

Observation by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Inquiry “Uppehållstillstånd på grund av praktiska verkställighetshinder och preskription”

I. INTRODUCTION

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Government of Sweden for the invitation to provide observations on the Inquiry “Uppehållstillstånd på grund av praktiska verkställighetshinder och preskription” SOU 2017:84 (hereafter the “Inquiry”) that proposes the granting of residence permits in certain situations where there are practical impediments to enforce a refusal of entry or expulsion order.
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,¹ UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [.]”² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention³ and in Article II of the 1967 Protocol relating to the Status of Refugees⁴ (hereafter collectively referred to as the “1951 Convention”).⁵ It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”).⁶
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular, the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.⁷ UNHCR

¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute”).

² *Ibid.*, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁶ European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁷ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. UNHCR has a specific and global mandate to prevent and reduce statelessness and to protect non-refugee stateless persons. UNHCR's role in the field of statelessness dates back to 1974 when the United Nations General Assembly entrusted UNHCR with a specific role under the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention") and the 1961 Convention on the Reduction of Statelessness (hereafter 1961 Convention)⁸. In respect of protecting stateless persons, the 1954 Convention remains the only international treaty aimed specifically at regulating the standards of treatment for stateless persons and is therefore of critical importance in ensuring the protection of this vulnerable group.
5. UNHCR's mandate on statelessness gradually expanded during the past decades to include an increasing array of responsibilities in respect of statelessness. UNHCR has been requested to take active steps to ensure that statelessness is avoided as spelled out in a series of General Assembly resolutions. For instance, in 1995, UNHCR was asked to promote accession to and implementation of the 1954 and 1961 statelessness conventions, in particular through the provision of technical and advisory services.
6. UNHCR's advisory responsibility is further set out by the Executive Committee that governs the work of UNHCR. In *"Conclusion on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons"* issued in 2006 the Executive Committee requires the agency to work with governments, other UN agencies, and civil society to address the issue of statelessness. The conclusion also requested UNHCR to actively disseminate information and, where appropriate, train government counterparts on appropriate mechanisms for identifying, recording, and granting a status to stateless persons and calls on States Parties to the 1954 Convention to fully implement the provisions of the Convention.⁹
7. Bearing in mind the safeguards of the 1951 Convention and the statelessness conventions of 1954 and 1961¹⁰, and their interplay with human rights, the following comments are based on applicable international and regional human rights law and jurisprudence, European Union law standards and non-binding sources of law of the United Nations and Council of Europe pertaining to the proposed amendments. UNHCR welcomes the opportunity to give its opinion on the Proposal and highlight the applicable criteria and legal standards relating to the granting of residence permits on the basis of practical impediments to enforcement or statutory limitation with a view to provide interpretative legal guidance to the Government of Sweden to ensure observance of principles in this area of law.

II. THE INQUIRY

⁸ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <http://www.refworld.org/docid/3ae6b3840.html> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <http://www.refworld.org/docid/3ae6b39620.html>

⁹ UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) - 2006*, 6 October 2006, available at: <http://www.refworld.org/docid/453497302.html>

¹⁰ Sweden is a signatory to the 1951 Convention and the statelessness conventions of 1954 and 1961.

8. UNHCR notes that the Inquiry concentrates on two specific issues, namely: 1. Residence permits on the basis of practical impediments to enforcing refusal-of-entry or expulsion orders, and 2. Residence permits as a result of a refusal-of-entry or expulsion order having expired (becoming statute-barred), normally after four years. The Inquiry's remit is to 1. examine the application of the law regarding the possibility for the Swedish Migration Agency and the courts to consider practical impediments to enforcement, both during the asylum process and after a refusal-of-entry or expulsion decision has been taken but has been unenforceable; 2. Study the effects of the Migration Court of Appeal's decision MIG 2009:13 regarding the possibility of granting a residence permit after a refusal-of-entry or expulsion order becomes statute-barred; and 3. To present relevant proposals that aim to prevent people who have applied for asylum from ending up or remaining in a situation where their refusal-of-entry or expulsion order cannot be enforced for practical reasons beyond their control.¹¹
9. The Inquiry makes several proposals to strengthen the provisions of the Swedish Aliens Act in regards to when residence permits should be granted on the basis of practical impediments to enforcement or statutory limitations, including:
 - a. Stipulating that practical impediments to enforcement must be considered in the initial case and that a residence permit may be granted on this basis,
 - b. Introducing the concept of *practical impediments to enforcement* in the provision of the Aliens Act that allows the Swedish Migration Agency to grant a residence permit following a final and non-appealable removal order (Chapter 12, Section 18, first para, point 2).
 - c. Introducing a new provision in the Aliens Act explicitly stating that if a removal order has expired, a residence permit may be granted if the individual's own actions are *not the decisive reason* for the removal order being unenforceable.
10. The Inquiry also proposes the commission of a separate inquiry to review the legal status of stateless people and the introduction of a statelessness determination procedure in Sweden.

III. GENERAL OBSERVATIONS

11. UNHCR welcomes the conclusions of the Inquiry and endorses its recommendations to provide greater clarity in Swedish law as regards the granting of residence permits on the basis of practical impediments to enforcement or statutory limitations. UNHCR notes that the recommendation to consider practical impediments to enforcement as part of the sequential procedure to assess asylum claims will benefit asylum-seekers which are unable – for reasons not attributable to them- to leave Sweden to return to their former country of nationality or habitual residence, thus providing a mechanism for regularization. Of particular relevance to UNHCR's mandate is the Inquiry's fourth proposal to appoint an inquiry on the legal status of stateless people and a statelessness determination procedure, which supports the recommendations put forward by UNHCR in the 2016 study *Mapping Statelessness in Sweden* (hereafter "UNHCR Statelessness

¹¹ "Uppehållstillstånd på grund av praktiska verkställighetshinder och preskription" SOU 2017:84, available at: <http://www.regeringen.se/rattsdokument/statens-offentliga-utredningar/2017/11/sou-201784/>

Mapping”) aiming to bring the Swedish legal framework, practice and administrative capacity fully in line with the standards set out in the 1954 Convention.¹²

12. UNHCR notes that a significant number of persons remain in Sweden following a removal decision that cannot be enforced. These individuals do not have a right to legally remain in the country and may not be granted a residence permit. UNHCR considers that a significant number of these persons are in fact stateless or at risk of statelessness and cannot be returned to any country for reasons beyond their control. Accordingly, such individuals fall within UNHCR’s statelessness mandate as a prolonged situation of “un-returnability” may be indicative of statelessness depending on the circumstances of the individual cases, or eventually lead to statelessness.¹³ UNHCR will therefore primarily address the Inquiry’s conclusions as they affect stateless persons in Sweden.

THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS

13. The 1954 Convention is the primary international instrument that aims to regulate and improve the status of stateless persons and to ensure that stateless persons are accorded their fundamental rights and freedoms without discrimination.¹⁴ The definition of a “stateless person” is set forth in Article 1(1) of the 1954 Convention, which provides that a “stateless person” is “a person who is not considered as a national by any State under the operation of its law”. The International Law Commission has concluded that the Article 1(1) definition of a “stateless person” is part of customary international law.¹⁵ Furthermore, the Convention spells out a set of rights and safeguards that are dependent on whether the person is “lawfully in,”¹⁶ “lawfully staying in,”¹⁷ or “habitually resident” in a territory,¹⁸ while others are applicable to all individuals who are either subject to the jurisdiction of a State Party or present in its territory. UNHCR observes that only the right to facilitated naturalization, as stipulated in Article 32 of the 1954 Convention, is provided for stateless persons under Swedish law. The definition of a “stateless person” or other rights enshrined in the Convention have not been incorporated into Swedish legislation, and are therefore not accorded to stateless persons.

¹² UNHCR, *Mapping Statelessness in Sweden*, December 2016, available at: <http://www.refworld.org/docid/58526c577.html>

¹³ UNHCR, *Expert Meeting - The Concept of Stateless Persons under International Law* (“Prato Conclusions”), May 2010, available at: <http://www.refworld.org/docid/4ca1ae002.html>, p.8

¹⁴ As of February 2017. UN Treaty Collection database, available at: <https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&clang=en>

¹⁵ See the International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 2006, p. 49 (stating that the Article 1 definition can “no doubt be considered as having acquired a customary nature”), available at: <http://www.refworld.org/docid/525e7929d.htm>.

¹⁶ For a discussion of the “lawfully in” rights, see UNHCR *Handbook*, para. 134.

¹⁷ See UNHCR, *Handbook*, para. 137, noting, “The ‘lawfully staying’ requirement envisages a greater duration of presence in a territory. This need not, however, take the form of permanent residence. Shorter periods of stay authorized by the State may suffice so long as they are not transient visits. Stateless persons who have been granted a residence permit would fall within this category. It also covers individuals who have temporary permission to stay if this is for more than a few months. By contrast, a visitor admitted for a brief period would not be ‘lawfully staying.’ Individuals recognized as stateless following a determination procedure but to whom no residence permit has been issued will generally be ‘lawfully staying’ in a State party by virtue of the length of time already spent in the country awaiting a determination.” See also Laura van Waas, *Nationality Matters: Statelessness under International Law*, Intersentia, 2008, pp. 325-327.

¹⁸ For a comprehensive discussion on the proper interpretation of these terms, see UNHCR, *Handbook*, paras 147-152, (*inter alia*, making specific recommendations as to the granting of a residence permit; noting that the recognition of an individual as stateless “triggers the ‘lawfully staying’ rights”; discussing “habitual residence”), paras 136-139 (discussing the “lawfully staying” rights as well as “habitually resident” provisions).

14. Whilst the 1954 Convention establishes the international legal definition of “stateless person” and the standards of treatment to which such individuals are entitled, it does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the 1954 Convention that States are required to identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments.¹⁹ It follows from the object and purpose of the 1954 Convention, that persons whose status as a stateless person has been determined should be entitled to a right of residence.²⁰
15. In accordance with UNHCR’s mandate and work on statelessness in Northern Europe, the UNHCR Statelessness Mapping provides an in-depth analysis of the protection framework for stateless persons, including recommendations for prevention and reduction mechanisms in accordance with the standards set out in the 1954 Convention and other relevant international standards.²¹ UNHCR concludes that Swedish national law, *inter alia*, lacks sufficient safeguards with regard to the determination of statelessness and protection of stateless persons on Swedish territory.
16. The lack of a common definition of “stateless person” in accordance with the 1954 Convention coupled with the absence of common guidelines results in the application of different standards in the assessment of statelessness. This results in many individuals, including children, being registered as having an “unknown nationality” instead of “stateless”. As nationality, and the lack thereof, is intrinsically linked to the identity of an individual, and will determine his or her eligibility for international protection, it is critical that a State properly records and confirms statelessness when it applies.
17. A key UNHCR recommendation to Sweden is therefore to incorporate into its legislation an express definition of a “stateless person”, in accordance with the 1954 Convention, introduce a statelessness determination procedure and afford stateless persons their rights encapsulated in the 1954 Convention. This includes the granting of a statelessness specific residence permit.

SPECIFIC OBSERVATIONS

18. The starting point for UNHCR’s analysis is the presumption that this Proposal does not impact on Sweden’s obligation to apply a sequential approach to the assessment of applications for international protection according to Chapter 4 of the Aliens Act which incorporates the 1951 Convention and transposes the EU Qualification Directive. The

¹⁹ States have recognized this in relation to the establishment of refugee status determination procedures despite the 1951 Convention being silent on this matter. Please see Executive Committee Conclusion No. 8 (XXVIII) of 1977, paragraph a; Executive Committee Conclusion No. 11 (XXIX) of 1978, paragraph h; Executive Committee Conclusion No.14 (XXX) of 1979, paragraph f; and Executive Committee Conclusion No. 16 (XXXI) of 1980, paragraph h. Please see UNHCR, Conclusions Adopted by the Executive Committee on The International Protection of Refugees, 1975-2009 (Conclusion No.1 – 109), 2009, <http://www.refworld.org/docid/4b28bf1f2.html>.

²⁰ *Ibid*, para 147-152.

²¹ UNHCR, *Mapping Statelessness in Sweden*, December 2016, available at: <http://www.refworld.org/docid/58526c577.html>

sequential approach requires that asylum claims must first be assessed in accordance with the criteria for international protection.²²

19. UNHCR emphasizes that the present Proposal and its recommendations need to be examined, as it relates to stateless persons, in the context of Sweden's obligations under the 1954 Convention. UNHCR notes that the first proposal recommends the introduction of a clear statement in the Aliens Act to consider practical impediments to enforcement in the initial determination of an asylum application and that a residence permit may be granted on this basis. In the absence of a statelessness determination procedure, which would result in the granting of a residence permit, UNHCR fully supports the recommendation and regards it as a first step in Sweden's fulfillment of its obligations under the above mentioned Convention. Accordingly, when assessing whether practical impediments to enforcement exist for stateless persons in the proposed procedure, *inter alia*, the determination of a person's habitual residence and recognition of the right to return should be a significant consideration in the authorities' assessment. However, as the status of stateless persons comes with specific rights as outlined in the 1954 Convention, the mere conclusion that there are practical impediments to the enforcement of removal orders, is insufficient in complying with State obligations under the 1954 Convention.
20. UNHCR endorses the second proposal which would expand the concept of *practical impediments to enforcement* [following a final and non-appealable removal order] to encompass other situations such as difficulty to travel to the designated country or to provide evidence of that country's unwillingness to accept the person. If adopted, this amendment would, in UNHCR's view, address and resolve the situation of stateless persons or persons at risk of statelessness with expulsion orders to such countries as outlined in the Inquiry.
21. UNHCR welcomes the third proposal to introduce a provision explicitly stating that if a removal order has expired (becomes statute-barred), a residence permit may be granted if the individual's own actions are *not the decisive reason* for the removal order being unenforceable. In this regard, UNHCR considers it positive that State action in carrying out a removal order is to be afforded weight when assessing possible practical impediments. UNHCR also acknowledges that the proposed measure would remedy the situation of persons of concern to UNHCR, where the refusal-of-entry or expulsion order cannot be enforced for practical reasons beyond their control. However, as recommended in paragraph 19, UNHCR reiterates that in keeping with the stated purpose of the 1954 Convention, statelessness should in and of itself constitute a ground for acquiring a residence permit²³.
22. UNHCR welcomes the fourth proposal, which recommends the commissioning of an inquiry on the legal status of stateless persons and the possible introduction of a

²² UNHCR, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, <http://www.refworld.org/docid/50474f062.html>. See also *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, European Union: Court of Justice of the European Union, 8 May 2014, para. 35, <http://www.refworld.org/docid/5375e84f4.html>. See also, Recital 33 of the Qualification Directive: European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)*, 29 June 2013, OJ L. 180/60-180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

²³ See UNHCR, *Handbook*, para. 147-150

statelessness determination procedure. In UNHCR's view, the Statelessness Mapping and the present Inquiry appear to already provide extensive analysis to support the adoption of an express definition of a "stateless person", the introduction of a statelessness determination procedure and affording stateless persons their rights enshrined in the 1954 Convention, thereby aligning Sweden's legislation and practice to the standards set out in the Convention and related interpretative guidelines.

23. Moreover, the recommendations set forth in the Inquiry would ensure Sweden's compliance with international and regional human rights standards, such as the Bill of Rights, the European Convention on Fundamental Rights and Freedoms, the European Union Charter on Fundamental Rights and the European Social Charter (revised). UNHCR points in this regard to Sweden's obligation under Article 2 (the right to life), Article 3 (the prohibition against torture) and Article 8 (the right to respect for family life and private life) of the ECHR²⁴. In this regard, the recent report of the Human Rights Commissioner of the Council of Europe requests the authorities to ensure that rejected asylum-seekers, who cannot be returned and are at risk of destitution, are treated in a manner which is both human and human rights compliant.²⁵ The report also specifically refers to Article 13 and Article 31 of the European Social Charter (revised), to which Sweden is a party, stating that "*anyone, irrespective of whether their stay in a country is lawful, has the right to an adequate standard of living for him/herself and his/her family, including adequate food, clothing and shelter*".²⁶

IV. CONCLUDING RECOMMENDATIONS

24. UNHCR recommends Sweden to:

- I. Implement the afore-mentioned proposals 1-3 as set out in the Inquiry.
- II. UNHCR encourages Sweden to align the relevant legislation with the 1954 Convention Relating to the Status of Stateless Persons, i.e. to incorporate the 1954 Convention's definition of a 'stateless person', establish a Statelessness Determination Procedure and provide for the protection of duly recognised stateless persons.

In UNHCR's view, the findings of the UNHCR Statelessness Mapping and the present Inquiry appear to provide sufficient data and analysis to present legislation incorporating Sweden's obligations under the 1954 Convention. However, should the government consider that further analysis is warranted, UNHCR would support the

²⁴ See also relevant jurisprudence of the European Court of Human Rights in *Mengesha Kimfe v. Switzerland and Agraw v. Switzerland*, where the Court established that for the purposes of Article 1 of the European Convention on Human Rights, persons, whose involuntary prolonged stay in a Contracting Party had been due to the failure to enforce the order deporting them to the country of origin, came within the "jurisdiction" of that country. The ECtHR also held that in situations where the country of origin systematically opposes the repatriation of its own nationals, the Contracting Party has an obligation under Article 8 to regularize the illegal stay of unsuccessful asylum-seekers.

²⁵ Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Sweden from 2 – 6 October 2017, available at: <https://rm.coe.int/commdh-2018-4-report-on-the-visit-to-sweden-from-2-to-6-october-2017-b/16807893f8>

²⁶ *Ibid*, page 8.

recommendation to commission a new inquiry on the legal status of stateless people and a statelessness determination procedure and expresses its readiness to support such an inquiry.

UNHCR Regional Representation for Northern Europe
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