

NEW ISSUES IN REFUGEE RESEARCH

Research Paper No. 250

A responsibility to protect: UNHCR and statelessness in Egypt

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January 2013



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ISSN 1020-7473

Introduction

To date there has been no comprehensive research on instances of statelessness in Egypt, which has negatively impacted how government, the United Nations High Commissioner for Refugees (UNHCR), and other organisations have been able to deal with the problem. This paper considers cases of stateless migrants to Egypt and evaluates how far the UNHCR in Cairo has been able to provide stateless persons the international protection they may be owed under the UNHCR's statelessness mandate.¹ This paper aims to be accurate as of March 2012. Since that date, AMERA has worked with UNHCR to address a number of the issues raised, including development of standard operating procedures to determine statelessness in the context of UNHCR's refugee status determination procedures.

Egypt is not party to either the 1954 Convention Relating to the Status of Stateless Persons (the 1954 Convention) or the 1961 Convention on the Reduction of Statelessness (the 1961 Convention). Egypt also has no domestic legislation specifically regulating the status of stateless persons. Egypt is, however, party to the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) and the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention), which both commit Egypt to upholding the basic rights of all refugees, including those who do not hold a nationality.

In accordance with an agreement between UNHCR and the Egyptian Government, UNHCR Cairo carries out refugee status determination (RSD) in Egypt. Asylum-seekers awaiting adjudication of their claim and refugees formally recognised under either the 1951 or 1969 Conventions are able to acquire residence permits, renewable every six months, and are protected against *refoulement*.

Case studies demonstrate that stateless migrants who are unable to claim the benefit of the 1951 or 1969 Conventions and who seek protection from UNHCR Cairo for recognition of their basic human rights often do not receive it, despite the organisation's mandate responsibilities to protect stateless individuals. Stateless persons are often not identified by UNHCR. Even where they are identified the protection afforded to them is at best *ad hoc* thus leaving many people vulnerable to deportation and detention.

Methodology

The research began with a broad review of existing literature on statelessness in the Middle East and North Africa, and in Egypt more specifically, and on the mandate responsibilities of UNHCR Field Offices. Individual instances of statelessness amongst migrants to Egypt were then identified through a thorough review of the client database of Africa and Middle East Refugee Assistance (AMERA-Egypt), an NGO providing legal aid to asylum-seekers in Cairo. Individuals who were identified as stateless were then interviewed.

Where persons identified as stateless could not be contacted, either because they had left Egypt or their whereabouts were unknown, their written statements submitted to UNHCR in the course of RSD were studied in order to identify key issues relating to their status. Interviews were also conducted with staff at UNHCR, including UNHCR Cairo Field Office's Statelessness Focal Point, UNHCR Cairo's Deputy Regional Representative, and the Head of UNHCR's Statelessness Unit in Geneva. The Refugee Status Determination Supervisor at UNHCR Cairo was unfortunately unable to participate in interviews during the research

period. Drafts of this report were circulated to staff at UNHCR Cairo and UNHCR's Head Office for comment prior to publication. AMERA would like to thank all of those who agreed to interviews and who provided helpful feedback on the drafts of this paper.

Definitions

UNHCR's Statelessness mandate emanates from a series of UN General Assembly Resolutions.¹ Guidance on the implementation of that mandate is found in UNHCR's Executive Committee (ExCom) Conclusion No. 106 on the 'Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons'. Conclusion No. 106 lists a number of measures to be taken by UNHCR with respect to identification of stateless persons, protection of stateless persons, and prevention and reduction of statelessness.²

Stateless persons are defined in accordance with Article 1 of the 1954 Convention as any 'person who is not considered as a national by any State under the operation of its law'.³ Such individuals are often described in academic commentary as *de jure* stateless, although such a description does not appear in any international legal texts.

UNHCR's statelessness mandate is primarily focussed on statelessness as defined in the 1954 Convention. However, in order to properly fulfil this mandate – in particular its mandate to *prevent* statelessness, the UNHCR may be required to address instances of *de facto* statelessness. This is acknowledged in Resolution I of the Final Act of the Conference that drew up the 1961 Convention which recommends that 'persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.'⁴

Although *de facto* statelessness is not defined in an international treaty, for the purposes of this paper *de facto* stateless persons are defined as

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.

Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries.

This is the definition adopted in the concluding report of a recent Expert Meeting on the concept of statelessness in international law, though this definition that has not been formally adopted by UNHCR.⁵

¹ UN General Assembly Resolution 3274 (XXIV) (10 December 1974); UN General Assembly Resolution 31/36 (30 November 1976); UN General Assembly Resolution 49/169 (23 December 1994); UN General Assembly Resolution 50/152 (21 December 1995).

² UN High Commissioner for Refugees, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* (6 October 2006), No. 106 (LVII) – 2006. This was endorsed by UN General Assembly Resolution 61/137 (19 December 2006).

³ UN General Assembly, *Convention Relating to the Status of Stateless Persons* (28 September 1954), United Nations, Treaty Series, vol. 360, p. 117, Article 1.

⁴ UN General Assembly, *Convention on the Reduction of Statelessness* (30 August 1961), United Nations, Treaty Series, vol. 989, p. 275.

⁵ UN High Commissioner for Refugees, *Expert Meeting - The Concept of Stateless Persons under International Law Summary Conclusions* (May 2010), p. 6.

In this definition, ‘protection’ refers only to the rights of diplomatic protection, diplomatic and consular protection and assistance generally, and the right to safely and legally return to the country of nationality. For the purposes of this paper, ‘valid reasons’ for being unwilling to avail oneself of a state’s protection are defined as those listed in the 1951 Refugee Convention.

It therefore follows that all refugees, recognized as such under the Refugee Convention, are *de facto* stateless persons, unless of course in addition to their refugee claim, they are not recognised as a national of any state under the operation of its law, in which case they will be *de jure* stateless persons. However, as the 1951 Refugee Convention operates to protect refugees, and this paper is concerned primarily with UNHCR’s statelessness mandate, this paper is limited only to the consideration of *de jure* stateless persons (be they refugees or non-refugees) and *de facto* stateless persons who do not enjoy international protection under the 1951 Convention.

Statelessness in Egypt

It is notoriously difficult to quantify stateless populations in any state, and Egypt is no different. UNHCR Cairo publishes useful statistics in relation to persons who have approached the Office. However, UNHCR statistics understandably only record persons who have approached the office, and therefore only really contain details of migrants with a refugee claim. Statelessness, however, can exist outside the context of migration. UNHCR statistics are thus not the best source to go to in an effort to quantify the size of the stateless population in Egypt.

An example of statelessness outside the context of asylum and migration includes children born in Egypt to foreign fathers. Research indicates that there is a large number of children in Egypt, born to foreign fathers, who have been made stateless by previous policies preventing them from inheriting their mother’s nationality, though it should be noted that these policies have since been revoked.⁶

There is also evidence that members of the Baha’i faith in Egypt have been at risk of statelessness owing to the authorities’ unwillingness to recognise their religion and thus provide them identity documents.⁷ Although this policy was recently overturned by the courts, the United States Commission on International Religious Freedom has reported doubts about

⁶ Refugees International has estimated the population of stateless children in Egypt at between 400,000 and 1 million. This was due to discriminatory nationality legislation that held that nationality follows the paternal line only, thus preventing children born to foreign fathers from claiming Egyptian nationality. In recent years, however, this law has changed, enabling Egyptian women to bestow their nationality on their children. For more information see Refugees International, *Lives on Hold: the Human Cost of Statelessness* (February 2005); Women’s Learning Partnership, ‘Claiming Equal Citizenship’ (14 March 2008), available at <http://www.learningpartnership.org/citizenship> [last accessed 2 January 2012]; Decree 1231 of the Minister of the Interior [Egypt] (2 May 2011).

⁷ For more information see *Abdu’l-Majid Al’Anani v. Mr. Husam ‘Izzat Muhammad Musa and others and The Minister of the Interior and others v. Mr. Husam ‘Izzat Muhammad Musa and Others*, Judgment delivered by the Administrative Court of Cairo in the application no. 24044 of 58 J. On 4/4/2006 (16 December 2006) [Egypt]. English Translation available at http://info.bahai.org/pdf/EGYPTSAC_16DEC06_ENGLISH.pdf; See Gamal Nkrumah, ‘Rendered Faithless and Stateless’, *Al-Ahram Weekly Online* 825 (21-27 December 2006), available at <http://weekly.ahram.org.eg/2006/825/eg5.htm>; Advocates for the Persecuted, *Egyptian I.D. Card Cause of Suffering for Religious Minorities* (28 August 2011), available at <http://advocatesforthepersecuted.org/index.php/stories/3063.html>; Cynthia Johnston, ‘Egypt Baha’is win court fight over identity papers’, *Reuters Online* (29 January 2008), available at <http://af.reuters.com/>.

the extent to which the court's ruling has been enforced.⁸ Whilst absence of identity documents in itself does not render an individual stateless, it does put someone at risk of being unable to prove their identity and thus not being recognized by any country as a state national.

However, as this paper is concerned with UNHCR's mandate responsibilities towards stateless persons – particularly its mandate to protect stateless persons - the focus of this paper is on statelessness in the context of migration, and in particular on the experiences of stateless migrants who have actively approached UNHCR Cairo.

According to UNHCR statistics there were 60 stateless persons in Egypt in November 2011.⁹ This group consists exclusively of elderly individuals of Armenian origin who are afforded UNHCR protection arising from a historic agreement with the Egyptian government.¹⁰ However, Egypt is home to one of the largest refugee populations in the world,¹¹ 97% of whom come from Sudan, Ethiopia, Eritrea, Somalia and Iraq.¹² Given the protracted issues of statelessness that occur in some of these countries of origin, notably Ethiopia and Eritrea, it is likely that there are more instances of statelessness in UNHCR's database than its statistics suggest.

Indeed, an analysis of AMERA-Egypt's case load between 2006 and 2011 identified approximately 45 persons who may have qualified as persons of concern under UNHCR's statelessness mandate, either because they are *de jure* stateless persons or because they are non-refugee *de facto* stateless persons, and therefore do not already enjoy the benefit of protection under UNHCR's refugee mandate. None of these individuals were identified as stateless in UNHCR statistics, despite the fact that almost all of them had registered with UNHCR and had their refugee claims adjudicated.

Although AMERA-Egypt has only identified 45 stateless persons (all of whom were known to UNHCR), it should be noted that AMERA-Egypt only has contact with around 10 per cent of the total migrant population that approaches UNHCR Cairo.¹³ Furthermore, AMERA-Egypt tends to meet asylum-seekers relatively soon after their arrival in Egypt; when they need legal assistance prior to RSD procedures. As a result, there is no way of estimating the size of the population which, after being refused refugee status, is refused consular assistance by embassies, and has no means of repatriating, and who may therefore be left stateless. This issue is discussed below.

Of the 45 persons identified in AMERA-Egypt's database persons of Ethiopian and Eritrean origin constituted the single largest group. Stateless persons from DRC and children born in Egypt to stateless migrants also factored heavily in AMERA-Egypt's caseload (see Figure 1 below).

Of the 45 cases identified, 29 are men and 16 women. Five had entered Egypt as unaccompanied children. Thirteen had experienced immigration-related detention in Egypt (three of whom had also been detained in their country of former habitual residence), and a

⁸ United States Commission on International Religious Freedom, *USCIRF Annual Report 2011 - Countries of Particular Concern: Egypt* (28 April 2011).

⁹ UN High Commissioner for Refugees, *UNHCR Egypt Fact Sheet* (November 2011).

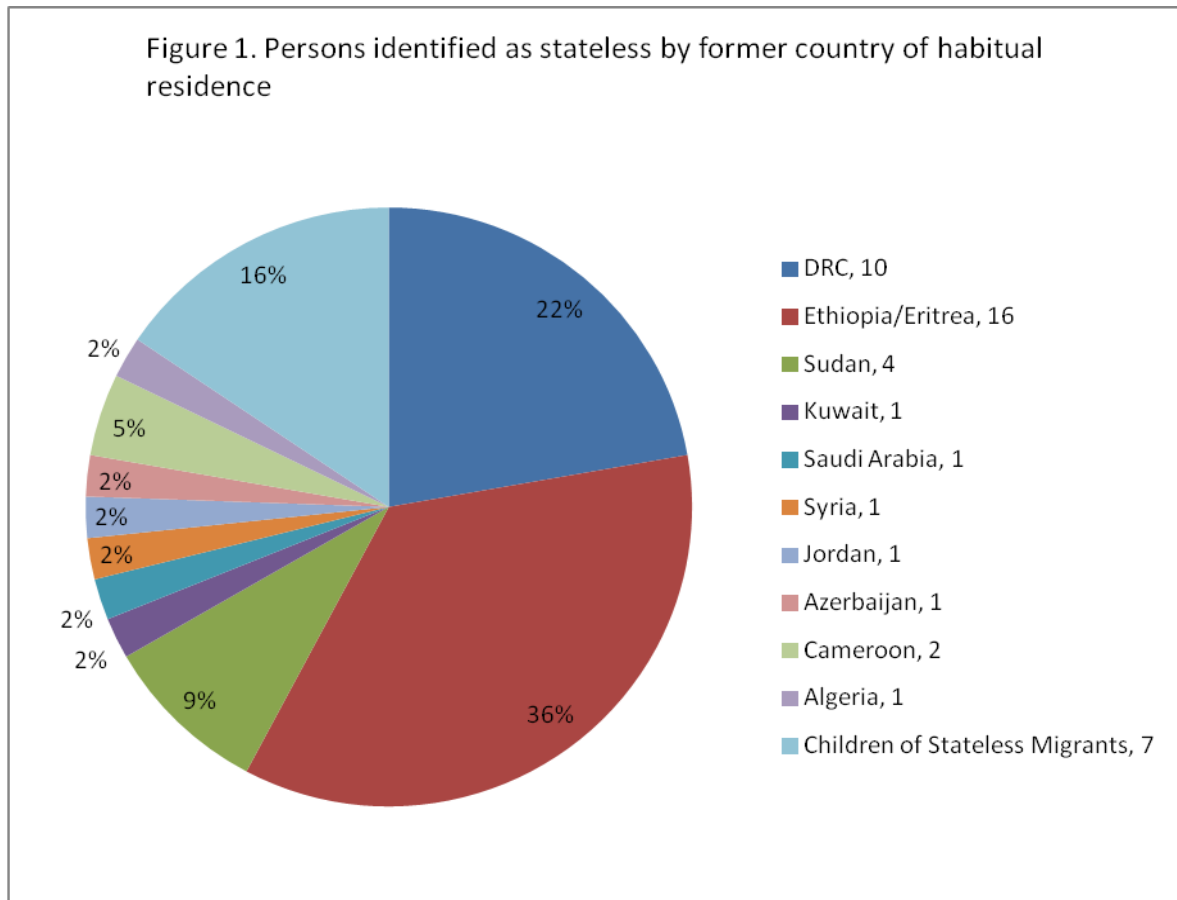
¹⁰ Copy of agreement, in Arabic or in English translation is available on request from the UNHCR Field Office in Cairo.

¹¹ See Heba Nassar, 'Irregular Migration in Egypt', *Carim Research Report, 2008/57* (2008).

¹² See note 10.

¹³ AMERA-Egypt assisted 4,400 asylum-seekers and refugees in Egypt 2011. This is approximately 10 per cent of the 44,000 persons of concern to UNHCR-Cairo (see note 9).

further six had been detained in their countries of former habitual residence. Twenty had been forced to rely on smugglers to cross international borders or had been victims of trafficking.



Case Studies

The case studies below aim to give some insight into the circumstances of stateless migrants in Egypt, and the difficulties they have faced in obtaining protection from UNHCR. In order to maintain the confidentiality of all the persons identified, all of the names throughout this paper are pseudonyms.

Stateless persons of mixed Ethiopian-Eritrean origin

High levels of statelessness in Ethiopia and in Eritrea are well-documented, especially amongst persons of mixed Ethiopian-Eritrean origin.¹⁴ Given that persons from Ethiopia and Eritrea make up the fourth and fifth largest populations who approach UNHCR Cairo

¹⁴ The causes of statelessness amongst persons of Ethiopian-Eritrean origin are complex and a full explanation is beyond the scope of this paper. For more information please see Amnesty International, *Human Rights in a Year of Armed Conflict*, AFR 04/03/1999 (21 May 1999); United States Citizenship and Immigration Services, *Eritrea and Ethiopia: Large-Scale Expulsions of Population Groups and Other Human Rights Violations in Connection with the Ethiopian-Eritrean Conflict, 1998-2000*, QA/ERI/ETH/02.001 (January 2002); Louise Thomas, *Refugees and Asylum Seekers from Mixed Eritrean and Ethiopian Families in Cairo*, FMRS Working Paper No.7 (June 2006); Human Rights Watch, *The Horn of Africa War: Mass Expulsions and the Nationality Issue June 1998-April 2002* (January 2003); Refugees International, *Lives on Hold: the Human Cost of Statelessness* (February 2005).

respectively,¹⁵ it is unsurprising that that they comprised the single largest stateless group in AMERA's caseload.

Despite legal proclamations which should have put an end to continuing instances of statelessness in these countries, objective information regarding the ease with which persons of mixed origins can obtain Ethiopian or Eritrean nationality is lacking. No research has been conducted on actual success levels of persons of mixed origins who have attempted to assert their legal right to Ethiopian nationality.¹⁶

Case studies reveal that because neither Ethiopia nor Eritrea allow their citizens to be dual nationals, the administrative process for obtaining nationality can become little more than a procedure for denial of nationality, as the Eritrean authorities determine that the applicant is actually Ethiopian, and *visa-versa*. This problem was experienced by Muna whose story is told in Case Study 1, below.

Case Study 1

Muna applied for refugee status with UNHCR Cairo in 2004. Muna was born in Eritrea to an Eritrean mother and Ethiopian father. Despite always having lived in Eritrea she held an Ethiopian identity card and passport. On account of her Ethiopian heritage she was harassed and detained in Eritrea. After becoming pregnant by a Jordanian national, Muna fled Eritrea and claimed asylum in Egypt. Her claim was rejected.

Following her rejection for refugee status, Muna approached the Eritrean Embassy in the hope of obtaining an Eritrean passport which would allow her to return. Her request was denied. Muna claims that this was because the Eritrean Embassy determined that she was Ethiopian. Muna then approached the Ethiopian Embassy. The Ethiopian Embassy also refused to recognise her, and therefore refused to renew her passport to allow her passage to return. Muna, denied protection by both Ethiopia and Eritrea and with no means of safely returning to either country, is stateless. The whereabouts of her child's father is unknown and Muna has no evidence of his Jordanian nationality. Muna's son, now ten years old, is therefore also stateless. He has lived his whole life in Cairo but has never been able to attend school.

Stateless persons from Democratic Republic of Congo (DRC)

Asylum-seekers from DRC do not make up a substantial percentage of UNHCR Cairo's overall caseload. However, they do constitute a substantial percentage of the stateless persons identified in the course of this research (see Figure 1 above). All of the stateless persons of Congolese origin that approached AMERA-Egypt were members of the Banyamulenge ethnic group.

The Banyamulenge have long been denied citizenship rights in DRC.¹⁷ Although this was seemingly reversed by a new Citizenship Act in December 2004,¹⁸ in 2008 the UK Home Office reported that the act has not 'produced tangible results. In practice, there are no

¹⁵ See note 9.

¹⁶ See Louise Thomas, *Refugees and Asylum Seekers from Mixed Eritrean and Ethiopian Families in Cairo*, FMRS Working Paper No.7 (June 2006).

¹⁷ For more information see Refugees International, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (11 March 2009); Refugees International, *Lives on Hold: the Human Cost of Statelessness* (February 2005).

¹⁸ Law No. 04/024 of 12 November 2004 on Congolese Nationality [DRC].

examples of cases of Banyamalenge who have successfully obtained Congolese nationality'.¹⁹ A more recent 2012 UK Home Office report is more nuanced, but nevertheless still states that 'Despite a 2004 citizenship law granting citizenship to the Banyamulenge community, it was doubtful whether the 300,000 to 400,000 of them living in the DRC could obtain nationality documents or their rights as citizens in the ongoing conflict in eastern DRC.'²⁰ Detailed or systematic research into this issue is lacking.

Despite the known problem of statelessness amongst the Banyamulenge ethnic group, many of those identified in AMERA-Egypt's database who approached UNHCR Cairo for protection under the 1951 Convention were rejected. No further assistance has been offered based on UNHCR's statelessness mandate.

Case Study 2

Muco, a member of the Banyamulenge ethnic group from South Kivu, fled DRC in 1998 during the ongoing violence between the Banyamulenge and other Congolese groups. He had never been recognized as a Congolese national in his home country. He applied to UNHCR Cairo for refugee status but was denied. Following his rejection, Muco applied for Congolese citizenship at the Embassy of DRC in Cairo. He was told that he was not a Congolese national. Muco approached UNHCR to reopen his file. His request was denied. It should be noted that UNHCR Cairo has recently re-examined a number of their Banyamulenge cases, acknowledging that they lacked expertise in relation to the experiences of this population (see section 6.1 below). Muco's whereabouts were unknown when these re-evaluations were made.

Persons at risk of statelessness owing to lack of documentation

A number of the persons identified by AMERA-Egypt found themselves stateless simply because of situations spiralling from their lack of documentation. Although lack of identity documents in itself is not sufficient to warrant a status of statelessness, the inability to prove one's identity brings with it the risk of being unable to prove one's nationality, and thus being denied recognition of citizenship.

Many refugees flee their homes taking no possessions with them. Many irregular migrants have never possessed a passport, birth or marriage certificates. For some like Mary, whose story is found in Case Study 3, the result is that they are denied recognition by their national authorities.

¹⁹ United Kingdom: Home Office, *Operational Guidance Note: Democratic Republic of the Congo* (23 December 2008), p. 13.

²⁰ United Kingdom: Home Office, *Operational Guidance Note: Democratic Republic of the Congo* (May 2012), p. 21.

Case Study 3

Mary was born and raised in Sudan. Her father, who was a Sudanese Christian of Egyptian heritage, abandoned the family when she was eleven. Mary's mother was of mixed Ethiopian-Eritrean origin and had never formally elected a nationality after Eritrea's secession. Mary never possessed a birth certificate or any formal identity documents. When she tried to acquire documents by formally applying for Sudanese nationality her request was denied as she was unable to produce any evidence of her father's nationality. She was denied Ethiopian nationality after the Ethiopian Embassy determined her mother to be Eritrean, and denied Eritrean nationality as she was unable to fulfil the evidence requirements. Mary is therefore stateless. She has no legal right to reside in any country and is thus at risk of immigration-related detention. She is unable to enrol in public education facilities or take up legal employment, and is therefore forced to risk taking up potentially exploitative, informal work. Mary's application for refugee status in Egypt was denied by UNHCR Cairo as she had no well-founded fear of persecution.

Particular difficulties for persons of mixed origins

Mary's case is not an isolated example. Several of the case studies identified suggest that the failure of states to recognize their citizens is particularly acute where the individual in question is of mixed origin. The majority of the refugee-producing states in question do not allow for dual nationality (including Sudan, Ethiopia and Eritrea). There is thus evidence of embassies shifting the responsibility of protection towards their nationals onto a different state.

Persons who are denied diplomatic or consular protection or assistance

There were some instances, identified in the course of this research, of individuals being rendered stateless because of the failure of their consulates to recognise them as nationals and thus deny them consular assistance to return to their countries. In many cases this was linked to a lack of documentation: the persons in question were unable to prove their nationality and as a result were not issued passports or passage to return.

However, lack of documentation is not the only reason that individuals were denied consular assistance. Evidence emerged of persons being denied passports and consular assistance to travel back to their countries, notwithstanding their ability to prove their nationality. Whilst refusal to issue or renew a passport is not in itself demonstrative of statelessness (many countries may refuse to issue or renew passports for a number of reasons and yet continue to consider that person a national) the accounts of some of those identified suggest that some states regard persons who have sought asylum to have effectively renounced their nationality. Although this may not be stated in law, it is evident in practice, as Melsa's case (Case Study 4) demonstrates.

Case Study 4

Melsa came to Egypt from Eritrea with her husband and three children. Her husband approached UNHCR with a claim for political asylum and Melsa and the children were registered as dependents on his file. The UNHCR provided the family with protection pending the adjudication of their refugee claim.

After Melsa's husband had his RSD interview with UNHCR Cairo, Melsa approached the Eritrean Embassy to renew her passport. The embassy officials refused her request, telling her that 'opponents do not deserve a passport'.

Later, Melsa's husband's refugee claim was rejected by UNHCR Cairo. The family lost their right of residence in Egypt. But with no right to return to Eritrea they decided to continue living in Egypt illegally and without UNHCR protection.

Since these events, Melsa's husband has disappeared and she does not know what has happened to him. Their expired passports disappeared with him leaving the whole family without any identification documents. All Melsa has is her membership card from the Eritrean National Democratic Front.

Melsa is unable to work legally and finds it difficult to support her children. The older children work illegally and none of them has been able to attend school. Melsa reports that she is forced to regularly move home for fear of being identified by the authorities and arrested and detained because of her irregular status.

It should be made clear that denial of a refugee claim should of course not give rise to a presumption of statelessness. However, in view of UNHCR's protection mandate, it would appear appropriate to encourage an inquiry on a case-by-case basis in instances where there is evidence or testimony pertaining to a consul's refusal to provide assistance.

Protecting stateless migrants in Egypt

UNHCR has undertaken a great deal of good work globally providing advice to and advocating with states to help them take measures to prevent and reduce statelessness.²¹ However, as well as acting as a general advocate for stateless populations around the world, UNHCR also has a duty to act where it is alerted to individual cases of statelessness.

According to the UNHCR's *Action to Address Statelessness Strategy Note*, which primarily deals with the UNHCR's approach to non-refugee stateless persons, UNHCR 'involvement may be triggered when there are indications that an *individual* or population could be stateless [emphasis added].'²² Further helpful guidance on the triggers for intervention are also found in the strategy note, and recommends prioritising cases based on factors such as the gravity of issues faced; the ability of UNHCR to achieve positive results; the legal

²¹ See Mark Manly and Santhosh Persaud, 'UNHCR and Responses to Statelessness', in *Forced Migration Review*, 32 (April 2009) [hereinafter cited as 'Manly 2009'], pp. 7-11; UN High Commissioner for Refugees, *Progress Report on Statelessness 2009*, EC/60/SC/CRP.10 (26 May 2009).

²² UN High Commissioner for Refugees, *UNHCR Action to Address Statelessness: A Strategy Note* (March 2010), p. 7.

framework; and levels of social and economic integration.²³ Furthermore, ‘under its mandate for statelessness UNHCR can assist States which do not have the capacity or resources to put in place statelessness determination procedures, by conducting determinations itself if necessary’.²⁴

UNHCR therefore has a role to play in identifying individual cases of statelessness and taking an operational role in providing protection to that person and helping them to find a durable solution. Where the state in question is signatory to the 1954 Convention the UNHCR is clearly mandated to assist the individual in making an application to the relevant national authorities. Where the state in question is not signatory to the 1954 Convention, as is the case in Egypt, UNHCR could act as an advocate for the individual’s rights under the full spectrum of international human rights law, provide information on naturalization procedures, or consider that person for resettlement to a country where naturalization may be a plausible solution.²⁵

Many of these issues have already been taken into account by UNHCR, which recently published *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* (the Analytical Framework).²⁶ The Analytical Framework identifies a four pillar response to statelessness:

- i. Identification of stateless persons;
- ii. Prevention of new causes of statelessness;
- iii. Reduction of existing cases of statelessness; and
- iv. Protection to ensure that stateless persons enjoy their fundamental rights, pending a comprehensive solution to their problem.

However, as described below, it seems that these pillars have not yet been fully considered by UNHCR Cairo, where mechanisms for dealing with individual instances of statelessness are underdeveloped.

Identifying stateless persons

UNHCR Cairo has no specific procedures in place for identifying stateless persons. Instead, identification of stateless persons is carried out as part of RSD procedures. The RSD process at UNHCR Cairo generally proceeds as described in Figure 2.

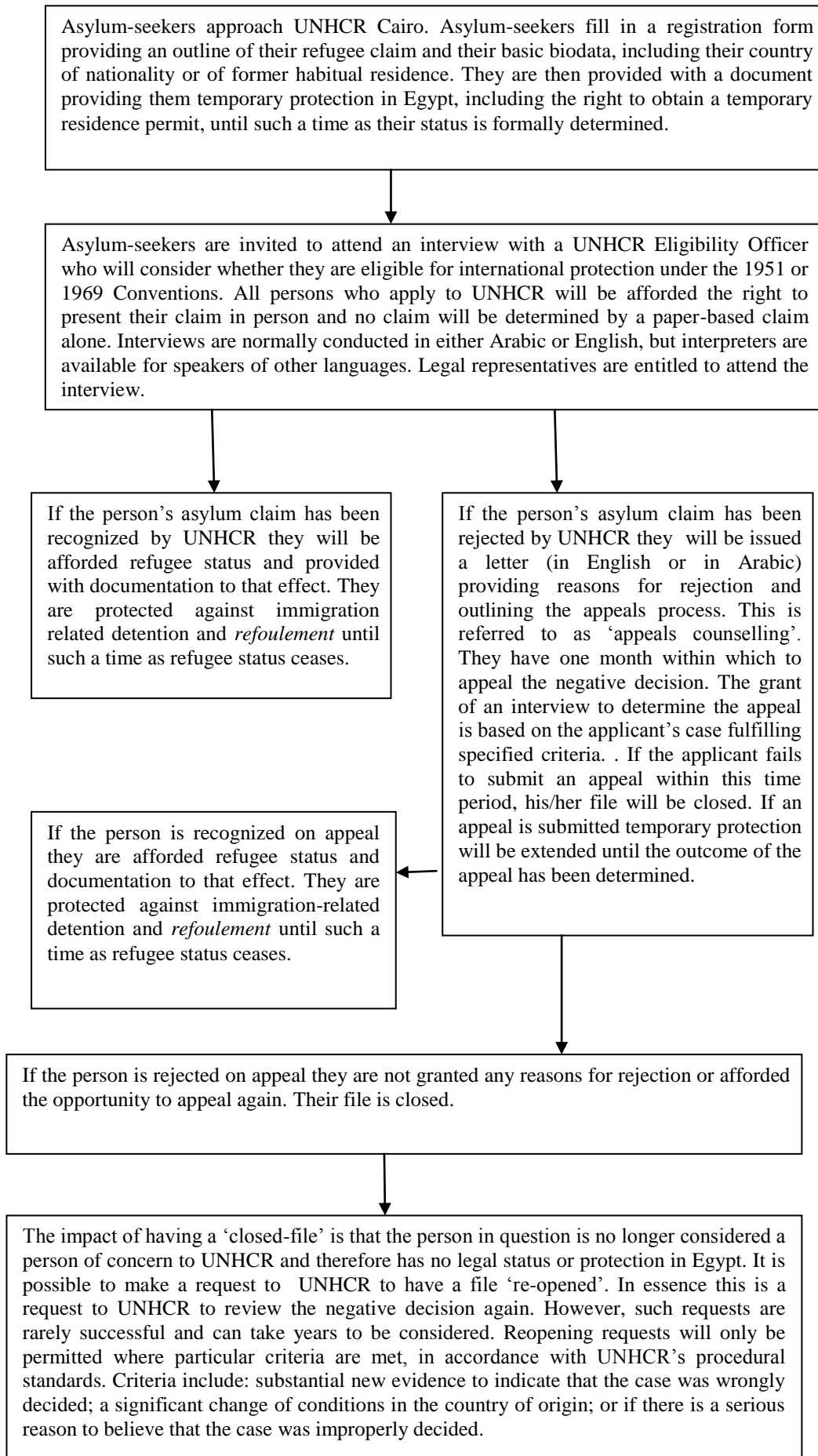
²³ See note 23, para. 74.

²⁴ UN High Commissioner for Refugees, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)* (December 2010), p. 4.

²⁵ Chapter 5.3.1 of UNHCR’s Resettlement Handbook makes provision for the resettlement of stateless non-refugees ‘where a stateless person’s situation cannot be resolved in the present host country or other country of former habitual residence, and remains precarious.’ UN High Commissioner for Refugees, *UNHCR Resettlement Handbook* (July 2011).

²⁶ UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* (2008).

Figure 2. RSD procedure at UNHCR Cairo



Eligibility Officers therefore have a dual responsibility to make a determination of nationality **and** consider whether the person should be considered a person of concern under UNHCR's refugee mandate. Any cases of statelessness identified are then referred to UNHCR Cairo's Statelessness Focal Point who will consider potential solutions.

In theory, this model has many positive elements. Because all asylum applicants have a right to have their claim assessed in person, fusing statelessness identification with RSD ensures that stateless persons have a right of access to UNHCR. It also is far less resource-intensive than developing an entirely independent statelessness determination procedure, given the relatively low numbers of stateless non-refugees in Cairo.

This model relies on the ability of Eligibility Officers to recognize instances of statelessness. However, in some cases, Eligibility Officers lack the necessary knowledge and expertise necessary to make quality determinations regarding nationality. Eligibility Officers receive no training on statelessness beyond that of an introduction to the subject as part of their induction training, and no training at all on how to identify stateless persons during RSD interviews or on specific instances of statelessness that are likely to appear in their caseloads (such as statelessness amongst persons of Ethiopian-Eritrean origin).

As a result many of the stateless persons identified in the course of this research reported that their statelessness was not addressed *at all* during their RSD interviews, with Eligibility Officers solely focusing on questions related to their experiences of persecution.

UNHCR Cairo has, however, acknowledged the problem of lack of capacity and expertise when it comes to identifying stateless persons through RSD and has taken steps to address this problem in respect of some of its Banyamulenge applicants for refugee status. In 2010 UNHCR Cairo received a specialist consultant to review a number of decisions rejecting Banyamulenge applicants for refugee status. But since the departure of that particular consultant no further training has been afforded to Eligibility Officers on Banyamulenge cases or on assessing nationality status and identifying statelessness more generally. The same historical problems are therefore likely to repeat themselves (see Case Study 5, below)

Case Study 5

Dominique underwent her RSD interview in November 2011. A transcript of the interview reveals that no inquiries were made regarding her statelessness claim during her RSD interview. She was not even asked to state her nationality.

Dominique was, however, granted refugee status under the 1951 Convention, owing to the persecution she faced in DRC. Nevertheless, she has still not properly been identified as stateless. When issued refugee status documentation by UNHCR her nationality is identified as 'Congolese' not as stateless.

The consequence of Eligibility Officers failing to properly identify and examine cases of statelessness is that cases do not reach the Statelessness Focal Point for further consideration, thus hindering the possibility of finding a durable solution.

Interpreting nationality laws

Even where issues related to nationality have been identified by Eligibility Officers, there is some evidence of errors being made in the application of nationality laws. Nationality legislation is often notoriously complex. This is particularly true of nationality legislation in African states. Many states have constitutions stating that certain persons are nationals, but the constitutional aims are nevertheless not reflected in nationality legislation or in practice. It therefore takes advanced legal skills to make sense of the question of who has a right to citizenship. Without sufficient expertise and guidance regarding citizenship law *and its implementation* errors will inevitably be made, as in Case Study 6.

Case Study 6

Abraham, a man of mixed Ethiopian-Eritrean origins, was imprisoned in Egypt for illegal entry. The Egyptian authorities began procedures to deport him but neither the Eritrean or Ethiopian embassies would cooperate. Abraham, unable to return to either country and facing indefinite detention, should have been considered as stateless. However, UNHCR failed to recognise him as such. UNHCR also refused his asylum claim on first instance stating

In the RSD interview, you indicated that you don't identify yourself as an Ethiopian national or citizen and that you were not entitled to the Ethiopian citizenship [in spite of your mother's Ethiopian nationality] ... This reason/explanation is not consistent with the Constitution & Nationality Proclamation of Ethiopia, which indicate that you are entitled to or at least able to acquire the Ethiopian citizenship on the grounds of your alleged profile.

Thus, although the Eligibility Officer in question was able to identify sources of nationality law, they failed to take into account the practical application of those laws.

Identifying Stateless Persons: The Burden of Proof

It is also possible that persons who should be properly identified as stateless are failing to be identified as such because they are unable by themselves to discharge the burden of proof.

An Expert Meeting, hosted by UNHCR in December 2010, addressing the issue of statelessness concluded that

The 1954 Convention requires proving a negative: establishing that an individual is not considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts. In Statelessness Determination Procedures the burden of proof should therefore be shared between the applicant and the authorities responsible for making the determination[.]²⁷

The UNHCR's recent guidelines on procedures for determining whether an individual is stateless, therefore rightly recommends a non-adversarial approach, in which the burden of proof is shared between both the applicant and the determining authority. The guidelines recommend cooperation and collaboration in establishing whether the individual falls within

²⁷ See note 25, p. 4.

the scope of the 1954 Convention. Thus, whilst the applicant has a duty to give as full and truthful account of his/her situation as possible, the determining authority should also be required to *obtain* as well as consider all evidence reasonably available.²⁸

The applicant should therefore not be solely responsible for gathering evidence regarding his/her statelessness from the relevant authorities. Indeed UNHCR, which has far more influence, is more likely to be successful in obtaining informative responses than is an individual (though it should be noted that such inquiries should not be made until it is well-established that the individual in question has no asylum claim, as to act otherwise could put them at risk).

To its credit, UNHCR Cairo has in the past made inquiries to consular authorities on behalf of stateless persons. For example, UNHCR Cairo successfully made an intervention with the Russian Embassy which resulted in the Russian authorities confirming the nationality of a stateless person of Uzbek origin, thereby addressing his immediate protection concerns. This is demonstrative of the achievements that can be made by UNHCR's involvement. UNHCR should build on and strengthen such efforts going forward.

Identifying stateless failed asylum seekers

A key structural problem with UNHCR's approach to the identification of stateless persons is that almost no provision is made for identifying those failed asylum seekers who may be stateless or who are at risk of becoming stateless.

As described above, some failed asylum seekers find themselves without consular assistance and unable to return to their countries of nationality after their refugee claims have been rejected. However, as these people have 'closed files' they are not considered persons of concern to UNHCR Cairo. The only means by which they can have their claims re-examined is to submit a reopening request. Given that the vast majority of applicants have no access to legal assistance, this is no easy feat. Furthermore, reopening requests may take years to be considered. Indeed, at the time of writing consideration of reopening requests by UNHCR Cairo had been suspended for over a year due to lack of capacity. These access difficulties reflect the need for UNHCR to implement a dedicated means of access for persons with statelessness claims.

Identifying stateless persons granted indefinite temporary protection

The structure of the RSD process also prevents proper identification of stateless persons who, due to UNHCR Cairo policy, are not provided with a full RSD interview in adjudicating their refugee claim. This has applied to asylum seekers from Sudan: the single largest asylum-seeking population in Egypt.

UNHCR suspended refugee status determination for Sudanese asylum seekers some years ago. This policy was put in place because of changing circumstances in South Sudan and the need to see whether peace would be durable or if conflict would continue. On that basis, UNHCR Cairo implemented a very sensible policy of granting Sudanese asylum seekers refugee status *prima facie*. However, whilst this policy was undoubtedly appropriate to

²⁸ UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person* (5 April 2012), para. 37.

ensure the protection of this population, it meant that – in the absence of a detailed refugee status determination interview – issues relating to potential statelessness could go unidentified.

This could be a real problem. As identified by a recent publication by the Open Society Initiative for East Africa, instances of statelessness in Sudan and South Sudan have been identified since South Sudan's succession in July 2011. A nine month deadline was established for “southerners” resident in Sudan to regularise their status by 8 April 2012. Those who failed to do so now have no recognised legal status in Sudan, and according to the Open Society Initiative report, it is likely that some of those treated as South Sudanese nationals by the Sudanese authorities will in fact find themselves without the recognised nationality of either state.

It is unclear what the status of those residents outside Sudan or South Sudan is, and it is likely that many Sudanese refugees affected by these policies may not actually be aware of their legal status in either country. Identification of potentially affected individuals should therefore be of paramount concern.²⁹

Keeping appropriate records

Understanding the extent of the problem of statelessness is vital if UNHCR is to be able to carry out its mandate responsibilities effectively. This therefore demands that instances of statelessness, when identified, are properly recorded.

All asylum seekers registered with UNHCR Cairo have their data uploaded to the UNHCR's online database, *proGres*. Individual records on this system include attributions of nationality and country of origin from a drop-down list. Although ‘stateless’ is included as a nationality option, it is afforded no description or definition. It is therefore unsurprising that the ‘stateless’ option has been chosen in a mere handful of cases. Instead, even people who identify themselves as stateless have been recorded in *proGres* as nationals of their country of birth or of former habitual residence. Such was the case for Dominique (Case Study 5) and Abraham (Case Study 6).

Case Study 6 Revisited

Abraham was recognised as a refugee on appeal. He approached UNHCR Cairo to receive his certificate of refugee status, which would enable him to acquire a residence permit and provide a form of identification. On being handed his certificate, he found that he had been identified as ‘Ethiopian’, rather than as ‘stateless’. He inquired as to why this was and was told, ‘Because this is where you are from.’ Despite his stateless status having been accepted by UNHCR (indeed his statelessness was a key factor in his refugee claim), he had still not been identified as such in *proGres*.

²⁹ For further information on the nationality issues arising out of South Sudan's succession, please see Bronwen Manby, ‘The Right to Nationality and the Succession of South Sudan: a commentary on the impact of the new laws’, *The Open Society Initiative for East Africa* (2012).

Because so few individuals are identified as stateless or at risk of stateless in UNHCR Cairo's database the true picture of the scale of the problem is obscured. Accurate reporting is essential to prevent assumptions that statelessness is not a problem on Egypt, and to facilitate the identification of protection and human rights issues particular to the stateless population. Lack of awareness, fuelled by incomplete statistics, prevents any sophisticated mapping of stateless populations and hinders adequate reduction and protection strategies from being developed.

Protecting stateless refugees

There is some evidence to suggest that UNHCR Cairo has not been appropriately applying the 1951 Convention in relation to stateless persons who do have refugee claims. Eden's case (Case Study 7) is illustrative of the problem.

Case Study 7

Eden, a then sixteen year old girl of mixed Ethiopian-Eritrean origin, applied to UNHCR Cairo with a refugee claim based on political opinion. Her reasons for rejection letter stated:

[B]ecause of your lack of identify documents, we have no way to identify where you are from. Your fear of return cannot be assessed because your nationality cannot be assessed.

This is a fundamental misapplication of refugee law. The 1951 Convention provides that where a person is stateless, or their nationality cannot be verified, the determining authority should assess whether that person has a well-founded fear of return in relation to their country of former habitual residence. This assessment was evidently not made in Eden's case. Eden is awaiting the outcome of her appeal, prepared with the help of AMERA-Egypt.

That such fundamental errors of law are being made should be of paramount concern, particularly as all rejections letters are subject to review, and also taking into account the fact that the vast majority of asylum applicants in Egypt have no legal counsel to identify when such errors are being made.

Furthermore, arbitrary deprivation of nationality or of the right to return may, in and of itself, constitute persecution, as described by Professor Hathaway and affirmed in the UK Immigration Tribunal in the case of *Lazarevic* thus:

If a state arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a state to its citizens, there is in my view no difficulty in accepting that such conduct can amount to persecution. Such a person may properly say both that he is being persecuted and that he fears persecution in the future.³⁰

³⁰ James C. Hathaway, *The Law of Refugee Status* (1991), pp. 104-5, cited in *Lazarevic v. Secretary of State for the Home Department* [1997] Imm AR 251.

Arbitrary denial of the right of return, which as we have seen has been the case for some failed asylum seekers, in practice is also likely to be persecutory and may therefore lead to a ground for a reopening of an asylum claim.³¹ However, there is no guidance for UNHCR Eligibility Officers regarding the relationship between arbitrary denial of nationality and persecution, thus potentially leading Eligibility Officers to underestimate the woeful impact lack of nationality has on a person's life and acting as a barrier to refugee status for some stateless persons.

Protecting Stateless Non Refugees

As there is no Memorandum of Understanding between UNHCR and the Egyptian Government providing for the protection of stateless persons in Egyptian territory, even those few persons identified as stateless by UNHCR Cairo are unable to enjoy a special legal status, unless they are also recognized as refugees.

Nevertheless, UNHCR still has a mandate responsibility to protect stateless persons in Egypt, and UNHCR Cairo has addressed the protection concerns of some stateless persons brought to its attention. For example, UNHCR Cairo provided a stateless failed asylum seeker from Azerbaijan with indefinite temporary protection, recognizing his vulnerabilities as a stateless man without documentation.

However, instances of direct intervention by UNHCR Cairo to address the protection concerns of stateless persons lack a consistent approach. When questioned regarding the protection of stateless persons UNHCR Cairo readily admitted that it was an area that needed more attention and, when the issue was explored in depth, was able to come up with a number of potential solutions to protection concerns. For example, it was suggested that where a person had been identified as stateless but had been rejected for refugee status they should be advised in their appeals counselling that they were still considered 'persons of concern' and individual action plans could be drawn up providing advice on possible interventions to be made with national authorities, or avenues of naturalization, if any. UNHCR could also act as an advocate for that person with the Egyptian authorities, lobbying for them to be granted the right of residence until such a time as their situation is permanently resolved.

Protecting stateless detainees

The most immediate concerns should be those regarding the stateless individual's most fundamental rights, including protection from arbitrary detention. Over 42 percent of the persons identified as stateless in AMERA-Egypt's caseload had experienced detention either in their country of habitual residence, in Egypt, or in both. The Equal Rights Trust has also identified a high number of stateless persons in detention around the world.³²

Of particular concern is the detention of stateless persons *pending removal* as, by virtue of their status, many stateless persons have no place to be removed to. Their stay in detention

³¹ See *ST (Ethnic Eritrean-nationality-return) Ethiopia CG* [2011] UKUT 00252 (IAC) (30 June 2011) paras. 76, 82-89).

³² Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (July 2010).

will therefore very likely be indefinite, and thus arbitrary, as authorities try to find a country willing to cooperate with deportation proceedings (see Case Study 8).

Case Study 8

Sartu, a woman of mixed Ethiopian-Eritrean origins and who was just 17 years old when she entered Egypt, was arrested on entry to Egypt and charged with illegal entry. Not recognised by Ethiopia or Eritrea as a citizen, the Egyptian authorities have no place to deport her to. At the time of writing she had been imprisoned for three years.

The problem of stateless detainees is compounded by the fact that the Egyptian Government rarely grants UNHCR Cairo access to persons in detention who are not already registered with them, notwithstanding their nationality status or their asylum claim. UNHCR Cairo has requested access to a number of persons in detention, including potentially stateless persons, without success. UNHCR Cairo should therefore continue its advocacy efforts with the Egyptian authorities to allow it access to potential persons of concern in detention.

Where UNHCR is alerted to the prospect of a stateless individual in detention, UNHCR should always advocate for the release of stateless detainees, citing the relevant state's obligations under the ICCPR and any other relevant international or regional human rights instruments. In the event that the state is unwilling to release the individual in question, UNHCR should consider them an urgent case for resettlement.

Finding durable solutions

The only durable solution to resolve instances of statelessness is the acquisition of nationality. This is not normally an easy feat. However, if left untouched statelessness will perpetuate future statelessness as future generations are born.

UNHCR Cairo can boast success regarding its advocacy efforts with the embassies of Sudan and South Sudan. The problem of statelessness arising from South Sudan's succession has already been mentioned (see section 6.5 above). However, UNHCR Cairo has secured an agreement from both embassies that they would consider any issues of nationality and potential statelessness identified by UNHCR Cairo in relation to returnees. The challenge therefore, in relation to this group, is identifying those affected.

UNHCR Cairo has not taken an active enough approach to addressing individual instances of statelessness brought to its attention. Best practice demands that whenever UNHCR Cairo is alerted to an instance of statelessness it should identify potential solutions. This means taking steps to verify an individual's nationality and advocating with embassies to ensure that the individual in question is able to exercise their citizenship rights. In other instances, and where appropriate, UNHCR Cairo should investigate potential avenues of naturalization in states with which that person has a relevant link. If no avenues are forthcoming, UNHCR Cairo should consider that person for resettlement to a third country which does make provision for the naturalization of stateless persons.

Recommendations

1. UNHCR should give more attention to statelessness as a protection issue. UNHCR Field Offices should therefore begin to prioritise statelessness, rather than leave it as a marginal issue dealt with solely within the refugee protection framework, and take up individual cases for advocacy with states.
2. UNHCR should develop procedures within its own offices for identifying stateless persons and conferring them with a specific status and documentation.
3. UNHCR should provide training and guidance to its field staff on identifying stateless persons, and should build its capacity to deal with complex issues relating to nationality.
4. UNHCR Country Specific guidance notes for RSD Eligibility Officers should include chapters on instances of statelessness in the countries in question in order to help Eligibility Officers identify stateless persons. Guidance should also be produced on deprivation of citizenship as a form of persecution.
5. UNHCR Field Offices should record in their statistics the numbers of stateless people who have applied to them for protection. Uncertainty regarding nationality status should also be recorded. Reporting on numbers of stateless persons of concern to UNHCR should then be made available as a disaggregated group in published statistics. IT systems should be modelled so as to facilitate effective data collection
6. UNHCR should provide guidance, training or other assistance to Field Offices on actively assisting stateless individuals to resolve their status, whether it be through advocacy with authorities, judicial mechanisms, applications, or resettlement.
7. UNHCR should form close relationships with legal aid partners. Where incidents of potential statelessness come to UNHCR's attention, UNHCR should work with partners to ensure that applicants for protection are provided legal assistance.
8. UNHCR Field Offices should develop mechanisms through which failed asylum seekers can reapply to UNHCR if they find themselves rejected by their embassies and unable to return home. In such instances, or in any other instance when a person is without consular protection, the UNHCR should provide that person protection, essentially acting as a 'default' consul.
9. UNHCR should make inquiries on behalf of applicants, on a case-by-case basis, where failed asylum seekers claim denial of consular protection resulting in an inability to return.
10. Where a refugee or *de facto* stateless person is theoretically entitled to acquire a nationality (for example if they have a parent from that state), but the state in question first requires a renunciation of the former nationality, UNHCR should provide protection to that person for any interim period of statelessness between renunciation of one nationality and acquisition of another, in addition to maintaining its existing advocacy efforts that seek to reduce such instances of statelessness occurring in the first place.

¹ Note that instances of statelessness amongst Palestinians in Egypt is beyond the scope of this paper and as such no references to the stateless population or recommendations within this paper is intended to refer to this group. This decision has been made as this paper is primarily concerned with the UNHCR's mandate to protect stateless persons. UN assistance to the Palestinian population, however, largely falls within the mandate of the UN Relief and Works Agency.