

UNHCR’s Commentary on the Constitutional Law of the Republic of Tajikistan “On Nationality of the Republic of Tajikistan”

The Office of the United Nations High Commissioner for Refugees (UNHCR) is the Agency entrusted by the United Nations General Assembly with a global mandate to identify, prevent and reduce statelessness and provide protection to stateless persons. The General Assembly has specifically requested UNHCR “to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States.”¹ Thus, UNHCR has a direct interest in the constitutional provisions and national legislation of countries impacting on the prevention or reduction of statelessness, including implementation of safeguards contained in international human rights treaties as well as those set out in the 1961 Convention on the Reduction of Statelessness.

Since 2011, the UNHCR Office in Tajikistan has shared its comments on the draft Law “On Nationality of the Republic of Tajikistan” with the Working Group on Citizenship, and extends its appreciation towards the Government of Tajikistan for the opportunity to contribute to the process. UNHCR praises the Government for their big achievement of the adoption of the Constitutional Law of the Republic of Tajikistan “On Nationality of the Republic of Tajikistan” (hereafter, the 2015 Constitutional Law on Nationality) adopted on 08 August 2015.

In this vein, the UNHCR Office in Tajikistan would like to hereby share with the Government of Tajikistan their commentary on this 2015 Constitutional Law on Nationality, while applauding the fact that the law provides for a number of safeguards for prevention and reduction of statelessness in Tajikistan. The comments below aim to provide suggestions which can be made to bring the 2015 Constitutional Law on Nationality into full compliance with the international principles on prevention and reduction of statelessness, and more importantly to highlight some key areas where procedural requirements are to be explicitly stipulated in its implementing regulations.

Nationality of Tajikistan

Article 1. Principal definitions

UNHCR highly welcomes the fact that the law brings the definition of a stateless person into closer compliance with the definition set out in Article 1(1) of the 1954 Convention relating to the Status of Stateless Person (hereafter, the 1954 Convention), which has become a norm of customary international law.

Under the 2015 Constitutional Law on Nationality, a stateless person is defined as “a person who is not considered a citizen of any state in accordance with its legislation”. (*лицо без гражданства - лицо, не считающееся гражданином какого-либо государства, в соответствии с его законодательством.*) The term “legislation” in Russian (*законодательство*) indicates not only legal acts passed by the legislative power

¹ UN General Assembly Resolution A/RES/50/152.

of a country, but also executive regulations such as presidential decrees, government regulations and normative acts of executive power. However, it is UNHCR's view that the reference to "law" in Article 1(1) of the 1954 Convention should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law and, where appropriate, customary practice. Further, the reference to "operation of law" in the definition of statelessness in Article 1(1) covers situations where the written law is substantially modified when it comes to its implementation in practice. Considering this, UNHCR encourages a State conducts a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status.

Article 1 defines the nationality of the Republic of Tajikistan. UNHCR are concerned about citizens of the former USSR who have been habitual residents in Tajikistan, and UNHCR recommends that consideration be given to granting them nationality of the Republic of Tajikistan automatically, by including them in the definition of Tajik nationals under Article 1, as exemplified by the 2007 Citizenship Law of Kyrgyzstan.

General Principles

UNHCR notes with satisfaction the inclusion of key principles, notably, the right to a nationality for everyone (Article 4), equality of nationals irrespective of the grounds for acquiring nationality (Article 4), the avoidance of statelessness (Articles 4 and 6), the guarantee that the change of nationality of one spouse will not affect the nationality of other spouse or their children (Article 4, 7, 26(2)). These are all fundamental principles of international law, set out, reflecting the provisions of Article 15 of the Universal Declaration of Human Rights.

That being said, UNHCR regrets that an important principle contained in Article 1 of the 1995 law and its 2008 amendments was withdrawn from the current law, namely, prohibition against arbitrary deprivation of nationality articulated in Article 15(2) of the Universal Declaration of Human Rights, which is considered customary international law. Thus, UNHCR strongly recommends that this principle be maintained.

Article 4. The principles of nationality

UNHCR notes that retention of nationality is ensured "irrespective of marriage and dissolution of marriage". This serves as a basis for equality between men and women in terms of ensuring the right to a nationality as stipulated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Tajikistan is a party to.

Although there is no specific discriminatory provision in the current law, to ensure that the law is implemented in a non-discriminatory manner, UNHCR recommends the inclusion of a non-discrimination clause emphasising equal treatment and equal benefit of the law for every individual irrespective of race, ethnic origin, religion, sex, age, mental or physical disability or other analogous ground of disadvantage.

Documents proving nationality

Article 10. Documents confirming nationality

Article 10 lists documents confirming nationality of the Republic of Tajikistan. While the previous law clearly articulated such documents, in the current law, it simply mentions that the list of documents confirming nationality shall be specified by the national legislation. In order to avoid uncertainty, UNHCR recommends that such documents be certainly listed in the implementing regulations as indicated previously in the 1996 Regulation on procedures for consideration of issues nationality of the Republic of Tajikistan.

Prevention against statelessness at birth

It is significant that the law contains general safeguards which protect children against statelessness at birth as per UNHCR's earlier recommendations. These provisions ensure that 2015 Constitutional Law on Nationality is almost complete compliance with Articles 1 and 2 of the 1961 Convention on Reduction of Statelessness. It also ensures observation of obligations under other Conventions to which Tajikistan is already a party to, notably the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR).

Article 13. Acquisition of nationality by birth

UNHCR observes that Article 13(2) stipulates that when the nationality of the parents is different, and one of them is a national of the Republic of Tajikistan at the time of the child's birth, the child born of the Republic of Tajikistan shall become a national of the Republic of Tajikistan. On the contrary, Paragraph 8 of the Resolution of the Government of the Republic of Tajikistan on the rules of issuance of passports of nationals of the Republic of Tajikistan, reference #406 as of 13 June 2014, states that persons aged 16, are required to submit their birth certificates, passports of their parents and copies of their passports when applying for a passport for the first time. Thus, if either parent lacks proof of nationality, the child might not be able to apply for a passport, a proof of Tajik nationality. In this regard, UNHCR concerns that children born in mixed marriages where one of the parents is a national of Tajikistan, and the other parent does not have valid documents, and the child would be rendered stateless; therefore, UNHCR recommends that the relevant legislation be harmonised with the Constitutional Law on Nationality.

UNHCR observes that Article 13 (3) stipulates that a child born outside Tajikistan, to a Tajik national and a foreign citizen, will acquire Tajik nationality on the basis of a written agreement between the two parents when both of them permanently reside abroad. As per UNHCR's earlier recommendations, UNHCR highly welcomes the inclusion of a safeguard whereby the child acquires Tajik nationality if the parents fail to submit a written agreement on choosing the nationality of the child within the period of three months after the child's birth, if the granting of nationality from the State of birth would not be available for the child.

A similar safeguard is provided under the application of Article 28 (2) that in cases where the parents of a child adopted by a Tajik national and a foreign citizen, the child will acquire Tajik nationality within one year following the adoption if the two parents fail to submit an application on the child's nationality. UNHCR welcomes the inclusion of such a safeguard whereby the child would be otherwise stateless. That being said, there might be still a risk arising that the concerned children might be rendered stateless longer than three months due to the procedures required to obtain Tajik nationality. In line with Article 7 of the CRC which binds State parties to register a birth of a child immediately after birth, a detailed procedure related to implementation of Article 13(3) and Article 28(2) of the Law should be stipulated in the implementing resolutions.

Article 13(5) continues to provide that in cases where a child's mother is stateless and an affiliation is established with the child's father who is a national of Tajikistan, the child is recognized as a national of Tajikistan. UNHCR welcomes that Article 13(6) covers cases where a child's father is stateless and an affiliation is established with the child's mother who is a national of Tajikistan. These provisions are appreciated from the perspective of prevention of the occurrence of statelessness in a more gender neutral manner.

Referring to Article 13(7) provides that a child born on the territory of Tajikistan to stateless persons, if both or one of them permanently resides in Tajikistan, is recognized as a national of Tajikistan, UNHCR concerns that this condition may prevent children born to undocumented stateless parents from acquiring the nationality of Tajikistan. UNHCR notes that this is not in line with the 1961 Convention. Article 1(1)a of the 1961 Convention stipulates: in case of automatic acquisition of nationality at birth, no residency requirements are allowed. Further, in accordance with Article 1(1)b and Article 1(2), in case a State opts for application procedure, only habitual residence of a child can be required, but no residency requirement is allowed for the parents. As such, UNHCR strongly supports that the grant of nationality should not be limited only to children born to stateless persons legally residing in the country. The inclusion of a safeguard to cover all stateless persons in a broader context, regardless of their or their parents' residency or documentary status, would bring the articles relating to acquisition of nationality through birth on State territory into compliance with Article 1 of the 1961 Convention on the Reduction of Statelessness.

Referring to Article 13(8), UNHCR notes with regret that the 1995 Law and its 2008 amendments was amended to "a child born on the territory of Tajikistan, whose parents are unknown, shall become a national of Tajikistan". Under the previous law, "a child who is on the territory of the Republic of Tajikistan, both of whose parents are unknown, is a national of the Republic of Tajikistan" the child would have automatically acquired the Tajik nationality. Whereas the new law suggests that the child would go through application procedure to acquire the nationality. In regard to this point, UNHCR recommends that application requirements be limited so as to allow children to acquire nationality as soon as possible after birth in line with Article 7 of the CRC. Moreover, it is not clear if the new law requires proof of birth in the country, which is not required for foundlings under Article 2 of the 1961 Convention which assumes that birth occurred in the country unless proof to the contrary exists. Thus, UNHCR recommends that the previous provision, "a child who is on the territory of Tajikistan" be retained. Further,

UNHCR recommends wording “in the absence of proof to the contrary” from the 1961 Convention, be incorporated in the implementing regulations.

Article 13(9) guarantees that children born in Tajikistan acquire nationality if they are born to two foreign citizens who are unable to transmit their nationality. UNHCR welcomes that this provision also covers children born to one stateless person and a foreign citizen, in cases where the child is unable to acquire the nationality of the foreign parent and becomes stateless as per UNHCR’s earlier recommendation. UNHCR further recommends that procedural requirements be explicitly stipulated in its implementing regulations.

UNHCR would like to note that the new law does not have provisions on birth on a ship or in an aircraft. The 1961 Convention considers a child born in-flight or on a ship to have been born in the airplane or the ship’s registered country. Thus, UNHCR recommends that provisions related to this matter be stipulated in the implementing regulations.

Naturalization

Article 15. General terms of naturalization

UNHCR notes that the new law envisages that only persons who have been considered as stateless with residence permits issued in Tajikistan, as such may apply for naturalization. UNHCR strongly recommend a generous consideration of all stateless persons, individuals with residence permits for stateless persons issued in a foreign State, be they formally recognised as stateless or not.

Article 16. Naturalization as a national of Tajikistan under the simplified procedure

Article 32 of the 1954 Convention provides that state parties “shall facilitate the assimilation and naturalization of stateless persons. State parties shall in particular make every efforts to expedite naturalization proceedings and reduce as far as possible the charges and costs of such proceedings.” In view of this, UNHCR welcomes the fact that facilitated conditions for naturalization of stateless persons are established, including a provision with a reduced period of residence.

UNHCR notes with regret that Article 23 (3)(e) of the 1995 Law and its 2008 amendments, the provision for facilitating simplified procedures for naturalisation of refugees, was removed in the current Law. UNHCR would like to emphasize Article 34 of the 1951 Convention relating to the Status of Refugees, which Tajikistan is a party to, stating that state parties “shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every efforts to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” In this regard, UNHCR would like to request reconsideration of facilitating naturalization proceedings of refugees.

As contained in Article 6 of the 2015 Constitutional Law on Nationality, UNHCR encourages the principle of reduction of statelessness through acquiring the citizenship of Tajikistan, to be translated into facilitated procedures for naturalization by all stateless

persons who would qualify for it. UNHCR concerns about citizens of the former USSR who have been habitually residents in Tajikistan. It is our understanding that holders of former USSR passports with *propiska* issued in Tajikistan, are considered nationals of Tajikistan once confirmed. As for the status of former USSR passport holders without *propiska* issued in Tajikistan (including holders with *propiska* issued in another state), UNHCR highly appraises that the Government of Tajikistan is currently working on promulgating an Amnesty Law to facilitate solutions for stateless populations residing in the country without valid documentation, including holders of former USSR passports without *propiska* issued in Tajikistan.

UNHCR welcomes the provisions on acquisition of nationality through simplified procedures for naturalization in Article 16(1), and would like to advocate that a detailed procedure for implementation of Article 16 is stipulated in its implementing regulations. However, UNHCR regrets that Article 16(1) (5) covers only “persons who were born on the territory of the Tajik Soviet Socialist Republic and held citizenship of the former USSR, who resided or reside in the states former members of the USSR, but who have not acquired citizenship of these states and, as a result, are stateless” to have a right to file an application for naturalization under simplified procedures. While the great majority of stateless persons in Tajikistan may be able to benefit from the application of Article 16, UNHCR notes that Article 23(3)(a) of the 1995 Law and its 2008 amendments facilitate naturalizations of individuals with “possession of the citizenship of the former USSR” irrespective of the place of birth. It is of UNHCR’s view that consideration is also given to any stateless person who is a habitual resident of the country, regardless of their former citizenship, place of residence or place of birth.

Under the 1995 Law and its 2008 amendments, persons married to Tajik nationals and persons born to Tajik nationals who have acquired a foreign citizenship at birth can acquire Tajik nationality by a process of registration. Until 2008, this process was open to former USSR citizens, stateless persons, and descendants of former Tajik nationals. UNHCR notes that this process of registration was removed in the new law. In the interest of ensuring family unity, UNHCR recommends facilitated naturalization for spouses married to Tajik nationals.

Restoration of nationality

Article 17. Restoration of nationality

Article 17 of the Law retains important provisions from the 1995 Nationality Law for restoration of nationality by those who lost it at a time they had no capacity to provide consent (adoption or due to change of nationality of their parents). UNHCR understands that the provision of this article may benefit a large number of cases, including those who lost their nationality through application of the 1995 Nationality Law, including Article 29(b) of the 1995 Nationality Law for instance. Although UNHCR recommended that such individuals have their nationality automatically restored, rather than being required to go through a procedure to require nationality, UNHCR observes the current Law states that the application is required to restore nationality. In this case, UNHCR recommends that those procedures be spelled out in more explicit terms in its implementing regulations.

Article 18. Grounds for rejection of naturalization and restoration of nationality

UNHCR notes that Article 18 states that the reason for rejection of naturalization includes “a citizen of a foreign state that Tajikistan does not have an international agreement for dual nationality with”. Thus, it sets a condition that persons who wish to apply for the citizenship of Tajikistan renounces their current citizenship. UNHCR is aware that a person applying for citizenship has to submit a certificate of non-affiliation to the nationality of any other country or a certificate of renunciation of previous nationality at the time of application. In other words, renunciation of current nationality is required, even when the acquisition of the nationality of Tajikistan is not guaranteed yet. In case the application is rejected, the person would be rendered stateless.

UNHCR recommends that the implementing regulations guarantee that no one will be rendered stateless in the process of acquiring nationality of Tajikistan. UNHCR would like to share one more time, with the Government of Tajikistan the relevant safeguard which has been included in the 2001 Law on Citizenship of Ukraine. Article 9 of the Law states that: The conditions of admission to the citizenship of Ukraine shall include:[....] 2) obligation to terminate foreign citizenship or not holding foreign citizenship; [...] Persons who are aliens shall undertake to terminate foreign citizenship and submit a relevant document issued by the authorized bodies of the respective state to the body that received documents on their admission to the citizenship of Ukraine, within one year following such persons’ admission to the citizenship of Ukraine. The inclusion of a similar safeguard in the legislation in Tajikistan would be a positive development and an important safeguard against statelessness.

Renunciation of nationality

Article 22. Grounds for rejection of renunciation of nationality

As per UNHCR’s earlier recommendation, UNHCR welcomes the inclusion of a safeguard in Article 22 of the law that rules out voluntary renunciation of nationality unless the national possesses another nationality or has a formal assurance to acquire another citizenship. This safeguard constitutes an important safeguard against statelessness and brings the law in line with Article 7.1(a) of the 1961 Convention.

Right of option

Article 25. Choice of nationality of another state (optation) in the event of change of the State border of Tajikistan

Article 25 deals with the nationality of Tajik nationals residing on the territory affected by a change of the border of the Republic of Tajikistan. The relevant article states that such individuals have the right to preserve or change their nationality (right of option) according to the conditions of the relevant international agreement. UNHCR welcomes that the right of option in the context of state succession is incorporated in the law. UNHCR finds it desirable to include a guarantee that statelessness will be avoided in such situations.

Loss of Nationality

While UNHCR is aware that Article 29(b) of the 1995 Constitutional Law on Nationality was not functioning in practice, UNHCR applauds the fact that there is no provision in the new law to stipulate that “nationality of the Republic of Tajikistan shall be lost if a person permanently residing abroad has not registered in a consulate without valid reasons within five years.” This is in line with Articles 7.4 and 8.2(a) of the 1961 Convention, according to which residence abroad, failure to register or similar shall not lead to loss or deprivation of nationality. It also follows a regional trend towards removing similar provisions from nationality legislation, as exemplified through a 2011 amendment to the Law on Citizenship of the Republic of Kazakhstan and a 2010 amendment to the Organic Law on Georgian Citizenship.

Article 26(2) Nationality of a child in the case of change in the nationality of parents

UNHCR welcomes the inclusion of a safeguard articulated in Article 26(2) to prevent children becoming stateless in cases where the child’s parent(s)’ nationality is withdrawn. This safeguard is consistent with Article 6 of the 1961 Convention.

Deprivation of Nationality

Deprivation was removed among the grounds for withdrawing nationality articulated in Article 20 of the 2015 Constitutional Law on Nationality. There is no specific provision on deprivation of nationality, so no grounds that lead to it are elaborated. Deprivation is not listed in either the competencies of the President regarding nationality issues (Article 31) or those of the authorities mentioned in Article 32, 33 and 34. If, however, deprivation of nationality is to occur, UNHCR strongly recommends that the authorities clarify under which conditions persons may be deprived of their nationality, in order to avoid arbitrariness in such decisions.

UNHCR would like to address that international instruments may use different wording to describe situations of withdrawal of nationality. The 1961 Convention on the Reduction of Statelessness, for instance, distinguishes between “loss of nationality,” understood to occur *ex lege* (automatically or by operation of law), and “deprivation of nationality” where the loss is initiated by the authorities of the State.

Authorities in charge of nationality matters

Articles 30, 31, 32, 33 and 34. Competent authorities on matters of nationality

UNHCR notes that the Chapter does not explicitly establish which authorities are responsible for decisions on loss or deprivation of nationality. It would be desirable that the implementing regulations clarify this for the sake of greater transparency regarding how such decisions are made.

Procedures

Article 37. Timelines for consideration of the application on matters of nationality

Article 37 of the law provides that an applicant may reapply for withdrawal of nationality after one year. UNHCR recommends that applicants should be notified of the decision in writing and with sufficient reasoning, stipulated in the implementing regulations.

Article 41. Appeal against decisions on nationality matters

UNHCR welcomes that Article 41 of the law provides that broader scopes of nationality matters, including rejections of applications related to nationality, can be appealed in court.

*UNHCR Representation
Republic of Tajikistan
May 2016*