16 December 2020

Ongoing challenges in accessing leave to remain in the UK as a stateless person

Introduction

UNHCR published an audit of the UK Home Office procedures for stateless applicants on 16 December 2020. About 3.5% of applicants succeed in obtaining a residence permit through the procedure.

The University of Liverpool Law Clinic and Asylum Aid issue this briefing to share our experiences of advising and representing applicants for leave to remain in the UK as a stateless person. We emphasize the need for improvements, as identified in the recent UNHCR audit. There are delays, flaws in decision making, and a lack of procedural safeguards.

In 2013, the UK introduced a statelessness determination procedure through Part 14 of the Immigration Rules, along with guidance which explains how Home Office caseworkers should apply the Rules. Applications made under Part 14 ('statelessness applications') are distinct from other types of applications that may be suitable for some stateless persons; for example, stateless persons who are also refugees normally apply for refugee status, rather than leave to remain as stateless persons. Official figures are not available but we estimate that about 7,000 people have applied and less than 200 had received a permit by the end of 2020.

Since Part 14 was introduced, our organizations have been advising, assisting and representing stateless persons using the procedure. We meet regularly with Home Office officials to discuss how to address challenges in statelessness decision-making and other issues relating to the status of stateless persons in the UK. We have previously authored briefings, reports and other resources relating to this issue (listed

at the end of this briefing). We also consult regularly with other legal practitioners assisting stateless people in the UK. Examples here are not necessarily from our own clients' experiences.

We are happy to acknowledge the progress the UK has made in addressing statelessness, and in particular the importance of introducing a statelessness determination procedure. Our experience of negotiating the procedure is that while the Home Office has made some improvements in its policies and procedures since 2013, there is room for further significant improvement in the handling of stateless people's applications.

This briefing addresses three main issues relating to statelessness applications:

- Flaws in Home Office decision-making
- Delays in Home Office issuing decisions
- The lack of key procedural safeguards in the statelessness determination procedure

Delays in Home Office decision-making on statelessness applications

Although we are aware that the Home Office has made some efforts to reduce delays in issuing decisions on statelessness applications, particularly with respect to applications involving children, unfortunately, unreasonably long delays continue to occur in some cases.

The Home Office has declined to set a specific timeframe for issuance of decisions on statelessness applications; however, their guidance states that:

> Wherever possible, …[caseworkers] must progress the case to conclusion within a **reasonable timeframe** and where a response is not received for a protracted period … may decide the case without waiting for a response [from a foreign government regarding a nationality enquiry]. (Home Office Instruction - Statelessness and applications for leave to remain (v 3, 2019), p 21.

We have represented and continue to represent applicants who have had to wait unreasonably long periods for a decision on their statelessness application, including, for example:

- An application submitted in May 2018, which still has not been decided.
- An application submitted in Sept 2017 received a (positive) decision in August 2019. The Home Office claimed for some time (including in appeal proceedings) that an Emergency Travel Document had been issued for the applicant in 2016; however there were no records to support this claim and the Home Office eventually apologized, in August 2020, for having claimed that such a document had been issued and admitted that gross maladministration had occurred in the Home Office handling of this case.
- Two linked applications submitted in February 2020, which still have not been decided; these are repeat applications under Part 14, following a previous flawed refusal decision.
- An application submitted in 2015 which the Home Office refused 3 times for flawed reasons, which ignored relevant parts of an expert report. The initial decision was made in August 2017, and subsequent refusals were made in June and December of 2018. The Home Office found in two administrative review proceedings that errors had been made in previous decisions, and finally granted leave to remain as a stateless person in February 2019 (after the applicant alleged that the Home Office's handling of his case constituted maladministration).

- An applicant applied in March 2016 for statelessness determination and for a deportation order against him to be revoked on the basis that deportation was impossible due to his statelessness. At the time there was no agreed procedure for such cases. None was agreed until August 2018. In February 2019 the Home Office refused to recognize the applicant as stateless (even though it had issued him a document in 2011 stating that he was stateless). A new decision was not made by the statelessness team until November 2020 – 22 months after the first decision. Disappointingly, in response to a complaint about the time it was taking, the Home Office blamed delays due to COVID, which were only relevant from March 2020.

Flaws in Home Office decision-making on statelessness applications

- An application was refused in February 2020 where the Home Office made an incorrect assessment of the evidence provided. The Home Office made factual errors in their assessment of evidence and did not invite the client for an interview before issuing a refusal, despite submissions by the applicant regarding original evidence that could be provided at an interview. An administrative review found that the original decision maker had made an error in assessing the evidence and that a new decision should be issued.
- A decision in February 2019 stated that the applicant could contact his mother, who was on record as having died in 2009; and accused the applicant of hiding his 'true identity' to remain in the UK, in spite of the Home Office file showing that he had previously applied to return home, when his passport was assumed to be valid, in 2008, and had gone willingly to the airport. He has since been recognized as stateless – which means he has been stateless since 2008, including a period of over 3 years in immigration detention.
- In June 2019 a rapid decision based on the fact the applicant was recorded as holding a passport. The Home Office's own file recorded that it had already accepted that the national authority had confirmed that the passport had been improperly obtained by a relative of the applicant and that the applicant was not considered by them to be a national (which is the legal definition of a stateless person). A new representative had to point out the error and the refusal was withdrawn immediately, but without acknowledging that the Home Office had always had relevant information in its own files. This is particularly concerning if the Home Office will generally refuse applications under their triage system where the applicant has previously held a passport, without examining the file. Applicants without a representative might assume that the Home Office decision maker would already know all relevant information about them, and not point it out.

The lack of procedural safeguards

UNHCR recommends three important procedural safeguards that, if introduced in the UK, would bring significant improvements in the statelessness determination procedure:

1) **Time frame for decisions: UNHCR's standard is that an applicant should receive a decision on their statelessness case within 6 months of the application in most cases and within 12 months in complex cases**

Serious delays - examples provided above - have a negative impact on the people waiting for the decision. If they are destitute and also a failed asylum seeker, they may get shared accommodation on a no-choice basis; and £37.75/week under s4 Immigration and Asylum Act 1999 (detailed guidance linked below). Frequently our clients have already spent years living in the UK without permission to work, due to their statelessness, and are already in long term poverty, sometimes homeless, with associated health problems and other indicators of exclusion. These factors have an obvious and harsh impact on

stateless persons' well-being, dignity, and private life and can negatively affect their ability to integrate if they are granted leave to remain.

2) **Legal aid: UNHCR recommends that legal aid should be accessible for statelessness applications**

The lack of standard legal aid in England and Wales, together with the relatively low number of claimants, means that there is also a lack of expertise on statelessness amongst legal practitioners. Statelessness applications are very often legally and factually complex. Applicants may need interpreting or expert reports on nationality law, may need to travel to embassies and numerous legal interviews, and may need to pay for various administrative costs relating to their cases. In cases audited by UNHCR, about 50% of the applicants had a 'representative'. Of those who had representatives, 30% were granted leave to remain; and of those without, 6% were granted. The audit did not consider a strictly representative sample of cases, and thus we do not know if overall rates of grants and refusals are linked to whether an applicant has legal representation, but these figures suggest that there could be an important connection which would be worth investigating with reliable statistics. The Home Office has stated that it cannot provide statistical information on numbers/percentages of applicants with a representative.

The sample did not consider which region of the UK the applicant lived in. In Scotland and Northern Ireland, legal aid is routinely available for statelessness applications. In England and Wales, only Exceptional Cases Funding is available, which requires the adviser to investigate the case in order to make an application, and the work is not paid if the ECF application is not granted, and is paid at a fixed rate unless a certain threshold for number of hours worked is reached. Many legal aid practitioners are unable to take on such risks; it is not financially feasible without an additional funding source to ensure that a legal practitioners' time will be covered. Research via a professional information-sharing forum in 2020 revealed that fewer than 10 statelessness ECF applications have been granted (we don't know how many applications for ECF have been made). This low number tallies with our general knowledge that not many organisations are applying for ECF for statelessness applications. Again, official statistics are not available because the Legal Aid Agency does not keep statistics on the content of the law where ECF is granted.

Regarding value added by representatives, there is no suggestion that the Home Office is in any way biased towards applicants with a representative. A good representative will advise against making a poorly evidenced application and will also organise legal and factual material to help the decision maker understand the case that is being made. These two factors should increase the success rate.

3) **Right of appeal: UNHCR advises that a right of appeal to an independent body is an essential part of a robust statelessness determination procedure**

This application procedure has been available since April 2013. Initially the only way to challenge a refusal decision was by way of judicial review, which is expensive and inappropriate for a factual claim. The Administrative Review procedure – an internal review by a separate Home Office team, described in the UNHCR audit – was introduced in October 2014. The audit identifies flaws in the Administrative Review procedure, where the reviewing team falls into the same errors as the original caseworker, fails to spot the errors pointed out by the applicant, or fails to spot others that the applicant did not notice themselves. The audit shows - and our own more recent experiences confirm - that Administrative Review does not always result in correction of Home Office errors, and second decisions sometimes contain similar or identical reasons for refusal as the initial refusal. The Home Office policy instruction of November 2019 now requires a new caseworker to consider an application following a successful

Administrative Review request; a senior caseworker must review post-administrative review decisions. We maintain strong concerns, based on our cases, and the examples provided above, that the administrative review procedure is not an adequate legal remedy.

Recommendations

To address the shortcomings identified above, we recommend:

- Introducing a statutory right of appeal
- Introducing standard legal aid for statelessness applications in England and Wales
- Introducing a requirement for Home Office to issue a decision on statelessness applications within 1 year of the application, or to grant an interim status to the applicant and the right to work until a decision on the statelessness application is made
- Advanced training on statelessness for Home Office decision-makers, with regular updates and consultation on training materials with key stakeholders
- An inspection of Home Office decision-making on statelessness by the Independent Chief Inspector of Borders and Immigration in 2021, with findings to be made public.

Key resources

- UNHCR Audit Report [link to follow on 16th December]
- European Network on Statelessness, The Statelessness Index: UK Section (last updated March 2020)
- Consonant, Liverpool Law Clinic, European Network on Statelessness, Urgent Reforms Needed to Improve UK's Approach to Statelessness, July 2019
- J Bezzano and J Carter, *Statelessness in Practice: Implementation of the UK Statelessness Application Procedure* (University of Liverpool Law Clinic, 2018)
- Dr Sarah Woodhouse and Judith Carter, *Statelessness and Applications for Leave to Remain: A Best Practice Guide* (ILPA, 2016)
- Asylum Aid and UNHCR, *Mapping Statelessness in the United Kingdom* (2011)
- The Statelessness Archives, Free Movement [various legal blog articles]
- Joint Council for the Welfare of Immigrants contribution to Justice Committee inquiry into the future of Legal Aid, October 2020: https://committees.parliament.uk/writtenevidence/12983/default/

Home Office documents

- Immigration Rules, Part 14 (introduced 2013, amended 2019)
- Home Office Instruction - Statelessness and applications for leave to remain (v 3, 2019)
- Civil Legal Aid (Remuneration) Regulations 2013 (as amended), Schedule 1: https://www.legislation.gov.uk/uksi/2013/422/schedule/1; Fixed fee is £234 (compared to £413 for asylum cases); hourly rate once 3 times the fixed fee has been carried out, is approximately £55/hour.
- Asylum support, section 4(2): policy and process: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682495/asylum-support-section-4_2_-policy-and-process-v1.0ext.pdf.