stateless. As with refugee status determination, this approach recognises the serious consequences of incorrectly rejecting an application for stateless status and the practical difficulties inherent in proving statelessness.

Burden of proof

The Home Office policy on statelessness leave is not in line with UNHCR guidance and instead states that the burden of proof "rests with the applicant."

Paragraph 403(d) of the Immigration Rules also requires the applicant to "obtain and submit all reasonably available evidence". Yet, where the available information is **"lacking or inconclusive"** the caseworker **"*must* assist"** the applicant by undertaking relevant research or making enquiries. The Home Office guidance, therefore, envisages that a shared burden of proof will be required in some cases.

In the cases reviewed, UNHCR observed that where an applicant presented evidence which was "lacking or inconclusive", decision makers did not always offer their assistance. In seven cases, where the applicant had made efforts, often with limited or no success, to visit or contact relevant foreign authorities in order to obtain confirmation regarding their citizenship status, the burden was placed exclusively on the applicant. The decision-maker did not "assist" the applicant in any cases by contacting relevant foreign authorities to enquire about the applicant's citizenship status, as required by the policy.

These challenges in evidencing claims were compounded by a lack of clarity from both applicants and decision-makers as to what is meant by **"reasonably available evidence"** and what process is required to establish this threshold. For example, some decision-makers had high expectations of what documentary evidence applicants should possess and/or should reasonably be able to obtain and submit, whilst applicants in some cases, appeared to be unaware of the evidence which would be useful in supporting their claim.

Standard of proof

The Home Office maintains that a higher standard of proof should be applied when determining statelessness than is applied in refugee status determination. The threshold applied is whether **"on the balance of probabilities"** a person is stateless. Whilst UNHCR does not endorse the higher standard applied in the UK SDP, it was positive to find that in the majority of cases reviewed, the standard of proof appeared on face value, when considered in isolation, to be applied in accordance with Home Office policy.

However, UNHCR observed that in almost half of the cases where a substantive decision was made on statelessness, not all the available evidence was before the decision-maker. This was due to a failure to apply the burden of proof correctly as outlined in the section above. The lack of assistance to the applicant by the decision-maker, where evidence was inconclusive played a role in this. In these cases, it is not surprising therefore that on the basis of evidence available, the applicant was not, on the balance of probabilities, found to be stateless. However, further evidence, or a further effort to obtain evidence, could have allowed the decision maker to make a more informed and complete assessment.

UNHCR RECOMMENDS THAT:

- In statelessness determination the burden of proof should be shared and a low standard of proof should be applied.
- The Home Office should consider supporting applicant's in approaching and gathering evidence from embassies/consulates. This support could be provided for by the funding of an independent organisation.
- A checklist to supplement the policy should be developed to assist decision-makers and applicants in understanding what is required to determine if "all reasonably available evidence" has been provided or not.

APPROACH TO CREDIBILITY ASSESSMENT

The credibility assessment involves a determination of whether and to what extent the evidence gathered can be accepted and therefore inform a determination of statelessness. This audit examined the extent to which this process was effectively undertaken in line with UNHCR credibility guidelines.[10] Whilst there were several areas of positive practice, UNHCR highlighted a number of areas needing improvement.

Gathering of evidence

- UNHCR considered that the applicant's previous asylum claim and/or immigration history was relevant to the determination of statelessness in ten of the 36 cases. However, the use of this information by decision makers was mixed. In three cases, the decision-maker used this to carefully inform their decision. However, in seven cases, the applicant's immigration history was not fully examined and vital information, such as a finding on the State's previous position as to an applicant's citizenship status, was missed.
- Positive practice was observed in the gathering of nationality law. There were 15 cases where information on the nationality law in question was absent from the evidence submitted by the applicant. In all these cases, the decision-maker proactively sought to verify or collect information on the relevant nationality law in efforts to determine the applicant's citizenship status.

10 UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons" 2014, Section 9.

- Decision-makers took active steps to gather relevant country of origin information (COI) in eight cases. However, UNHCR considered that there were five further cases where an absence of COI hindered the assessment of statelessness, but the decision-maker did not seek this information. Analysis suggests that a lack of up to date Home Office COI on nationality law and statelessness contributed heavily to this. However, there were no specific individual enquiries made to the Country Policy and Information Team (CPIT) by decision-makers to full this gap, as is directed by Home Office policy.

Determining material facts and assessing their credibility

- There was a lack of clarity in both grant and refusal letters reviewed as to what facts the decision-maker considered material. For example, cases were identified in which the letter focused on elements of the applicant's circumstances which appeared immaterial to the determination of statelessness. In other cases, the material facts of the case were not established, therefore it was unclear how these facts went on to be considered as part of the overall credibility assessment.

- There was mixed practice as to how an applicant's written and oral testimony was considered. In four cases the applicant testified to having been in contact verbally with the relevant foreign authority but failed to obtain a formal response in writing confirming that the State refused to document them. Decision-makers did not acknowledge or take this testimonial evidence into account, dismissing it without giving it weight. Conversely in two other cases, sympathetic consideration was given to testimonial explanations regarding the lack of a response from the relevant State, and weight was assigned to this, in accordance with UNHCR guidelines.

- There was a tendency for caseworkers to consider some facts in isolation when reaching their decision. This was particularly pronounced in four cases in which nationality law on the papers was privileged by caseworkers above other evidence. This meant an analysis was undertaken as to how nationality law simply appears on paper, without consideration of how the law applied *in practice* to the individual circumstances of the case.

- In two cases, negative credibility findings were reached by the decision-maker without an appropriate assessment of credibility indicators. This arose in cases where there was little or no documentary evidence available because the applicant claimed to have never held legally accepted identity documentation. This included credibility findings based on subjective assumptions or speculation as well as a lack of consideration of the internal consistency of an applicant's account.

UNHCR RECOMMENDS THAT:

- A structured approach to decision-making in the SDP should be introduced. This would help ensure that the principles underpinning credibility assessment are fulfilled and the credibility findings are objective and impartial. This could be achieved through the development of templates and tools to focus decision-making.
- Training for statelessness leave decision-makers should be strengthened. This should include sessions on how to identify material facts, when and how to 'assist' applicants, how to utilise credibility indicators and how to consider and weigh different types of evidence.
- Relevant Home Office COI reports should include a section on "nationality and citizenship". This would ensure that decision-makers have information on the updated country situation to draw on to make accurate determinations of statelessness.
- Home Office policy on statelessness leave should be amended to address the issue of credibility in statelessness claims. This would ensure that decision-makers are guided directly in this regard.

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The absence of procedural guarantees can hinder the quality of decisions made and adversely impact upon the integrity of the process

UNHCR considered a number of fundamental procedural guarantees relating to applications for statelessness leave. These include the right to an individual interview, access to legal counsel, the right to appeal and that decisions are made and communicated within a reasonable time. Analysis in these areas points to deficiencies in the application of these procedures, undermining the fairness and transparency of decision-making as well as limiting the information gathered by the decision-maker.

STATELESS INTERVIEWS

It is unknown to UNHCR what proportion of applicants for statelessness leave are offered interviews, but from the selection of cases given to UNHCR for this audit, the numbers appear very low. UNHCR selected seven cases where interviews took place. UNHCR was concerned to review cases in some instances where interviews were not offered, and the applications were refused. This included three cases where UNHCR deemed an interview necessary because more information was needed on the individual circumstances of the case in order to undertake a full assessment of statelessness.

SPEED OF DECISION-MAKING

The UNHCR handbook[11] advises that it is undesirable for a first instance stateless decision to take more than six months to be issued. Home Office policy, however, does not provide a specific time scale for the statelessness leave decision to be made. In just under 30% of cases reviewed, a decision was made by the Home Office within a six-month time frame. In just over 60% of all cases audited, a decision took more than one year to issue. Two of these applications took more than two years to finalise. Positive practice on decision making on children's claims however, was observed. These were made at a quicker rate than for adults, with four of seven cases decided within six months, arguably in "in a timely" manner as outlined in Home Office policy.

11 UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons" 2014, para. 74.

AVAILABILITY AND IMPACT OF LEGAL ADVICE AND REPRESENTATION

Legal aid is not generally available for advising, representing or assisting someone who wishes to make an application for statelessness leave. In the cases audited, half of applicants made their initial applications without the assistance of a legal representative. The absence of legal advice and representation for applications for statelessness leave in UNHCR's view contributed to problems in the assessment and determination of statelessness. This included a failure by self-represented applicants to submit available or relevant evidence pertinent to their statelessness application. Furthermore, in four self-represented cases the information submitted suggested that statelessness leave may not have been the correct route for the individual and that applications for asylum or British citizenship would have been more appropriate.

Where the applicant had a lawyer, the quality of advice and representation was nevertheless mixed. There are examples where legal representation was particularly effective and necessary in demonstrating an applicant's lack of nationality and in meeting the legal tests required. Yet in seven cases in which the applicant had a legal representative, either very little, inappropriate evidence or no evidence was provided about the applicant's lack of nationality to substantiate the applicant's claim. This indicates that more training for legal representatives on statelessness is required.

ADMINISTRATIVE REVIEW (AR)

There is no statutory right of appeal against the decision to refuse to grant leave as a stateless person in the UK. Rather, unsuccessful applicants can only apply for an administrative review (AR). There were eight cases in the audit in which the applicant applied for an AR. In all cases where an AR was undertaken, the original decision to refuse the application was maintained and in only one case was a case working error identified correctly by the decision-maker. UNHCR observed that rigorous scrutiny was not applied to all the claimed case work errors highlighted in AR applications. This resulted in case work errors not being identified, similar errors being replicated in the AR decision notice as those made in the first instance decision and not all of the applicant's challenges being addressed in every case.

Statelessness cases are legally and evidentially complex, but in the UK judicial review is the only judicial remedy available in these cases. This is a mechanism which does not focus on the facts of the case but instead challenges the lawfulness of the decision made. UNHCR therefore considers that a right to appeal in the UK SDP would be most effective in ensuring the correct decisions are made on eligibility under the 1954 Convention.

UNHCR RECOMMENDS THAT:

- A stateless determination interview should be mandatory in all cases. This policy should be combined with the development of a process for accelerated case management. This would mean that an interview may not be necessary in both manifestly unfounded and manifestly well-founded applications.
- The Home Office should adequately staff the SDP to ensure that in the majority of cases decisions are made within 6 months and up to 12 months in exceptional circumstances. This timescale should be detailed in the Home Office policy.
- Legal aid should be introduced for applications for statelessness leave. This could not only assist applicants but could also reduce the number of applications made without appropriate supporting evidence and help ensure fewer unmeritorious applications.
- Applicants to the statelessness procedure should have an effective right to appeal against a negative first instance decision. The appeal procedure should rest with an independent body.

Aspects of the Immigration Rules and policy do not uphold the purpose and intention of the 1954 Convention

Two areas of decision-making reviewed in this audit - specifically on 'admissibility' and the application of the General Ground for Refusal, indicated that the Immigration Rules and Statelessness leave policy in these areas do not uphold the purpose and intention of the 1954 Convention.

ADMISSIBILITY

Even if an applicant is determined to be stateless, they can still be refused leave to remain in the UK because they are deemed "admissible" to their country of former habitual residence.[12] Home Office policy indicates that admissibility equates to the applicant having a right of "permanent residence" in the relevant country.[13]

In the cases audited, the rules on admissibility were only applied to applicants originating from Palestine. Analysis revealed that decision-makers appeared to consider admissibility in these cases solely with regard to the ability to "re-enter" another country without reference to the applicant's ability to enjoy "permanent residence" as outlined in the policy. This appears to undermine efforts to ensure that stateless persons are not returned to a country without an adequate level of protection.

Further, these cases shed light on the challenges of interpreting and establishing the concept of admissibility under the current rules. It is UNHCR's position that the current admissibility test is contrary to the object and purpose of the 1954 Convention because it appears to have unintended and adverse consequences for stateless persons, namely that they remain without legal status in any country. This means that the way the existing rules on admissibility are drafted does not ensure sufficient protection for stateless persons.

UNHCR believes that the admissibility provision in the UK Immigration Rules should only apply to those individuals who are able to acquire or reacquire nationality through a **"simple, rapid, and non-discretionary procedure" or, "enjoy permanent residence in a country to which immediate return is possible."**[14] The UNHCR Handbook also states that return to another State must also be accompanied by a full range of civil, economic, social and cultural rights, in conformity with the object and purpose of the 1954 Convention. UNHCR advises considerable amendments be made to the current "admissibility" test in the UK Immigration Rules and policy.

GENERAL GROUNDS FOR REFUSAL

If an applicant is found to be stateless under Paragraph 401, they may still be refused statelessness leave where there is evidence in their background, behaviour, character, conduct or associations[15] which satisfies Part 9 of the Immigration Rules – the General Grounds for Refusal. The application of this rule applied to five applicants in this audit due to their history of offending.

In all five cases, there was no substantive consideration given to their claim to be a stateless person under the Immigration Rules. Instead, the Home Office proceeded directly to refuse the applications under the mandatory general grounds for refusal. It is noteworthy that in UNHCR's view, four of these five cases demonstrated clear indicators of statelessness. UNHCR does not consider the approach taken in these cases to be correct and rather advises the first question to be asked is whether or not a person is stateless. This was raised with the Home Office during the course of this audit, and UNHCR is pleased to note that the updated statelessness leave policy now directs

12 See Paragraph 403(c) of Part 14 of the UK Immigration Rules

13 Home Office Policy Guidance "Stateless leave", 30 October 2019 See pages 4, 5, 6, 7, 12, 14, 17 and 27.

14 UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons" 2014, paras. 153 – 157, available from: www.unhcr.org/53b698ab9.html.

15 Home Office Guidance "General Grounds for Refusal Section 1" 11 January 2018, available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827971/GGFR-Section-1-v29.0-EXT.PDF.

the decision-maker to undertake a substantive consideration of statelessness in cases where general grounds applies.

Additionally, in the same five cases, there was no subsequent consideration as to whether or not there were any human rights grounds that needed to be considered, as is directed by policy as interpreted by UNHCR. This omission is significant because human rights considerations are particularly relevant in the context of statelessness. An individual who has been found to be stateless but does not qualify for statelessness leave is at increased risk of potential breaches of the European Convention on Human Rights including a real risk of destitution and arbitrary detention.

UNHCR RECOMMENDS THAT:

- The current "admissibility" test in the UK Immigration Rules and policy should be amended. This is to ensure it is in line with international law, by reflecting the UNHCR Handbook.
- In cases where general grounds applied, the Home Office should identify and reconsider those cases where this error has been made historically. This is in recognition of the seriousness of the oversight in failing to undertake substantive determinations of statelessness.
- The Home Office should consider human rights issues when applying general grounds, rather than expecting a stateless person to make a separate application.

Additional safeguards are needed to prevent stateless persons from being subjected to prolonged or arbitrary detention in the UK

Stateless persons generally do not possess identity documents or valid residence permits, so they can be at high risk of repeated and prolonged detention with significant barriers to removal which could render detention arbitrary.[16]

UNHCR requested examples of decision-making on statelessness leave applications made whilst the applicant was in immigration detention. However, the Home Office was only able to specify one case fitting this criterion. A lack of known applications from detention could, in UNHCR's view, point to barriers which prevent or deter applications for statelessness leave being made from within detention, such as lack of access to information and legal advice. The Home Office view is that statelessness applications should be flagged and considered when deciding whether or not to detain an individual, and that this is what accounts for the low number of applications from within detention.

16 UN High Commissioner for Refugees (UNHCR), "Stateless Persons in Detention: A tool for their identification and enhanced protection" June 2017, available from: http://www.refworld.org/docid/598adacd4.html.

Observations from the full analysis of case files however, points to individuals in detention exhibiting indicators of statelessness but who have not applied to the SDP at an early stage. In five cases, the applicant spent a period of time in detention prior to their application to the SDP. In all cases the applicant was eventually released due to difficulties obtaining documentation meaning there was no realistic prospect of removal. Each case exhibited a number of indicators of statelessness but notes on file suggest these were not identified by officials when the applicant was entering detention or during detention reviews. UNHCR considers that more research is needed into this area to gain an insight into what is happening in practice.

UNHCR RECOMMENDS THAT:

- The Home Office should amend the "Adult at Risk in immigration detention" policy to expressly identify an individual's risk of statelessness as a factor that will weigh against detention on the basis that it is likely to indicate that there are no reasonable prospects of removal.
- The Home Office should make changes to its training and detention review forms in respect of statelessness. This will help ensure that officials are able to identify indicators of statelessness, the appropriateness of immigration detention in these cases and the approach that should be taken to removal.

CONCLUSION

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The introduction to the UK of a Statelessness Determination Procedure in 2013 was a critical step forward in ensuring the UK meets its obligations to stateless persons under the 1954 Convention. This report provides evidence of the vital protection role this procedure and a determination of stateless status can play for some of the most vulnerable people in the UK - those without a nationality. However, a detailed analysis of decision-making in this system has also highlighted some of its shortcomings, indicating that stateless people may be falling through the gaps of protection due to both deficiencies in the quality of decision-making on individual cases and wider systemic limitations including a lack of legal aid and right of appeal. UNHCR stands ready to provide support to the UK Government to help improve this system to ensure all stateless people in the UK are properly identified, protected and can thrive.


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