

Assessment of statelessness as part of a person's identity

RS/003/2023



Adoption decision: RA/017/2023			Version 1.0
Decision date: 27 March 2023			
Applies to: whole Agency			
Applies as of: 27 March 2023			

Date for revision	Version	Sections revised	Decision reference
state date	number	content	XX/XXX/XXXX
state date	number	content	XX/XXX/XXXX

Facts about legal position papers

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Contents

1. Background, purpose and scope	3
2. Definition of statelessness	4
3. Investigation and assessment	5
3.1 Acquisition of citizenship	6
3.1.1 The principle of descent and the territorial principle	7
3.1.1.1 Acquisition of citizenship through a parent	7
3.2 Standard of proof and burden of proof.....	8

1. Background, purpose and scope

There is no definition of the term stateless in Swedish national law¹. Nor is there any common guidance on how to carry out the assessment of whether a person is stateless. There are also no rules about what supporting documentation or what standard of proof is required to establish that a person is stateless². Sweden does not have any special procedure³, either, for the determination of statelessness, and nor is any special decision made that a person is stateless⁴. So the assessment of statelessness cannot be appealed separately. The term stateless is, however, used both in the Aliens Act (2005:516) and in the Swedish Citizenship Act (2001:82)⁵.

When a person applies for asylum or a residence permit on some other ground, the general rule is that the Swedish Migration Agency must, when assessing the person's identity, consider whether the person has a citizenship⁶. This assessment can result in a person being assessed as stateless. Statelessness can also be of importance regarding the granting of travel documents⁷. When a person makes a notification of or applies for Swedish citizenship, the Migration Agency must also consider whether the person is stateless, since statelessness can, in itself, result in more generous conditions⁸.

The absence of more detailed regulations and advice or guidance concerning statelessness may generate inconsistency in the assessment of whether a person is stateless⁹. Not only internally at the Migration Agency, but also between agencies¹⁰. At the Migration Agency there are, for instance registrations that persons are stateless, but also that a person's citizenship is unknown or under investigation.

¹ The UNHCR has given Sweden criticism for not having a definition, see e.g. [UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally](#), 16 September 2022, section 2.6, p. 6.

² Cf. [UNHCR \(2016\). Mapping statelessness in Sweden](#), p. 75.

³ Iceland has, for example, a special procedure, a 'stateless determination procedure', to establish whether a person is stateless. If a person is assessed as being stateless in that procedure, the assessment is binding on other agencies and a special decision is made about their statelessness as such. When a person is stateless, this also means that the person can be granted a residence permit on account of their statelessness. Cf. Article 39 of [Iceland's Aliens Act](#). Cf. also [UNHCR Handbook on Protection of Stateless Persons](#), 30 June 2014.

⁴ The UNHCR recommends that Sweden introduce a stateless determination procedure, see [UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally](#), 16 September 2022, section 2.6. pp. 6 f.

⁵ See, for example, Chapter 4, Section 1, third paragraph, Chapter 4, Section 2, third paragraph, Chapter 4, Section 4 of the Aliens Act and Sections 6 and 8 of the Swedish Citizenship Act.

⁶ According to case law, in cases concerning Swedish citizenship identity is considered to consist of the applicant's name, date of birth and, as a general rule, citizenship (Govt Bill 1997/98:178 p. 15). The same definition applies to cases concerning residence permits based on family ties (see MiG [\[Migration Court of Appeal Reports\] 2011:11](#)) and in asylum cases (cf. MIG 2014:1).

⁷ Cf. Chapter 4, Section 4 of the Aliens Act

⁸ For example, a stateless person only needs four years of habitual residence in Sweden, instead of five years, under Section 11 of the Swedish Citizenship Act.

⁹ Cf. [UNHCR \(2016\). Mapping statelessness in Sweden](#), p. 75.

¹⁰ The Swedish Tax Agency is one such other agency. The Swedish Tax Agency has, for example, to register in the population registration database that a person has foreign citizenship. The Swedish Tax Agency can register a person with one or more foreign citizenships or register that the person is stateless. Cf. Section 1 of the Population Registration Act (1991:481) and Chapter 2, Section 3, first paragraph, point 8 of the Act on the processing of personal data in the Swedish Tax Agency's population registration activities (2001:182).

The Migration Agency does not have a common process and regulations for establishing statelessness. Nor are there any common provisions about proof. The purpose of this legal position paper is to define the term stateless and to provide guidance around how to conduct the assessment of statelessness when a person's identity is being investigated.

This legal position paper does not provide guidance around individual assessments of statelessness on the basis of different countries' citizenship legislation or about questions concerning statelessness that are directly linked to the assessment in an asylum process of what need a person may have of protection.

2. Definition of statelessness

One important starting point in Swedish law and in case law in the area of citizenship is the avoidance of statelessness¹¹ and that everyone has the right to a citizenship^{12, 13}. This is also the basis for several international conventions¹⁴ that Sweden has undertaken to follow¹⁵. Sweden has acceded to the 1954 UN Convention relating to the Status of Stateless Persons¹⁶ (called the Convention below). The Convention contains a definition of the term "stateless person":

For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law¹⁷.

This definition is considered to be international customary law¹⁸. The Convention only covers persons who are stateless *de jure*, i.e. stateless under the operation of the law. Persons who are stateless *de facto*, persons who have a citizenship but are not under the protection of the country of their citizenship, are not covered by the Convention¹⁹.

As mentioned previously, Swedish law does not have a national definition of the term stateless, but the Migration Agency applies the definition in the 1954 Convention.

Section 6 of the Swedish Citizenship Act contains a special provision on the acquisition of Swedish citizenship for stateless children born in Sweden²⁰.

¹¹ Govt Bill 1999/2000:147 pp. 15 and 35.

¹² See Article 15 of the [UN Universal Declaration of Human Rights](#) and Article 4 of the 1997 European Convention on Nationality (SÖ [Swedish Treaty Series] 2001:20).

¹³ The most central international agreement is the 1961 UN Convention on the Reduction of Statelessness (SÖ 1969:12). Article 1(1)(a) of that Convention provides that a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.

¹⁴ Cf. Article 7 of the UN Convention on the Rights of the Child, Article 15 of the UN Universal Declaration of Human Rights and the Preamble to and Articles 4 and 6(2) of the 1997 European Convention on Nationality (SÖ 2001:20).

¹⁵ Govt Bill 1999/2000:147 p. 35.

¹⁶ Sweden's International Agreements 1965:54.

¹⁷ Article 1.1 of the 1954 Stateless Convention

¹⁸ [UN International Law Commission, Draft Articles on Diplomatic Protection with commentaries, 2006](#), p. 48 f.

¹⁹ Govt Bill 1964:179 pp. 4 and 11.

²⁰ Section 7, first paragraph, point 2, Section 8, second paragraph and Section 11, paragraph 4 b of the Swedish Citizenship Act also contains special conditions for stateless persons.

The legislative history makes it clear that the provision only becomes applicable if it is *clear* that the child really is stateless and that a child whose citizenship is *unknown* is not covered by the provision²¹. The child must also be involuntarily stateless, i.e. through no fault of their own or their parents. Certain countries²² have, for instance, provisions concerning release from citizenship to the effect that a person can apply to be released from their citizenship. The fact that a child can, through a simple procedure, obtain citizenship of a country, e.g. by its parents' registration of the child's birth with a competent foreign authority, does not, however, affect the identity assessment of whether or not a child is to be considered stateless²³. These statements in the legislative history will guide the Migration Agency's assessments of statelessness when statelessness as such must be *proved*²⁴.

In a situation where a person has themselves, or through their custodians (if the person is a child), renounced their citizenship and thus personally "made" themselves stateless by their own fault, the person is still to be considered stateless according to the definition in the 1954 Convention²⁵. However, on the basis of the above statements in the legislative history²⁶, the person does not enjoy the privileges that stateless persons have in the Swedish Citizenship Act.²⁷ Such a person would, for example, be required to fulfil the requirement of five years of habitual residence in Sweden, instead of the lower requirement of four years that applies to stateless persons, to be able to become a Swedish citizen on application²⁸.

3. Investigation and assessment

Statelessness as such can be of decisive importance for the individual and it is therefore important that a person's potential statelessness is investigated thoroughly²⁹. If we do not investigate statelessness with sufficient care, a person can, for instance, miss out on being a Swedish citizen³⁰. In each case concerning an individual, a specific assessment must be made of whether a person is stateless and that investigation should assess, among other evidence, the information, documents and other documentary evidence provided by the applicant and examine relevant country-specific citizenship legislation.

As a first step in the assessment of whether a person is stateless, an investigation must be made of whether the person has a citizenship³¹. In such an assessment the person's ties to a country or several countries are particularly important.

²¹ Govt Bill 1999/2000:147 pp. 38 f.

²² As an example, it can be mentioned that Sweden has rules about release from citizenship. A release decision cannot, however, be issued if the person would thereby become stateless, cf. Section 15, second paragraph of the Swedish Citizenship Act.

²³ Govt Bill 1999/2000:147 p. 75.

²⁴ Cf. section 3.2.

²⁵ Cf. [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 51.

²⁶ Govt Bill 1999/2000:147 p. 75.

²⁷ Cf. Section 6 and also Section 11, which sets up a requirement of four years of habitual residence for a stateless person instead of five years.

²⁸ Cf. Section 11, Sections 4 b and 4 c of the Swedish Citizenship Act.

²⁹ See also section 3.2.

³⁰ Cf. Section 6 of the Swedish Citizenship Act, which means that a stateless child born in Sweden can become a Swedish citizen if the child has a permanent residence permit and has their habitual residence here.

³¹ The [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 84 sets out a non-exhaustive list of proof that can be relevant in the assessment of statelessness.

The assessment is limited to the country or countries with which the person has relevant ties, e.g. through birth in a country, to their parents' citizenship or previous habitual residence³². It can therefore be relevant to be aware of fundamental principles concerning the *acquisition* of citizenship in particular. It is, however, important to bear in mind that some countries also apply rules about *loss*³³ of, *release*³⁴ from and/or *withdrawal* of citizenship in certain circumstances. If a person has lost³⁵ or been released from their citizenship or had it recalled, this could mean that the person is stateless, even though the person was previously a citizen of a country³⁶.

If a person is halfway through an application procedure for citizenship, this does not mean that the person has a citizenship. The same applies to a person who could become a citizen of a country through a simple procedure. In the same way, a person who is in a procedure to be released from their citizenship cannot be said to be stateless, either³⁷.

To sum up, there may be several circumstances that may have affected a person's nationality, and it is important to investigate which such circumstances are in place in each case concerning an individual in which a person's statelessness is to be assessed.

3.1 Acquisition of citizenship

How a citizenship is acquired is decided by different countries' citizenship legislation³⁸. A citizenship can, for example, be acquired automatically at birth³⁹, through adoption⁴⁰ or through parents' marriage⁴¹. A citizenship can also be acquired after a decision through, for example, an application to become a citizen of a particular country. The citizenship legislation of some countries also means that citizenship is transferred from one person to another person through marriage⁴².

If there is a decision granting citizenship of a country, the assessment should rarely be complicated. It can, however, be more problematic when it comes to considering whether there has been an automatic acquisition, and/or whether anything has happened since then that means that the person is now stateless, e.g. loss or withdrawal.

³² See [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 18.

³³ Cf., for example, loss through a time bar in Section 14 of the Swedish Citizenship Act.

³⁴ Cf., for example, Section 15 of the Swedish Citizenship Act.

³⁵ In Sweden there are provisions on the loss of Swedish citizenship in Section 14 of the Swedish Citizenship Act. However, Swedish citizenship can never be lost if its loss would lead to the person becoming stateless (fourth paragraph); other countries may, however, have other provisions that make the person stateless.

³⁶ Cf. [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 25.

³⁷ Cf. [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 50.

³⁸ It does happen that countries do not follow their own citizenship legislation to the letter, and it may therefore be necessary to make an assessment of whether a person really is stateless even though the legislation of the country in question expresses that the person is a citizen of that country. In such a situation, the applicant should have the burden of proof, compare what is said in section 3.2 below. See also [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), pp. 23 and 24.

³⁹ Cf. Section 2 of the Swedish Citizenship Act.

⁴⁰ Cf. Section 4 of the Swedish Citizenship Act.

⁴¹ What is called legitimation. Cf., for example, the previous wording of Section 4 of the Swedish Citizenship Act and point 2 of the transitional provisions to the Swedish Citizenship Act (Swedish Code of Statutes (SFS) 2014:481).

⁴² Cf., for example, Iran's citizenship legislation, Article 976, point 6 of [the Civil Code of the Islamic Republic of Iran](#).

3.1.1 The principle of descent and the territorial principle

Two principles are usually referred to in cases of automatic acquisition of citizenship: the principle of descent⁴³ and the territorial principle⁴⁴. The principle of descent means that the parents' citizenship is decisive for what citizenship a child receives. The territorial principle, in turn, means that a child receives citizenship of the country where it is born⁴⁵. The assessment of whether a child has become a citizen of a country through the principle of descent is often likely to be more complicated since it involves an assessment of whether a parent can be considered to have transferred their citizenship to their child or children.

When a citizenship is acquired automatically, no documents are normally issued as part of the process. In such a situation, however, a birth certificate can often function as proof of a person's birth and of who their parent or parents are. This information can then, along with the relevant citizenship legislation, be proof that the person has acquired citizenship of a country⁴⁶.

A point common to both these principles is that it is important to investigate what the relevant citizenship legislation was like when the child was born, since that is generally the point in time when the citizenship is acquired automatically.

3.1.1.1 Acquisition of citizenship through a parent

If we have to make an assessment of whether a child has acquired foreign citizenship from a parent, it is important to investigate whether the parenthood applies in the parent's country of citizenship and whether it follows from that country's laws that the child acquires citizenship from that parent⁴⁷.

It may, under the laws of the country, be important what kind of parental relationship is involved. For instance that under the laws of the country the child acquires citizenship from its mother, but not from its father, or the other way round. It may also be important whether or not the parents are married and whether, in that case, the marriage is valid in the country concerned. In some countries⁴⁸, children born outside marriage are, for example, not considered to have a father, even though there is an identified man who is said to be the biological father of the child. In such a case the child cannot acquire the identified father's citizenship.

If the child does not acquire citizenship of its parent's country of citizenship, the child may be stateless, even though the child's parents are not. In a situation when we do not know whether parenthood has been established or the parent cannot show that the child has acquired citizenship of a country, it has not been established⁴⁹ that the child is stateless. The child could actually have a

⁴³ Is also called the nationality principle or "*jus sanguinis*, right of blood".

⁴⁴ Is also called the domicile principle or "*jus soli*, right of soil".

⁴⁵ Sandesjö and Björk, *Medborgarskapslagen med kommentarer [The Swedish Citizenship Act with commentary]*, fourth edition, p. 24.

⁴⁶ Cf. [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), p. 35.

⁴⁷ In, for example, a situation when a child has been born in Sweden and where its parents have married here, more questions might have to be investigated. If the law of the parent's country of citizenship provides that children born in a marriage acquire citizenship from their mother, an investigation must first be made of whether the other country recognises the woman as the mother of the child. An investigation must also be made of whether the Swedish marriage is recognised. Only then can it be concluded whether the child has acquired citizenship from its mother.

⁴⁸ For example, [Somalia](#) and [Syria](#).

⁴⁹ Cf. Govt Bill 1999/2000:147 p. 38.

citizenship, even though this has not been shown⁵⁰. In such a situation, its citizenship is, instead, *unknown*.

3.2 Standard of proof and burden of proof

It has previously been mentioned that the assessment of whether a person is stateless may come up when a person applies for asylum, a residence permit on some other ground or Swedish citizenship. The question may also arise of what standard of proof is applicable and who has the burden of proof for “statelessness”.

According to case law, identity consists of the applicant’s name, date of birth and, as a general rule, citizenship⁵¹. In the Migration Agency’s assessment, the definition of identity should not exclude “statelessness” as part of the concept of identity. The fact that a person is stateless and thus does not have a citizenship is just as important a part of that person’s identity as the person having citizenship of a particular country.

The standard of proof for asylum seekers is that their identity has to be demonstrated *plausibly*⁵². In cases concerning residence permits on other grounds⁵³ and in cases concerning Swedish citizenship⁵⁴ the requirement is, however, that the identity has, as a general rule⁵⁵, to be *proved*. In notification cases concerning Swedish citizenship that do not require proven identity, but where statelessness as such is or may be decisive⁵⁶ for the acquisition of Swedish citizenship, the standard of proof is also *proved*.⁵⁷ This is because a decision granting Swedish citizenship is irrevocable⁵⁸ and can never be revoked, whatever the grounds, which means that a high standard of proof is essential. In this context, the Government has stressed that it is of the utmost importance – so as to, as far as possible, avoid Swedish citizenship being granted on account of false information – that a decision granting Swedish citizenship is preceded by a careful investigation of matters including a person’s identity⁵⁹.

In a situation where a person does not attain the relevant standard of proof and is therefore unable to either prove or plausibly demonstrate their citizenship or statelessness, the person’s citizenship must be assessed as *unknown*⁶⁰.

The fact that the standard of proof varies between different contexts depending on the type of case can mean that a person is assessed as stateless in one situation, e.g. in an asylum process where the standard of proof is plausibly demonstrated, but that their statelessness is then investigated again in a case concerning Swedish citizenship, where statelessness must instead be proved. This is an unavoidable consequence of what the legislation is like and how case law has developed.

⁵⁰ Cf., however, with what is said about different standards of proof in section 3.2.

⁵¹ Cf. Govt Bill 1997/98:178, p. 15 (Swedish citizenship), MIG 2011:11 (ties), and MIG 2014:1 (asylum).

⁵² Cf. the legal position paper on plausible identity in asylum cases, RS/031/2021 and MIG 2007:12.

⁵³ Cf. Govt Bill 1997/98:178, p. 10, Govt Bill 2005/06:72 pp. 68 f., MIG 2011:11, MIG 2012:1 and MIG 2016:6 which are about residence permits on account of ties.

⁵⁴ Section 11, point 1 of the Swedish Citizenship Act.

⁵⁵ In family reunification an assessment of proportionality has to be carried out when the applicant is unable to prove their identity in order to determine whether a lower standard of proof can be justified to the effect that their identity has to be plausibly demonstrated. Cf. RS/037/2021.

⁵⁶ Cf. Section 6, Section 7, first paragraph, point 2, Section 8, second paragraph and Section 11, point 4 b of the Swedish Citizenship Act.

⁵⁷ Cf. Govt Bill 1999/2000:147 p. 38 f. where it is stated that it has to be *clear* that the child is stateless. See also section 2 above.

⁵⁸ See Chapter 2, Article 7 of the Instrument of Government.

⁵⁹ Govt Bill 1994/95:179 p. 57.

⁶⁰ Cf. with what is said in section 3.1.1.1 above.

Even if the standards of proof are different, we should aim to ensure that statelessness is investigated thoroughly from the outset, so as to do the utmost to avoid different assessments of statelessness as far as possible at the Migration Agency.

Normally it is the person who applies for a benefit who has to prove that the conditions have been met⁶¹. So the starting point is that it is the applicant who has the burden of proof that they are stateless. In the present situation this involves proving a ‘negative fact’, that the applicant is *not* a citizen of a country. In such a situation, with the difficulties associated with proving a “non-existent” citizenship the obligation to investigate the person’s statelessness should be shared between the Migration Agency and the applicant. This means that both the Migration Agency and the individual have to gather and evaluate all the evidence to establish statelessness⁶². The Migration Agency will lead the investigation and ensure that the necessary material is received⁶³. This means, for instance, that the Agency may need to give the applicant instructions about what supplementary investigation is required⁶⁴, but also that the Agency will have to consider whether it is more appropriate to obtain the investigation in some other way, e.g. through country of origin information in Lifos⁶⁵. It is not sufficient for a person to say that they are stateless.

Swedish law applies *free evaluation of evidence*, which means that there is no restriction on the types of evidence that may be used or what evidentiary value a particular piece of evidence has⁶⁶. In principle, the court is free to assess the value of the evidence in the case and there are no rules about what value a particular type of evidence has compared with other types⁶⁷. All evidence in a case therefore has to be taken into account and an individual assessment has to be made in the specific case.

Translated from Swedish by Ian MacArthur, public translator authorised by the Swedish Legal, Financial and Administrative Services Agency for translation from Swedish to English (Stamp no 393)

Stockholm, 26 September 2023
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⁶¹ Cf. MIG 2007:45 I and II. Another principle for determining who has the subjective burden of proof when this is not stated in the relevant statute is that the person for whom it is easiest to produce the evidence has the burden of proof. Also compare the legal position paper on the standard of proof in ties cases, RS/030/2021, and the legal position paper on plausible identity in asylum cases, RS/031/2021. See also MIG 2007:24, MIG 2007:40 and MIG 2019:2 which relate to cases concerning Swedish citizenship.

⁶² Cf. [UNHCR Handbook on Protection of Stateless Persons, 30 June 2014](#), pp. 88–89.

⁶³ Cf. Section 23 Administrative Procedure Act (2017:900) and the legal position paper on the standard of proof in ties cases RS/030/2021.

⁶⁴ Cf. MIG 2007:24, MIG 2007:40 and MIG 2019:2 which relate to cases concerning Swedish citizenship.

⁶⁵ Cf. Sections 6–9 of the Administrative Procedure Act.

⁶⁶ Cf. Govt Bill 1997/98:178 p 8 and legal position papers RS/030/2021 and RS/031/2021.

⁶⁷ Cf. Chapter 35, Sections 1–5 of the Code of Judicial Procedure (1942:740) and Section 30 of the Administrative Court Procedure Act (1971:291).