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# **The Indefinite Statelessness of Refugees in Denmark and Sweden: Comparing the Impacts of the Temporary Asylum Laws**

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## The Indefinite Statelessness of Refugees in Denmark and Sweden: Comparing the Impacts of the Temporary Asylum Laws

### Abstract

The paper is part of a wider research project which seeks to explore the nexus between statelessness and refugee-ness at global, national and individual level. The relationship between the two legal concepts has not received much attention. This is surprising given that one in ten refugees globally are believed to be stateless. To begin to unpack this relationship, Denmark and Sweden are used as case studies. This article sets out an initial law and policy analysis of the national level frameworks related to identifying statelessness in the Danish and Swedish asylum system, or addressing it following the acceptance of a refugee. This will be discussed in relation to how these contribute to, or address, the situation of indefinite statelessness for stateless refugees. Further to this, the paper seeks to draw out the impacts of the temporary asylum laws in both states with regard to the barriers stateless refugees face in acquiring citizenship. Issues such as cessation of refugee status, the undeportability of some former refugees who are stateless and instances of arbitrary detention are discussed in relation to Denmark and Sweden's international obligations under the 1951 Convention Relating to the Status of Refugees and the 1954 Convention Relating to the Status of Stateless Persons.

### Key Words

Stateless refugees, Denmark, Sweden, statelessness determination procedure, temporary asylum laws.

### Bio Notes

Jason Tucker is a post-doctoral researcher at the migration research institute MIM in Malmö. He defended his doctoral thesis 'Challenging the Tyranny of Citizenship: Statelessness in Lebanon' at the University of Bath in 2014. His current area of research is the nexus between statelessness and refugee-ness.

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While not all stateless people are refugees, or all refugees are stateless, some people do fall into both categories. This is unsurprising given that statelessness can be both the cause or consequence of forced migration (NRC and Tilburg University, 2014). This paper provides an analysis of the law and policy related to the identification, assessment and recording of the statelessness of refugees in the Danish and Swedish asylum procedures. It considers the gaps in law and policy that can lead to a stateless refugee remaining in a prolonged, or possibly indefinite, stateless situation. It will also compare the impacts of the temporary asylum laws adopted in Denmark in 2015 and Sweden in 2016 (The Danish Parliament, 2016; Migrationsverket, 2016d) with regard to the situation of indefinitely stateless refugees.

This analysis is part of a larger research project *The Statelessness of Refugees*, which seeks to explore the relationship between statelessness and refugee-ness at global, national and individual level. The statelessness of refugees is by no means a minor issue in either the statelessness or refugee fields. In 2014, the United Nations High Commissioner for Refugees (UNHCR), who have the mandate for both refugees and stateless people, reported it had 14.4 million people under its refugee mandate, nearly one in ten - 1.3 million - being stateless, (UNHCR, 2015; ISI, 2014, p. 125). However, despite this, the relationship between statelessness and refugee-ness receives surprisingly little attention.

This paper is a comparative national level law and policy analysis, using Denmark and Sweden as case studies. Using secondary sources, the analysis was guided by the following questions:

- 1) How does the law and policy related to identifying statelessness in the asylum system, or addressing it following the acceptance of a refugee, contribute to, or address, the situation of indefinite statelessness for stateless refugees in Denmark and Sweden?
- 2) What are the impacts of the temporary asylum laws in both states with regard to the barriers stateless refugees face in acquiring citizenship?
- 3) How do the above relate to Denmark and Sweden's obligations under the 1951 Convention Relating to the Status of Refugees (1951 Convention) on the cessation of refugee status for stateless refugees (UN General Assembly, 1951, Article 1 C:2-3,6)?

The comparative element allows us to consider how indefinite statelessness can arise in two asylum and citizenship frameworks that are often considered liberal (as in the case of Sweden) and more restrictive (as in the case of Denmark). Given that no analysis with a specific focus on the indefinite statelessness of refugees has been undertaken in either state, this should not be considered a comprehensive law and policy analysis on the issue. As an initial law and policy

analysis on issues surrounding the statelessness of refugees, this piece can read a slightly speculative. This is acknowledged, though it should be remembered that such an analysis is a crucial first step in understanding any aspect of statelessness, which is, at its heart, a legal phenomenon. Further to this the findings will be supplemented with additional empirical research as the project develops. This analysis flags key concerns and gaps in law and policy that can lead to indefinite statelessness. It is hoped that it can act as a catalyst for further research on the issue, research which is very much needed.

### *Statelessness and Refugee-ness Under International Law*

Exploring the relationship between statelessness and refugee-ness is of importance as the current framing of this nexus in the discourse of international law is based on an assumption of the primacy of protection under international refugee law as compared to international statelessness law. Stateless refugees are under the protection mandate of the 1951 Convention and the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) (UN General Assembly, 1954) simultaneously. However, as UNHCR advises, '[a]lthough an individual can be both stateless as per the 1954 Convention and a refugee as per the 1951 Convention, at a minimum, a stateless refugee must benefit from the protection of the 1951 Convention and international refugee law' (UNHCR, 2014, p. 7).

This position has become a norm in international refugee law. This is often justified as the 1951 Convention provides refugees with crucial rights not guaranteed under the 1954 Convention, non-refoulement and not to be penalised for illegal entry. As a consequence, assumptions such as 'for stateless refugees, legal remedies should be found in international refugee law, namely, the 1951 Refugee Convention' (Lambert, 2014, p. 56) have remained largely unchallenged or unquestioned. However, such a position assumes that stateless refugees face no specific protection concerns due to their statelessness, and that their statelessness is both identified and poses no obstacle to securing protection and solutions on par with non-stateless refugees. The case studies of Denmark and Sweden problematise these assumptions.<sup>1</sup>

It is important to note that the possibility that a refugee may be stateless is recognised in the definition of a refugee in the 1951 Convention:

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<sup>1</sup> There is not space here to detail this norm of the imperative to protect stateless refugees under refugee law, which by and large side-lines the specific vulnerabilities that stem from refugee's statelessness. Challenging what I term the 'protection hierarchy', which sees the statelessness of refugees as secondary or inconsequential as compared to the protection concerns stemming from their refugee-ness, is part of larger research project.

... owing to well- founded fear of being persecuted for reasons of race, religion, national- ity, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; *or who, not having a nationality* and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [Emphasis added] (UN General Assembly, 1951, Article 1A(2)).

This recognition is important as for stateless refugees there are specific cessation provisions. These seek to ensure that stateless refugees who no longer require protection from persecution do not lose their refugee status unless specific criteria related to their statelessness are also met. The 1951 Convention Article 1 C:2-3,6 (*ibid*), states that the Convention will cease to apply to stateless refugees who:

... (2) Having lost his nationality, he has voluntarily reacquired it; or  
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

... (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Therefore, to ensure that stateless refugees do not lose their status, in contravention of these cessations provisions,<sup>2</sup> the identification of statelessness amongst refugees is key. With regard to the guidance from UNCHR on this issue they state that, ‘cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status’ (UNHCR, 2003, p. 3). It should also be noted that following the object and the purpose of the 1954 Convention, UNHCR recommends that states grant residency based solely on a person’s statelessness. However, neither Denmark nor Sweden currently do so.

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<sup>2</sup> For more detail on these standards see UNHCR, 2003, ‘Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)’.

Stateless refugees, whose refugee status ceases and who have not acquired a nationality, they are still under the mandate of the 1954 Convention. As such, the aforementioned 'ability to return in Article 1(C) of the 1951 Convention should also be read in light of states obligations under the 1954 Convention. UNCHR has provided legal guidance on the standards states should follow in returning stateless persons to their country of previous habitual residence:<sup>3</sup>

As for an individual's ability to return to a country of previous habitual residence, this must be accompanied by the opportunity to live a life of security and dignity in conformity with the object and purpose of the 1954 Convention. Thus, this exception only applies to those individuals who already enjoy the status of permanent residence in another country, or would be granted it upon arrival, where this is accompanied by a full range of civil, economic, social and cultural rights, and where there is a reasonable prospect of obtaining nationality of that State. Permission to return to another country on a short-term basis would not suffice. (UNHCR, 2014, p. 55)

### *Identifying the Statelessness of Refugees: Practical Considerations*

UNHCR's (2014) *Handbook on the Protection of Stateless Persons*, provides guidance on how states could establish stateless determination procedures. With regard to the identification of the statelessness of refugees, a few salient points should be summarised. When determining statelessness the burden of proof should be shared between the individual and the state. This is because of the difficulty individual's face in proving that they are not a citizen of any state. A further consideration is that stateless refugees may not hold any documents, and if they do, these will not necessarily state that they are stateless (some stateless people are recorded as foreigners in their documentation). These documents may also be seen as insufficiently credible to prove the individual's identity.

Some stateless people may actually be unaware that they are stateless, either assuming they are citizens of the state within which they were born, or have resided in for a substantial period of time. Others may have been rendered stateless through loss of nationality due to residence abroad or through denaturalisation; both can occur without the individual being notified by their state. Therefore, it is important for states to actively identify stateless persons, and when a person raises a refugee claim it is advised that they are also informed that they should apply to be recognised as stateless if they believe they are so, or their citizenship is uncertain (*ibid*).

Refugee status determination and statelessness determination can either be separate procedures or combined. Though whichever system is opted for, the

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<sup>3</sup> This differs for if the individual is stateless as a result of voluntary renunciation of nationality as a matter of convenience or choice.

confidentiality of the refugee or asylum seekers must be ensured. As such, in some instances it will not be possible to contact the state of previous habitual residence to request confirmation of citizenship or statelessness.

As of yet UNHCR has only provided very limited guidance on the identification of the statelessness of refugees. The need to do so is obscured by the claim of the primacy of international refugee law to provide sufficient protection and solutions for stateless refugees. This lack of guidance has consequences given the need to identify the statelessness of refugees to ensure states do not contravene the 1951 Convention provisions on the cessation of refugee status. As will be shown in the analysis of Denmark and Sweden (both of whom are party to the 1951 Convention<sup>4</sup> and the 1954 Convention), such guidance is required to avoid situations of indefinite statelessness for refugees.

## Stateless Refugees in Denmark and Sweden

Neither Denmark or Sweden have adopted a definition of statelessness within their national legislation. However, given that the 1954 Convention does not permit reservations to the definition in Article 1(1), the definition is seen as binding on all state parties to the Convention (UNHCR 2012). Therefore, for the purposes of this paper, the definition of a stateless person will be that under the 1954 Convention, to which both Denmark and Sweden are bound, namely, “... a person who is not considered as a national by any State under the operation of its law” (UN General Assembly, 1954, Art.1.1). The lack of law and policy on determining statelessness in both states makes challenging to know with absolute certainty if those recorded as stateless actually are so, as well as the possibility that some stateless people may not have been recognised as such. For this reason, other nationality categorisations are included in this analysis, such as people whose nationality was ‘not stated’, *Uoplyst*, in Denmark, or those with ‘unknown citizenship’ *Okänt medborgarskap* or ‘citizenship under investigation’ *Under utredning* in Sweden, as well as Palestinians in both states.

The definition of a refugee, will be that as established under the Part 1(7.1) of the Danish Aliens Act (Government of Denmark, 2013) and Chapter 4(1) of the Swedish Aliens Act (Regeringskansliet, 2010). Both these definitions in the national legislation acknowledge the possibility of a refugee being stateless.<sup>5</sup>

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<sup>4</sup> Denmark has a reservation to Article 17 para 1. However, this article is not of relevance to this analysis.

<sup>5</sup> Denmark considers a refugee those who fall under the 1951 Convention definition and Sweden notes in Chapter 4(1) of the Aliens Act: “A stateless alien shall also be considered a refugee if he or she - is, for the same reasons that are specified in the first paragraph, outside the country in

For the purposes of this analysis those who have been granted ‘convention’ status as refugees, as well as those who have been granted temporary protection status (though the nature of this status differs between the states), following Denmark and Sweden’s response to the refugee ‘crisis’ of 2015-2016, are to be included.<sup>6</sup> However, those who have been granted protection on humanitarian grounds are not included as the focus of this article is the relationship between those who are both refugees and stateless under international law. This distinction has been made for analytical reasons, but should not be read that stateless people who have been granted protection on humanitarian grounds do not face similar problems in having their statelessness accurately assessed, recorded or in finding solutions to their statelessness.

Denmark and Sweden do partially assess nationality, or lack thereof, during the assessment of asylum claims. As will be discussed below, this assessment is not comprehensive, transparent or based on clear law or policy in either state. Despite this, a large number of asylum seekers in both countries have been identified as being stateless, or a variation thereof. In 2015 and the first half of 2016, Denmark received 1,837 asylum applications from stateless people, or people whose nationality was ‘not stated’ *Uoplyst*, amounting to 9.4% of the total asylum applications (Statistics Denmark, 2017). In 2015 alone Sweden received 9,266 asylum seekers who were recorded as either stateless, stateless Palestinians, or of ‘unknown citizenship’ *Okänt medborgarskap* or ‘citizenship under investigation’ *Under utredning* - 5.7% of the total asylum applications (Statistics Sweden, 2017).

## **The Identification and Resolution of Statelessness Amongst Refugees in Denmark**

### *The Identification of the Statelessness of Refugees in the Asylum Procedure*

The Danish Immigration Service (DIS) is the responsible authority for processing applications for asylum claims. There is no legislation detailing how statelessness should be determined by the DIS, or procedural guidelines or safeguards to do so. During the procedure, statelessness or citizenship is however assessed to a certain extent. While a refugee can be categorised as being stateless or having nationality ‘not stated’ *Uoplyst*, this is not to be considered a ‘status’ affording the individual any protection or the right of residence.

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which he or she has previously had his or her usual place of residence and - is unable or, because of fear, unwilling to return there.”

<sup>6</sup> It should be noted that temporary protection has been issued to other refugees during other ‘crises’ in the past.

Applications by spontaneous asylum seekers are initially made with the local police, who take certain basic information from the individual such as their name, country of origin and how they travelled to Denmark. This information is passed to the DIS, who explain that:

Persons, who seek asylum in Denmark, are registered by the immigration authorities upon arrival. In connection with the first registration the Danish Immigration Service attempts to ascertain the identity and nationality (citizenship) of the asylum-seeker *including whether the person is stateless*. The registration is based on the asylum-seekers' explanation and any written documents etc. [Emphasis added] (Danish Immigration Service, 2015b, p. 18).

With the exception of those who are found to have a 'Manifestly Unfounded Claim', asylum seekers will either be categorised as having 'Manifest Permission', which normally is an expedited procedure requiring only one interview, or as in most cases, they have to go through the 'Normal Procedure' which involves two interviews (Refugees DK., 2016c). These interviews include credibility assessments of the information provided by the asylum seeker, which can then be assessed in light of the experience of the caseworker and/or the available Country of Origin Information (COI). With regard to the relationship between the caseworkers processing asylum claims and those gathering COI:

The Immigration Service's Country of Origin Information Division collect and collate background information on conditions in asylum seekers' countries of origin. This background information forms the basis for the ruling in asylum cases, but the employees of the Country of Origin Information Division are excluded from the processing of all applications for asylum, and are not involved in the ruling on any asylum case. (Danish Immigration Service, 2015a)

Therefore, while an asylum caseworker can turn to the Country of Origin Information Division to undertake individual assessments on the nationality or statelessness of certain individuals, this involves the caseworker initially identifying the need to do so, as well as the caseworker being left with the final decision whether the person in question is stateless or not. Where there is doubt, a consequence of the lack of clear procedures, the term 'not stated' *Uoplyst*, can be used. The use of this unspecified nationality category may impact stateless refugees' ability to prove their identity has been established during procedure to secure permanent residence (a prerequisite for naturalisation). Further to this the lack of guidance means that there is a substantial amount of discretion being used by case officers in making these assessments. This has led to the DIS recording large numbers of people as being citizens of states which do not consider them as such (CHP Post Online, 2012).

### *Criteria for Naturalisation: Resolving Statelessness*

When a refugee is granted protection in Denmark were previously issued a 4-year temporary residence permit (ELENA, 2013). Securing a permanent residence permit is a prerequisite for naturalisation as a Danish citizen. The rules governing who is eligible were, in March 2016, made more restrictive for all applicants and saw the withdrawal of facilitated access to permanent residence for refugees. A permanent residence permit can be secured in Denmark regardless of the type of residence permit individuals hold, if they meet the following compulsory requirements, as well as at least two of the additional ones. The compulsory requirements include 1) 6 years of legal stay (this can be reduced to 4 years if the applicant meets all additional requirements) 2) reaching a certain level of Danish language proficiency, 3) not being within the penalty period for any criminal offence (some crimes result in permanent exclusion), 4) being/have been in full time employment for 2 ½ years during the last 3 years (full time education is not considered as employment) (Refugees Welcome, 2016). The additional requirements include 5) having passed a member-of-society test (not to be confused with the more substantial citizenship test required for naturalisation), 6) having achieved participation in society (such as being a member of a club), 7) being in full time employment for 4 years, and 8) have an annual income of at least 270.000 DKR<sup>7</sup> during the last 2 years (*ibid*).

The criteria for naturalisation include signing an oath of loyalty to the Danish state, holding a permanent residence permit and having 9 years of legal residence in Denmark - 8 years for refugees, 6 years for those married to a Danish citizen and 5 years for those who have completed 3 years of Danish education (young people who arrived in Denmark before they reached 15 years of age can apply when they turn 18 if they have completed Danish education), are not within the penalty period for committing a criminal offence (some crimes result in permanent exclusion from the possibility of naturalisation, having no outstanding debt to the State, 6) be self-supporting, have passed a language exam and have passed a citizenship test (Refugees DK, 2016b).

In October 2015, these criteria were made more restrictive, including raising the level of the language requirement, increasing the length and required percentage of correct answers on the citizenship test, extension of penalty periods for committing criminal offences and making dispensation due to mental illness more difficult to obtain (*ibid*). Changes in the requirements were implemented for all pending applications at the time.

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<sup>7</sup> Approximately 36,000 Euros.

These high criteria for receiving a permanent residence permit, and naturalisation, poses a significant barrier to all refugees, stateless or otherwise. While not wishing to undermine claims that all refugees in Denmark should have facilitated access to citizenship, for stateless refugees this is a greater concern. A refugee with temporary residence in Denmark can see this status cease when “the conditions constituting the basis of the residence permit have changed in such a manner that the alien no longer risks persecution” (Government of Denmark, 2013, Article 19(1.i)). In contravention of their obligations under the 1951 Convention, no provisions for cessation criteria for stateless refugees is made in the Danish Aliens Act.

Thus, no assessment of the stateless refugee's ability to return to their country of previous habitual residence is made, and contrary to the guidance of UNHCR, the person can be left with an uncertain status or forced to return to a country where they do not have a realistic prospect of securing permanent residence and rights in line with the 1954 Convention. Denmark does not grant residence based on a person's statelessness, in line with the object and purpose of the 1954 Convention, which would at least provide a safety net to prevent stateless refugee who loses their refugee status, though cannot return to their country of previous habitual residence, from ending up in legal limbo.

Not taking this ability to return into account means that former stateless refugees in Denmark can end up in a situation of undeportability and/or arbitrary detention through no fault of their own (Bendixen, 2011). *Asylum Camp Limbo – A Report About Obstacles to Deportation* details the consequences of this lack of recognition of stateless persons inability to return, and how they can languish in detention limbo in Denmark (*ibid*). Such arbitrary detention of stateless people is a violation of European and international law (with the exception of a few narrowly construed permissible ground for so doing) (European Network on Statelessness, 2017).

### *Establishing the Identity of the Applicant for Naturalisation*

There is no legal requirement for an applicant for naturalisation to have proven their identity in Denmark. However, in order to submit an application for naturalisation, the person must provide:

a copy of his or her passport and a copy of a permanent residence permit. Often, foreigners hold a foreign national passport. However, some foreigners may not be in possession of a national passport for humanitarian or accessibility grounds. In this case Denmark will *normally* have issued them an alien's passport or a convention passport (for recognized refugees). [Emphasis added] (Ersbøll, 2013, p. 10)

It is not clear what happens if a stateless person has failed to secure a travel document on humanitarian or accessibility grounds, or if their documents are rejected as insufficient to prove their identity by the Ministry of Immigration, Integration and Housing (the authority responsible for processing naturalisation claims). While it has been noted that the Ministry of Immigration, Integration and Housing draws on identity information from the Aliens Register (which is administered by the DIS), the information registered in this database is not necessarily accurate given the lack of law and policy on statelessness determination (Ersbøll, 2013, p. 10). The fact that individuals can apply to have their nationality re-assessed, and considering that in 2012 the DIS acknowledged that 4,000 individuals from only three states may have had their nationality incorrectly registered, highlights the problem with relying on this information (CHP Post Online, 2012).

### *The Temporary Asylum Law in 2015*

In February 2015, a new Temporary Protection Status (§ 7,3) was adopted in Denmark, which was designed to accommodate Syrian refugees who had not directly faced a threat of individual persecution, but fled because of the general situation in their country of origin (Refugees DK, 2016a). Syrian refugees are particularly vulnerable to statelessness given the large stateless population in the country before the conflict, the difficulty they face in registering the birth of their children in the neighbouring states and the gender discrimination in the Syrian nationality law (ISI and NRC, 2016).

The new Temporary Protection Status § 7,3 provides less rights and a shorter time period of the right of residence than is granted under § 7,1 for ‘convention refugees’, or § 7,2 to those who are eligible for ‘individual protection status’ under the Aliens Act (Government of Denmark, 2013). As Refugees DK (2016a) summarise:

If granted this status (§ 7,3,) the asylum seeker obtains a 1 year residence permit and the asylum seeker does not have the right to apply for family reunification until it has been renewed and 3 years in total have passed. When the 1-year period expires, the case will be re-considered. If the asylum seeker *is still in need of protection*, the residence permit will be renewed for a 2-years period. [Emphasis added].

This will impact a significant number of stateless refugees, as 28% of all asylum claims in 2016 received this status (*ibid*). However, the withdrawal of this protection status is worrying as Article 1C of the 1951 Convention is more specific in its criteria for cessation of stateless refugees’ status, with the need for protection to be considered *along with* their ability to return to their country of previous habitual residence.

Given the already existing barriers to securing a permanent residence permit and subsequently Danish citizenship, the issuance of this status, rather than convention status (§ 7,1) or individual protection status (§ 7,2) may not have a significant impact in terms of exacerbating the already insufficient law and policy to identify statelessness and facilitate stateless refugees access to naturalisation in Denmark. However, it does add further complexity to the already worrying situation of stateless refugees in Denmark.

## **The Identification and Resolution of Statelessness Amongst Refugees in Sweden**

### *The Identification of the Statelessness of Refugees in the Asylum Procedure*

The Swedish Migration Agency (SMA), is the authority responsible for identifying and assessing the statelessness of refugees. However, UNHCR have reported that in Sweden “no comprehensive determination of an applicant’s potential statelessness takes place during the asylum procedure” (UNHCR, 2016, p. 20). Due to this lack of law, policy and guidance, in certain situations the SMA are not able to determine the citizenship or statelessness of the applicant, categorising some people as ‘unknown citizenship’ *Okänt medborgarskap* or ‘citizenship under investigation’ *Under utredning* (however, guidelines on how and when these classifications should be used have not been developed) (*ibid*).

Following the submission of an application for asylum, the SMA will conduct interviews with the applicant. During these interviews, questions related to the applicant’s country of origin and/or citizenship are raised. This is part of a credibility assessment for the asylum claim, which includes determining where the applicant was born, where they are from and which languages they speak (Migrationsverket, 2016g). These questions do not have the specific intention of determining a person’s citizenship, but rather they relate to establishing the credibility of their claim for asylum.

Similar to the DIS, all SMA asylum caseworkers are expected to determine the nationality or statelessness of asylum seekers, based on relevant legal provisions related to nationality in the country of origin (UNHCR, 2016). However, a crucial part of determining statelessness is also to consider the operation of the law. It is unclear to what extent this is taken into consideration by the SMA when they are making such assessments.

In response to the limited guidance received by SMA caseworkers on the establishment of the identity (including nationality) of the applicant, UNHCR, 2016, p.38) notes:

In March 2016, the SMA adopted a Judicial Position on the examination and determination of identity and citizenship, as well as country of habitual residence or regular place of residence in asylum cases. This Judicial Position provides guidance on the various forms of evidence and methodologies that can be used to establish an applicant's identity and citizenship, or in the case of stateless applicants, their regular place of residence. Furthermore, in June 2016, the SMA adopted a Judicial Position on the notion of regular place of residence (*vanlig vistelseort*), which provides guidance to case workers and decision makers on how to determine against which country, or countries, a determination of a stateless asylum applicant's claim should be made. This Judicial Position reaffirms that "*The one who claims to be stateless must make this probable.*" [Emphasis added].

Therefore, similar to Denmark, the stateless person has to raise their statelessness during the interview. Moreover, the burden of proof lies, by and large, with the applicant themselves. In contrast to UNHCR's guidance on the shared burden of proof in establishing statelessness, the SMA note in their guidance to asylum seekers:

*It is your responsibility to prove your identity.* This means that you must present documents that prove what your name is, when you were born *and your citizenship*. This document must also include a photograph and be issued by an authorised authority. [Emphasis added]. (Migrationsverket, 2016h)

Further increasing the barriers faced by refugees in proving their statelessness, the SMA place restrictions on the use of documentation issued by certain states or authorities in proving identity. These include people with documents from Afghanistan, Iraq, Somalia, Eritrea and 'stateless Palestinians' (Migrationsverket, 2016b). All of the above are countries/authorities with known stateless populations or with nationality law, or the implementation thereof, which sees the creation and perpetuation of statelessness.

SMA caseworkers initially rely on information or documentation that the individual can provide. To supplement this, they can draw on several other sources, such as their own background knowledge on the situation in the county, COI on the LIFOS database, other external sources and language analysis for the determination of origin (LADO). Caseworkers can also turn to either the *Migration Handbook*, produced and continuously updated by the SMA, legal positions (*Rättsligt ställningstagande*) made by the legal team of the SMA, or rulings of the Migration Board of Appeal.

The *Migration Handbook*, at the time of writing, did not include a definition of a stateless person, person with 'unknown citizenship' or whose 'citizenship is under investigation' (Migrationsverket, 2015a). Meanwhile, only 27 legal positions of the SMA available for caseworkers for guidance included a reference to statelessness, as of October 2016 (LIFOS, 2016). While these detail law and policy positions on individual cases of stateless Syrian and Palestinian

refugees, as well as how to record country of origin on stateless refugees' applications for a residence permit, no actual detail on how statelessness, 'unknown citizenship' or 'citizenship is under investigation' are to be identified or categorised was given.

The past decisions of the Migration Board of Appeal are the other means by which caseworkers can access information on how to determine statelessness. However, based on a review as of October 2016, this only related to individual cases and did not provide comprehensive guidance on how stateless should be identified in the asylum procedure.

With regard to the LIFOS database in Sweden, which provides caseworkers with information and guidance upon which to make better informed decisions, it only provides information on the major causes of statelessness in *some* states, including Syria, though this is not presented thematically (LIFOS, 2016). This information on statelessness on LIFOS is far from comprehensive in terms of providing caseworkers with the information they need to be able to identify statelessness globally, or even for the countries of origin of a significant number of asylum seekers arriving in Sweden. Further to this, research has suggested that the use of LIFOS by SMA caseworkers varies considerably, as discussed in Helge Flärd's report 'The Use, Misuse and Non-Use of Country of Origin Information in the Swedish Asylum Process' (Flärd, 2006).

Unlike Denmark, if the stateless refugee in Sweden has their nationality incorrectly recorded or their statelessness is not accepted by the SMA, they cannot appeal the nationality assessment specifically (Migrationsverket, 2016a). Due to the lack of law and policy that the SMA have to work with in identifying statelessness amongst refugees, it is likely that some stateless refugees have had their statelessness inaccurately assessed. UNHCR (2016) also noted that this lack of law, policy and standardisation of statelessness categorisations means that individuals can have different nationality statuses recorded in the Migration Agency Register and the Population Register in Sweden. This can have negative consequences for an individual in their ability to prove their identity when they apply for naturalisation, as will be discussed below.

### *Criteria for Naturalisation: Resolving Statelessness*

While the UNHCR report *Mapping Statelessness in Sweden* did not differentiate between the naturalisation of refugee and non-refugee stateless people, it did recognise that a relatively low number of people recorded as stateless in Sweden had managed to acquire Swedish citizenship, noting that the reasons behind this required further research (UNHCR, 2016, p. 71). The Swedish Citizenship Act details the criteria by which a foreigner can become a

Swedish citizen, following the *hemvist* principle.<sup>8</sup> Section 11, sets out the criteria for a stateless person or a stateless refugee to be naturalised, which require that the applicant has 1) established their identity, 2) is eighteen years old, 3) holds a permanent residence permit (or permanently resides legally) in Sweden, 4) has resided in Sweden for five years (four for refugees or stateless people), and 5) has led and can be expected to lead a respectable life (*ibid*). This provision was a useful means of ending both the need for protection as a refugee and a person's statelessness, as previously refugees were granted permanent residence, which was, effectively an automatic pathway to citizenship. Further to this, for those with residence they may be able to acquire Swedish citizenship after three years if they are married or in a registered partnership with a Swedish citizen and have lived with them for two years (Migrationsverket, 2017). However, if the individual has been in Sweden under an incorrect identity, or "impeded" their deportation, it may "harm... the possibility of obtaining citizenship after three years" (*ibid*).

The Citizenship Unit of the SMA *can* undertake an assessment of nationality or statelessness of the applicant for naturalisation. However, the Citizenship Unit "does not follow any specific guidelines when determining statelessness, instead each case officer is expected to be able to make the determination based on the available information regarding the applicant and the nationality laws of relevant countries" (UNHCR, 2016, p. 41). As mentioned previously, stateless people may face obstacles in proving their identity. Simultaneously, the Citizenship Unit of the SMA does not have the sufficient law, policy and guidance to ensure that their identity/credibility assessments allow for accurate, fair and transparent determination of statelessness.

The evidentiary benchmarks for proving ones' identity is higher in the naturalisation procedure than during the asylum application, as Bernitz (2013, pp.2-3) describes:

As to the first naturalization requirement, that the applicant can prove his or her identity, there are rather strict guidelines in practice. The proof of identity requirement has been tightened up over the years. Exceptions are possible, but only in certain situations. The identity may be proven by showing the national passport in the original *or* showing an identity document in the original *or*, if that is not possible, a close relative attesting to the applicant's identity... Original driving licenses and birth certificates are not normally accepted as proof of identity.

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<sup>8</sup> "Swedish [naturalisation] law requires residence under the juridical institute of *hemvist* for the last five years. The principle of *hemvist* is specific to Sweden, and implies that the individual has a strict subjective purpose of continuous residence, seeking regular employment and setting up a permanent home" See, Seland, G. B. a. I., 2010. Citizenship policies and ideas of nationhood in Scandinavia. *Citizenship Studies*, 14(4), pp. 429-443

Even where the law seeks to ostensibly facilitate access to citizenship for certain stateless people, the problem of establishing identity remains. For example, those who can naturalise through a notification procedure, rather than through the application procedure, have to be 1) aged between 18 to 21 years old, 2) be stateless, 3) have been in Sweden since they were 15 and 4) hold a permanent residence permit. The applicant must have held a permanent residence permit at the age of 15 to qualify, therefore if their identity had yet to be established at this time, they would not qualify for naturalisation by notification, and would have to go through the more demanding naturalisation by application (Migrationsverket, 2016e). Similarly, it is unclear how the applicant would prove they are stateless, given the lack of statelessness determination procedure and the lack of mechanisms to appeal the incorrect assessment of nationality by the SMA.

Section 12 of the Act on Swedish Citizenship foresees the potential barriers some people may face in proving their identity when applying for naturalisation, allowing for exceptions if the person has been domiciled in Sweden for eight years and the information about their identity is credible (UNCHR, 2016). Any period of time the applicant has spent in Sweden with an incorrect identity is not counted towards the period of residency (Bernitz, 2013). Given that stateless refugees cannot appeal decisions about their identity, this can lead to a situation of prolonged statelessness if the SMA have incorrectly assessed the person's statelessness.

### **The Temporary Asylum Law in 2015**

Temporary restriction on the possibility of being granted a permanent residence permit in Sweden came into force in late 2015. Previously anyone granted a residence permit as a refugee, as a person in need of subsidiary protection or as a person otherwise in need of protection, before the 20<sup>th</sup> of July 2016 received a permanent residence permit (Migrationsverket, 2016d). From this date however, those in need of protection as refugees only receive temporary residence permits valid for three years.<sup>9</sup> There are exceptions to this rule however. Unaccompanied minors and families with children under the age of 18 who are in need of protection are still to be granted permanent residence permits if they submitted an application for asylum before the 24<sup>th</sup> of November 2015. With regard to the extension of the temporary residence permits the SMA state that "If the person still has grounds for protection when their residence permit expires, they can be granted an extension of their

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<sup>9</sup> Those who are granted subsidiary protection receive a permit for 13 months, extended from the original 12 months to allow for access to certain social services, though they are not within the scope of this research.

residence permit in Sweden. If the person can support him/herself, they can be granted a permanent residence permit” (*ibid*).

While the temporary law was a response to concerns related to the increased numbers of asylum seekers, the SMA have been explicit in what this means with regard to these new arrivals ability to naturalise as Swedish citizens in the future. Due to the requirement that the applicant for citizenship has a permanent residence permit “This [temporary measure] means that the large number of asylum seekers who came to Sweden last autumn [2015] can only become Swedish citizens in a few years, *providing they have permanent residence permits*” [emphasis added] (Migrationsverket, 2016c).

In the past, the requirement to hold a permanent residence permit for naturalisation has been successfully challenged (Migrationsöverdomstolen, 2008). In this case it was decided that the applicant had intended to permanently stay in Sweden from the date of application for asylum, even though the applicant only received temporary residence. This was because at the time, an application for asylum was an application for permanent residence, thus it was successfully argued that it was always his intention to permanently reside in Sweden. However, refugees who have arrived after the temporary law was introduced are not applying for permanent residence, but only temporary residence. Thus, it remains unclear what the impacts of this temporary asylum law will be on refugees’ ability to acquire citizenship if they are unable to acquire permanent residence.

The temporary asylum law essentially could put citizenship further out of reach for refugees granted this temporary status, eroding the usefulness of Section 11 of the Swedish Citizenship Act, which saw many refugees (stateless or otherwise) naturalised after four years. Those with temporary residence permits now have certain criteria to meet to secure permanent residence, including self-sufficiency or educational attainment (Migrationsverket, 2016d). This is essentially the introduction of new naturalisation criteria specifically targeted at refugees who arrived after the 20<sup>th</sup> of July 2016, except for unaccompanied minors or families with minors. This is similar to the Danish law which restricts access to citizenship in part through restricting access to permanent residence permits.

Given that Sweden does not grant the right of residence to a person based solely on a person’s statelessness, such restrictions on access to permanent residence could lead to some stateless refugees seeing their right to temporary protection cease, though without being offered any other form of status. This will present Sweden with a new challenge. While previously all refugees received permanent residence, now the authorities will have to begin to consider cessation of

refugee status for some of those with temporary residence, and to ensure that this is done in line with the demands of the cessation provisions for stateless refugees in the 1951 Convention. The wording of the above SMA policy position, only notes the extension of the temporary permit if there continue to 'be grounds for protection'. However, Sweden, in contravention to its obligations under the 1954 Convention does not consider statelessness as grounds for protection. Further to this, the 'grounds for protection' must include consideration of the stateless refugee's ability to return to their country of previous habitual residence, if Sweden is to meet its obligations under the 1951 Convention.

If this is not managed carefully, stateless refugees may find themselves in legal and administrative limbo, with no status and being unable to return to their country of previous habitual residence. This uncertain status, which UNCHR warns against, and the consequences of this can be understood by referring to the literature on those who occupy a 'state of deportability', or who fall into the deportation gap in Sweden (see DeBono *et al*, 2015).

## Summary

With regard to how law and policy related to identifying statelessness in the Danish and Swedish asylum systems, or addressing it following the acceptance of a refugee, contribute to, or address, the situation of indefinite statelessness for stateless refugees, both states can be seen to face some common challenges and gaps. Neither Denmark or Sweden has established a definition of statelessness in their law or policy and their assessment of statelessness cannot be considered formal stateless determination procedures (SDP). Indeed, neither state provides their migration agencies with policy and guidance on the assessment of statelessness. The substantial discretion in assessments resulting from the lack of guidance has led to many people being registered with various nationality statuses (for which there is also not guidance or standardisation), and some with incorrect nationalities. These incorrect assessments can be a barrier to securing permanent residence and eventually naturalisation, as they put the credibility of the applicant's identity in question. Thus, they may lead to the prolonged or indefinite statelessness in both Denmark and Sweden.

With regard to the initial identification of statelessness in Denmark and Sweden, it is the responsibility of stateless refugees to raise their statelessness during the asylum procedure. This is problematic as it assumes the person knows of, *and can prove*, their statelessness. There is also no agreed shared burden of proof between the individual and the DIS or SMA. Proving statelessness, can be very difficult for any stateless person. However, stateless

asylum seekers and refugees may not be able to contact the country from which they fled to prove their statelessness to the SMA or DIS.

In Sweden, unlike Denmark, refugees cannot appeal an incorrect decision on their nationality or statelessness. Proving statelessness is made more problematic as in Sweden there are restrictions on the use of documentation from certain countries/authorities who are known to host large stateless population. The inability to challenge incorrect assessments may lead to difficulties in securing a permanent residence permit or naturalisation, as both require a confirmation of the identity of the applicant. Further to this, residence in Sweden based on an incorrect identity is not considered to count towards meeting the residency requirement for naturalisation. Further to this only those with permanent residence can benefit from the provisions which allow those whose identity has not been established to naturalise. However, securing permanent residence itself requires that the applicant's identity has been established.

The impacts of the temporary asylum laws in the two states, with regard to barriers stateless refugees face in acquiring citizenship, vary. Given the high criteria for acquisition of permanent residence in Denmark, and following this, naturalisation, the temporary asylum laws will likely have little impact on increasing instances of indefinite statelessness. The introduction of the temporary asylum laws in Sweden will however have a more significant impact with regard to the prolongation of statelessness amongst refugees in the country. This is a result of the previously useful provision on facilitated naturalisation for refugees being undermined with the introduction of criteria for refugees who have received temporary residence status to meet in order to acquire a permanent residence permit, which would then lead to citizenship.

The lack of SDP in the asylum procedures, or provisions in the Aliens Act that match the contents of Article 1C of the 1951 Convention on cessation of refugee status for stateless refugees is a significant concern in both Denmark and Sweden. There does not seem to be a consideration of the stateless refugees' ability to return to their country of previous habitual residence, and an assessment of the rights they would receive upon return, contrary to UNHCR guidance. In addition to this neither state grant a protection status based solely on a person's statelessness, in line with their obligations under the 1954 Convention. This would provide a safety net to avoid stateless former refugees being left with an uncertain status, in arbitrary detention or being caught in the 'deportation gap'.

With regard to the broader ramifications of the findings presented here, it is not possible to make generalisations on the impact of temporary asylum laws in

other states. This is due to the unique law and policy frameworks within which state's asylum systems operate. However, by and large, the majority of states do not identify the statelessness of refugees, or do not do so in conformity with international standards and procedural safeguards that are required in statelessness determination. This is problematic as it may not be the case that stateless refugees can find solutions to their statelessness under the national legal frameworks on asylum and nationality. For example, where states require that refugees prove their identity or nationality to acquire citizenship, similar issues as found in Denmark and Sweden will likely arise. Where refugees are required to prove they have renounced their former nationality in order to acquire the nationality of the state of asylum, this would be an insurmountable barrier for a stateless applicant. Therefore, the normative claim that for stateless refugees solutions should be found under refugee law, is based on the questionable assumption that the statelessness of a refugee is either inconsequential, or will not impede to pathway to citizenship. What that Danish and Swedish examples show, is that this is not the case in these two cases, and arguably in many other states receiving stateless refugees.

A combination of the lack of identification of statelessness of refugee, and the possibility of them being unable to resolve their statelessness through the acquisition of nationality, is especially troubling when we consider this in relation to state compliance with Article 1C of the 1951 Convention. Indeed, if states are to ensure that stateless refugees do not lose their refugee status in contravention of the 1951 Convention, their statelessness must initially be identified and their statelessness factored into considerations of cessation of refugee status. Given that one in ten refugees are believed to be stateless, and the lack of law, policy or knowledge about statelessness globally, there is an urgent need to assess national asylum systems of states in order to identify gaps in law, policy or practice that would see stateless refugees remain indefinitely stateless.

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