UNHCR's legal observations regarding the Proposal to amend the Nationality Act

Conditions to grant stateless children born in the Netherlands the right to apply for Dutch nationality

In a letter dated 12 November 2014 from the State Secretary of Security and Justice, Mr. Teeven, to the Chairman of the House of Representatives, it was proposed that the Nationality Act be amended so that stateless children born in the Netherlands who do not have a legal residence are granted the right to apply for Dutch nationality. This would be a welcome development in line with Article 1 of the 1961 Convention on the Reduction of Statelessness to which the Netherlands is a signatory and UNHCR's objective to end statelessness. Based on its mandate with regard to statelessness, UNHCR wishes to make some observations with regard to the conditions under which stateless children can apply for Dutch nationality.

In the State Secretary's letter, the proposal to grant stateless children born in the Netherlands and who do not have a lawful residence the right to apply for Dutch nationality is conditional on the following:

> *1. The stateless child has had a factual residence in The Netherlands for five consecutive years;*
>
> *2. One of the parents of the stateless child cannot undo the statelessness of the child through his or her own actions;*
>
> *3. The residence of the stateless child is stable, requiring that the child's parents have not obstructed their departure and have not withdrawn themselves from supervision by the Immigration and Naturalization Service, the Repatriation and Departure Service, the Central Agency for the Reception of Asylum Seekers or the Aliens Police (in view of the obligation to report oneself).*

Based on UNHCR's mandate with regard to statelessness and since the letter refers to paragraph 41 of UNHCR's Guidelines on Statelessness (no. 4, 21 December 2012, hereafter the Guidelines) UNHCR wishes to make the following observations:

Article 1(2) of the 1961 Convention on the Reduction of Statelessness (hereafter the Convention) lists the conditions that may be imposed on children who are born stateless to acquire a nationality. The list of conditions in Article 1(2) is exhaustive. Paragraph 37 of the Guidelines reads: *"The exhaustive nature of the list of possible requirements means that States cannot establish conditions for the grant of nationality additional to those stipulated in the Convention."*[1]

[1] UN High Commissioner for Refugees (UNHCR), *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

In the proposal, it is suggested that The Netherlands make use of the condition included in Article 1(2)b of the Convention: *"that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all".* However, the third condition of the proposal appears to go beyond the realm of Article 1(2)b.

In paragraph 41 of the Guidelines, the term "habitual residence", a term that is used in various international instruments, is discussed in more depth. To explain this term, the words "stable" and "factual" are used, as follows: *"The term 'habitual residence' is found in a number of international instruments and is to be understood as stable, factual residence. It does not imply a legal or formal residence requirement. The 1961 Convention does not permit Contracting States to make an application for the acquisition of nationality by individuals who would otherwise be stateless conditional upon lawful residence."* More explanation is provided in paragraph 42: *"It follows from the factual character of 'habitual residence' that in cases where it is difficult to determine whether an individual is habitually resident in one or another State, for example due to a nomadic way of life, such persons are to be considered as habitual residents in both States."* Paragraphs 41 and 42 do not contain any further requirements to inform the term "habitual residence". In paragraph 42 it is suggested that a nomad can be considered to have habitual residence in two states.

While according to paragraph 43 of the UNHCR Guidelines on Statelessness: *"States may establish objective criteria for individuals to prove habitual residence. Lists of types of permissible evidence, however, are never to be exhaustive."* The Guidelines do not foresee the requirement to report oneself regularly to the authorities. UNHCR would therefore suggest that the alien should be provided with the possibility to provide evidence that he/she has "habitual residence" in a certain country. Criteria set forth by a state can be useful to compile this evidence.

Moreover, according to the Convention on the Rights of the Child, in its Article 3.1 *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* The Convention also specifies in its Article 2.2 that: *"States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."*

Based on these legal observations, UNHCR recommends that condition 3 of the letter be amended in order to ensure full compliance with the Convention on the Reduction of Statelessness and the Convention on the Right of the Child.

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