ASKV / Refugee Support and the European Network on Statelessness make this joint submission as part of the consultation to the proposed statute law for a statelessness determination procedure by the Ministry of Security and Justice in the Netherlands.

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About the European Network on Statelessness (ENS)

ENS[1] is a civil society alliance of NGOs, lawyers, academics and other independent experts committed to addressing statelessness in Europe. Based in London, it currently has over 100 members (including 55 organisations) in 39 European countries. ENS organises its work around three pillars – law and policy, communications and capacity building. The Network provides expert advice and support to a range of stakeholders, including governments.

About ASKV / Refugee Support

ASKV [2] is an Amsterdam-based organisation, providing legal assistance and social support to undocumented refugees. At present, ASKV is one the last remaining organisations of its kind in Amsterdam, and every year hundreds of undocumented people make use of our daily walk-in legal and social advice clinics. ASKV has particular expertise in providing housing and guidance to refugees with psychiatric disorders. In addition to direct assistance, ASKV is a vocal advocate for refugee rights, both locally and nationally.

Introduction

Stateless persons are not recognised as a citizen by any country in the world. Statelessness has far-reaching impacts that affect almost every aspect of daily life. The Netherlands has signed the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Together these Conventions ensure the identification and protection of stateless persons and the prevention and reduction of statelessness in general. Other binding international and human right treaties, including the Convention on the Rights of the Child, also underpin the widely recognised right to a nationality.

In this context, ENS and ASKV believe it is ostensibly a welcome development that the Netherlands is now fulfilling the promise it made in 2014 to introduce a statelessness determination procedure. However, significant deficiencies in the legislative proposal risk undermining the efficacy and value of the new procedure, as well as potentially setting unfortunate precedents for states that might follow the Netherlands' example in the future. Despite the fact that the proposal recognises that status determination is both of symbolic and legal significance, the current texts also represents a missed opportunity. Namely, the opportunity to provide a meaningful place in society to those people who are currently left in limbo and forced to go through life disenfranchised. In this submission we therefore outline the flaws in the proposed procedure, as well as ways in which these shortcomings

[1] For more information about ENS, please see the website http://www.statelessness.eu/
[2] For more information about ASKV, please see the website http://www.askv.nl/

can be revised in order that the Netherlands can both meet its international obligations and adhere to good practices in countries that already operate a statelessness determination procedure.

1. Consequences of determination

Depending on the exact definition applied, there are currently 13 countries in the world that have implemented functioning mechanisms to determine statelessness. In the proposal, it is claimed that the Netherlands, following the example of those countries, aims to do more for stateless persons who often find themselves in a vulnerable position.[3] However, the Dutch proposal differs in a crucial way from its 13 predecessors, as it will be the first and only country so far to not establish a right of residence for those recognised as stateless.[4] Thereby the proposal runs counter to a primary rationale for introducing a procedure, and in essence disregards the suffering of stateless persons, namely that they commonly do not enjoy a right of residence. Also, in this way the procedure is likely to become merely a symbolic measure for many of the applicants.

As already acknowledged by the government, its interpretation of the 1954 Convention can be seen as controversial, and by implementing the procedure in this way it will go against the advice of numerous consulted experts. Furthermore, the choice of the Netherlands to break with established good practices could ignite a downward spiral. Other countries that might introduce a determination mechanism in the future could now feel legitimised to only provide the bare minimum just like the Netherlands. The Dutch stated aim to 'to do more for stateless persons' could thus have an extremely punitive impact in practice.

European case law also lends support to the importance of granting a residence permit. Specifically, the European Court of Human Rights concluded that the refusal of granting residence rights to recognised stateless persons constitutes a possible violation of Article 8 of the ECHR. In the case of Kuric and Others v. Slovenia the Court ruled:

> the prolonged refusal of the Slovenian authorities to regulate the applicants' situation comprehensively [. . .] in particular the failure to pass appropriate legislation and to issue permanent residence permits to individual applicants, constitutes an interference with the exercise of the applicants' rights to respect for their private and/or family life, especially in cases of statelessness.[5]

The government's arguments to not establish the right of residence following determination are based primarily on fears of a pull effect and 'stacking' of residence proceedings.[6] However, there are no substantive facts that support these assumptions in practice. For example, both Spain and Hungary have determination procedures in place since 2001 and 2007 respectively. The number of applications and positive decisions has remained modest in both countries,[7] and a similar trend has been reported in countries which more recently introduced a procedure.[8] In France, which has operated a procedure for decades, application numbers have remained consistent at about 200 per year. The French government recently confirmed that its statelessness determination procedure is not a documented

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[3] Draft explanatory memorandum statelessness determination procedure, p. 1. see www.internetconsultatie.nl/staatloosheid

[4] European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons*, October 2013, p. 36

[5] European Court of Human Rights, 13 July 2010, Kuric and others v. Slovenia, Application No. 26828/06, paragraph 361

[6] Draft explanatory memorandum statelessness determination procedure, p. 12

[7] Spain received in the period 2001-2009 in total 1,312 applications. Hungary received between 1 July 2007 and 30 September 2010 in total 109 requests.
[Source: Equal Rights Trust, *Unraveling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, July 2010, p. 206; and Hungarian Helsinki Committee, S*tatelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness*, December 2010, p. 5]

[8] In Moldova for example there were 617 applications received between 2012 and 2015 (source – a presentation by representative of the Moldovan Interior Ministry at a European Migration Network conference in Budapest in September 2016.

pull factor – not for persons outside of the EU or within the EU itself.[9] Hence there is absolutely no indication that countries operating a procedure have received an increasing influx of stateless persons besides those who already resided in the country.

Indeed, misguided fear of a pull factor may in fact deny the Netherlands one of the key rationale/advantages of introducing a determination procedure, namely a solution for stateless persons who cannot demonstrate entitlement to a nationality and cannot be removed. In this regard it is worth emphasising that all applicants must voluntarily and fully cooperate with evidence gathering (including contact with embassies/countries of origin) as part of a statelessness determination procedure, and hence submit themselves to two possible outcomes – one being establishment of a nationality and subsequent return, the other a finding of statelessness.

Furthermore, there exists a problematic assumption that recognised stateless persons can generally return to their former country of habitual residence or another country.[10] This is however not usually possible in reality. When an alleged country of origin does not cooperate with return of a stateless person, yet the Dutch authorities nevertheless persist that expulsion is possible the person involved ends up in an exceptionally hopeless situation. Supported by European case law, the European Court on Human Rights concluded in Amie and Others v. Bulgaria that the removal of refugees, in particular stateless refugees, in practice can lead to significant problems and sometimes even appears impossible because there exists no country they can be deported to.[11] Furthermore, repeated attempts to expel a person whose identity proves impossible to establish to a country where his admission is not guaranteed can potentially violate Article 3 of the European Convention of Human Rights.[12]

Article 27 of the 1954 Convention provides for the right of an identity document for recognised stateless persons, regardless of their residence status. However, there does not exist a competent authority in the Netherlands to issue identity documents. Despite the fact that this absence is in violation of the Convention, the current proposal for a determination procedure does not solve this problem. The suggestion that a decision from the Court could serve as proof of identification does not meet the requirements, particularly because the Netherlands has compulsory identification and the judgment of the court is not regarded as valid identification. Therefore, not only do stateless persons generally lack the documents that facilitate return to their former place of stay, they also cannot identify themselves while staying in the Netherlands.

In practice, the government often refers to the 'no-fault procedure' (buitenschuldprocedure) as a last resort for stateless persons who, despite their full and persistent cooperation/efforts, fail to effectuate their return. This is both surprising and highly problematic given that the Ministry of Security and Justice has stated repeatedly that statelessness as such plays no role in obtaining a permit on no-fault claims.[13] In addition, research from the University of Tilburg confirms that (recognised) statelessness is not considered in this proceeding.[14] It is therefore recommended that recognised statelessness should be a strong indication to issue a permit on the basis of the no-fault criteria. In this way it would fulfil its objective to provide a solution to stateless persons who cannot travel to and reside legally in any country in the world. It is also strongly recommended in these cases that the

[9] In response to a questionnaire of the European Migration Network (EMN) France concluded: "as far as we know, this procedure has not created a pull factor of persons residing before outside the EU and has not facilitated secondary movements in the EU". EMN/European Commission, *Ad-Hoc Query on recognition of stateless persons*, 4 May 2015.
[10] Draft explanatory memorandum statelessness determination procedure, p. 12
[11] ECHR, 12 February 2013, case 58149/08, Amie and Others v. Bulgaria, paragraph 77
[12] ECHR, 5 March 1986, case 10798/84, Harabi v. The Netherlands
[13] See amongst others European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention*, November 2015, p. 18.
[14] Sanghita Jaghai en Caia Vlieks, Buitenschuldbeleid schiet tekort in bescherming staatlozen, Asiel & migrantenrecht, 2010: 5-6.

burden of proof be reversed. Namely, if the government does not grant a (no-fault) residence permit to a recognised stateless person, the authorities must demonstrate that legal residence is possible in another country.

Also, under the current proposal it is not deemed necessary to provide legal stay during the procedure. This has major implications for those applicants that do not possess a residence permit. This group could face destitution and/or arrest and subsequent detention awaiting deportation to a country which is not yet known while the question of statelessness is determined. Moreover, this could negatively influence the ability of those people that need it the most to make use of this procedure. Persons who are destitute or in detention will likely lack resources (or communication facilities) to evidence their statelessness so will find themselves caught in a vicious circle. We therefore strongly urge that attempts to deport and detain should be suspended, at least pending the procedure.

Lastly, the failure to grant the right of residence for persons recognised as stateless in the current proposal also impedes their access to the labour market, education and health care.[15] Considering the inability for stateless persons to return to their former place of residence, it is likely they will remain in perpetual limbo in the Netherlands. Therefore, it is both in the best interest of the individual and wider society to provide these basic rights which are vital to successful integration and economic self-reliance.

2. Immediate interest

Access to a statelessness determination procedure must be ensured in order for them to be fair and efficient.[16] As confirmed by ENS following previous research: "In the overwhelming majority of states where statelessness is defined by law as a protection ground any non-national can submit an application for protection at any time (as in the case of asylum procedures)."[17]

In the current proposal it is stated in article 2(1) that a request to determine statelessness can only be submitted in the case of an "immediate interest" for the person involved.[18] This concept of "immediate interest" is not further mentioned or elaborated on in the Act or the memorandum. It is therefore unclear what the impact of this statement will be.

That being said, it has proved complicated in the past to prove immediate interest. For example, a possibly stateless man from Azerbaijan, born there when it was part of the Soviet Union, requested the Court in The Hague to determine its statelessness in the absence of a procedure. However, the State concluded that it was not clear what the concrete interest was in his claim as statelessness under the current law does not result in the issuing of a residence permit.[19]

Since the current proposal for a statelessness determination procedure does not grant residence rights either, ostensibly the most convincing ground on which to justify an immediate interest to request status determination, there exists the risk that the concept of "immediate interest" will significantly obstruct the access to the procedure for many stateless persons. We therefore would like to recommend that this concept be further explained, and that new arrangements ensure access to the procedure for everyone.

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[15] European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons*, October 2013, p. 37-39

[16] Ibid., p. 15

[17] Ibid., p. 14

[18] Draft Act statelessness determination procedure, Article 2 (1), see www.internetconsultatie.nl/staatloosheid

[19] Rechtbank Den Haag, JV 2015/158, r.o. 4.2, 4.3

3. Burden of proof

Given the nature of statelessness, applicants for a statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence. However, the explanatory memorandum to the proposal for a determination procedure does not find it necessary to determine additional instructions in this regard because existing regulations would conform. We believe this is a misconception and does not comply with Article 25 of the 1954 Convention in which treaty states are called upon to provide administrative guidance to stateless persons within their territories that governments normally provide their own citizens.

A shared burden of proof would facilitate better decision-making (i.e., by establishing all relevant facts) and take account of the substantial difference in power/influence (including when communicating with other countries) between the applicant and the rewarding party (the State). France, Hungary, Moldova, the Philippines and Spain all have determination mechanisms in which the burden of proof is shared.[20] As UNHCR explains in its *Handbook on the Protection of Stateless Persons:* "the procedure is a collaborative one aimed at clarifying whether an individual comes within the scope of the 1954 Convention".[21] While the applicant should be required to present all the information he can reasonably possess, it would be strongly recommended that the State would perform additional research in cases where it has not been established whether the applicant has a nationality.

To conclude, a proportional distribution of the burden of proof between the individual and the State is strongly preferred. We therefore welcome the possibility in the proposal for the Ministry of Foreign Affairs to officially ask questions to foreign authorities. In addition, we believe it to be beneficial for the court to be able to approach the International Law Institute on foreign nationality law.

4. Right of option for stateless children

One of the main cornerstones of the 1961 Statelessness Convention, which the Netherlands has signed, is the obligation of the parties to provide nationality to children born on their territory who would otherwise be stateless. For a long time the Dutch government only provided this so-called "right of option"/ "optierecht" to children legally residing in the Netherlands, in contravention of the treaty, standing jurisprudence, and advice from UNHCR and others.

While it is an important step forward that the government has now decided in the new proposal to revoke the legal residence requirement, there are still crucial implications. Namely, it has been decided to create separate grounds for legally and illegally residing children, whereby children without a residence permit have to wait longer to opt for Dutch citizenship. Furthermore, for illegal residing children there has been developed the criteria of 'stable principal residence'. The main issue herein is that this requires a cooperation requirement for the parents of stateless children, who must not have withdrawn from the supervision of the authorities during their stay in the Netherlands. This requirement is not allowed under the 1961 Convention and is in breach of article 2 of the Convention on the Rights of the Child, which prohibits the discrimination of children on the basis of circumstances or activities of the parents.[22]

If this aspect were retained, it would mean that the objective of the procedure is strongly undermined, as it does not move towards resolving statelessness in the Netherlands. Moreover, statelessness is a

[20] UNHCR, *Good Practices Paper – Action 6: Establishing statelessness determination procedures to protect stateless persons,* 11 July 2016, *p. 6*

[21] UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, p. 34.

[22] Convention on the Rights of the Child, article 2, see http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

legal fact, and the aim of this procedure is to determine whether a person is stateless in an individual case. Therefore, the allocation of rights derives from that determination in which the behaviour of the parents is legally irrelevant.

Article 6(b) of the Dutch nationality law now recognises nationality to a foreign national that has been born stateless in the Netherlands and has had admission and principal stay for a continuous period of at least three years. We strongly recommend the government to revise this in a way that stateless children born in the Netherlands without formal admission will also fall under this law, hereby allowing it to comply with international requirements.

Conclusion

In conclusion, the European Network on Statelessness and ASKV Refugee Support urge the Ministry of Security and Justice to consider the aforementioned highly problematic aspects of the proposal for a statelessness determination procedure and to revise the law accordingly.
The following recommendations, if adopted, would help guarantee the rights owing to stateless persons and help ensure the efficacy of the new procedure:

- ✓ The right of residence must be granted for persons recognised as stateless under the procedure. Hereby it should follow the example of all 13 countries that have established statelessness determination procedures in the world. Without residence rights this procedure is merely symbolic and will not protect the most vulnerable. Suspension of removal is also essential during the procedure.

- ✓ Recognised stateless persons should receive an identity document in accordance with settled jurisprudence and article 27 of the 1954 Convention. For this purpose a competent authority should be assigned.

- ✓ The term “immediate interest” should not lead to a restriction of access to the determination procedure for stateless persons, including those applicants without residence permits. Access to a determination procedure must be guaranteed at any time.

- ✓ Distribution of the burden of proof should be further specified. While taking into account the inherent difficulty experienced by stateless persons in proving their nationality a shared burden of proof is recommended.

- ✓ Stateless children born in the Netherlands without legal residence should be granted the same rights as those with legal residence in order to be in accordance with international law. Creating a separate system for children without residence permits is highly undesirable and discriminatory, and runs contrary to the best interests of the child.