

Statelessness determination: the Swiss experience

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While a detailed law on statelessness determination is recommended by UNHCR and others, Swiss practice in statelessness determination has evolved without one. Despite this, Swiss practice has been shown to be rather progressive, at least in some areas of statelessness recognition, and includes better treatment of the stateless in comparison with refugees.

On 1st February 2014, a revised asylum law came into force in Switzerland, abolishing the right for recognised refugees to receive a permanent residence permit. This permanent permit is the most attractive residence permit that Swiss law provides for foreigners, attainable after five years of lawful stay in Switzerland. The Federal Council had previously expressed its intention to apply the same restrictions to recognised stateless persons; however, by some oversight, the restrictions for stateless persons were not established and as a result stateless persons retained their right to a permanent residence permit. As statelessness recognition also qualifies the person for the right to an immediate temporary residence permit under Swiss law, and because it is often more swiftly determined than refugee status recognition, statelessness status is currently more attractive for applicants in Switzerland than refugee status.

Another case with significant consequences for the number of statelessness applications followed in May 2014, when a landmark decision by the Swiss Federal Administrative Court paved the way for recognising Syrian Kurds (so-called *Ajanib*) as stateless as they could not be required to go back to Syria in order to apply for citizenship, although a 2011 presidential decree had opened up the opportunity for *Ajanib* to apply for Syrian citizenship. In this case, a recognised refugee of Kurdish descent was recognised as stateless too. With this decision, the Court opened up the opportunity generally for recognised refugees to apply for statelessness status, a request that had previously been denied. With the arrival of thousands of persons from Syria into Switzerland, hundreds of Syrian *Ajanib* have acquired the right to an immediate residence permit in Switzerland. In contrast, the majority of Syrian nationals

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applying for asylum in Switzerland are not recognised as refugees, and are therefore being granted temporary admission only.

Background

Until 2008, in Switzerland as in other European countries, a formal statelessness determination procedure did not exist, although Switzerland had ratified the 1954 Convention Relating to the Status of Stateless Persons. Some individuals were considered stateless by the migration authorities and were granted travel documents. There was, however, no procedure and no legal framework for the determination of statelessness, although the law that governs the activities of all administrative agencies including government agencies does lay out the basic (yet fragmentary) legal grounds for the procedure. In 1999 competence for the determination of statelessness was moved to the former Federal Office for Refugees (now the State Secretariat for Migration, SEM, the same entity that handles all asylum claims), yet the legislative framework remained fragmentary. Even today, aside from the rules on competence, the only legal provision dealing specifically with stateless persons is article 31 of Switzerland's Federal Act on Foreign Nationals, which provides for the right of the stateless person to a temporary residence permit upon recognition as stateless and the right to permanent residence after five years. In contrast to other countries with detailed laws on statelessness determination, there are no specific rules in place in Switzerland for the determination of statelessness. Therefore, the recent surge in numbers of cases happened in the absence of a clear legal basis.

The number of cases of statelessness determination had been very low for years; compared with the large number of cases treated in the asylum procedure, statelessness determination was of small importance for the migration authorities. A first surge in the number of applications was seen in 2013, even before the legal changes and the milestone judgment described above. The surge then became enormous and the numbers clearly show the effect of the legal changes and the

decision of the Federal Administrative Court. The numbers peaked in 2014 when, according to the SEM, more than 300 applications for statelessness recognition were filed, of which 66% were accepted. In 2015 there were about 250 cases and again the majority of cases resulted in statelessness recognition and the immediate right to a residence permit.

Procedure

A person applying for statelessness status in Switzerland is not required to have entered Switzerland legally or to prove some form of lawful stay in the country, a question that has been the subject of heavy debate in other countries, such as Hungary and Italy. This point is crucial for a stateless person who is largely unable to fulfil the conditions required to prove a lawful stay in the host country.

Applicants in the statelessness determination procedure also receive better treatment in comparison with individuals applying for refugee recognition when it comes to the right to appeal; whereas the Asylum Act limits the right to appeal in refugee recognition matters to the Federal Administrative Court, statelessness decisions may also be appealed against before the Federal Supreme Court.

There are also disadvantages to not having a detailed law on statelessness in place. The Federal Administrative Court has held that the standard of proof in the area of statelessness determination is higher than in refugee determination procedures. Whereas refugee status only has to be 'credibly demonstrated', individuals applying for statelessness recognition must provide full proof of their statelessness. It remains to be seen how this recent decision will affect statelessness recognition in Switzerland.

A crucial area of concern is that, to date, there is no clarification of the legal status of an individual with a pending statelessness determination procedure. For example, questions around whether a person has a right to stay, can work or is entitled to health and social security benefits remain unresolved. In the majority of cases this has not been an issue, as most applicants either enjoy a so-called procedural right

to stay under Swiss law because they are simultaneously applicants in an asylum procedure, or because they already enjoy either refugee status or some other form of subsidiary protection in Switzerland.

However, the issue becomes critical in cases where a person who has already received a negative decision in the asylum procedure – and is confronted with a deportation order – and then files for statelessness recognition. There is some concern that granting the right to stay during the statelessness determination procedure could result in a big rise in manifestly ill-founded applications. Statelessness determination could, in other words, be abused in order to evade a deportation order from a preceding asylum procedure. Despite this concern, the Swiss authorities have so far refrained from deporting such individuals. In most cases it will anyway be impossible in practice to expel the person because of lack of travel documents. However, there is no legal guarantee under domestic law that an expulsion order would not be carried out while the person is still in awaiting statelessness determination.

The protection that international law provides for the stateless person is also different from the protection that refugees enjoy. One of the most striking differences between the 1951 Convention on the Status of Refugees and the 1954 Convention Relating to the Status of Stateless Persons is that the latter does not include a *non-refoulement* guarantee. For now, the only protection available to the individuals concerned are

the human-rights based guarantees of *non-refoulement*, as for example in the European Convention on Human Rights. At a minimum, Swiss authorities therefore are required to assess whether the expulsion of an individual in a pending statelessness determination procedure would violate Switzerland's international human rights obligations.

Conclusion

The shortcomings described above certainly need to be fixed. The question of whether a person has a right to stay during a pending procedure needs to be clarified. Yet the fixes could be implemented by inserting provisions in the existing laws instead of advocating for a specific law on statelessness that might take away some of the advantages that stateless persons enjoy today.

Sceptics assume that it is likely that the Swiss legislature – in order to correct the defect – will abolish the right for a permanent residence permit after five years of legal stay for those recognised as stateless and thereby even out the legal outcomes of refugee determination and statelessness determination. Yet it is just as likely that potential applicants, legal representatives, UNHCR and NGOs will recognise the benefits of statelessness recognition beyond the right to a permanent residence permit.

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