What to do with rejected asylum seekers?

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What to do with rejected asylum seekers?

By Anna Lundberg

As the EU considers tougher rules for returning asylum seekers who had their application rejected, more people might be placed in detention and the possibility of voluntary return could be limited, writes Anna Lundberg.

Anna Lundberg is a professor at Linköping University in Sweden and previously an independent investigator for the Swedish government in a state enquiry about practical impediments to enforcement of expulsion decisions.

This is not news. For many years, people who do not return to their country of origin have been described as a major policy problem. Forgotten in this debate is that some of the people who have had their asylum applications rejected cannot actually return home.

The underlying reasons vary. If the person is stateless, the designated recipient country may not see any obligation to grant entry permits. There may be political reasons for a state to deny a citizen’s return; an individual’s citizenship may have been withdrawn or it may be impossible to get to the designated country or very difficult to obtain entry permits.

These “Non-Returnable Returnees” end up being legally stranded, in an uncertain position with a high risk of exploitation. In many countries, such people has no right to work and no right to emergency support.

It should be in the interest of all EU countries to counter a law that results in more people ending up in this situation. However, the risk of this happening is obvious, if the Commission’s proposal is implemented.

I make this claim after having conducted an independent enquiry for the Swedish government of residence permits based on practical impediments to enforcing expulsion orders, and residence permits resulting from expulsion orders having expired.

The enquiry included case studies, an analysis of numerous court judgments and decisions by the authorities, interviews, an examination of how other countries handle the issue, and statistics. The investigation shows that the requirements of the individual are unreasonably high, even in cases where it is extremely difficult to obtain acceptable documentation.

The fact is that the possibility of gaining residency due to practical enforcement barriers is small; about 10–15 persons a year manage the feat of being granted a residence permit in Sweden on such basis.

Another problem relates to a previous main rule in Swedish case law, which grants residence permits as a result of an expulsion order having expired (becoming statute-barred), normally after four years. This rule is currently only applied in exceptional cases, due to a Migration Supreme Court’s guidance in a decision from 2009 (MIG 2009: 13).
Once not uncommon, resident permits are currently granted in almost none of these cases. Previously, the extent to which the migration authorities had taken any actions in the matter was considered.

Had the authorities been passive, the main rule granting residency would apply. This ought to be considered, I argue, partly because activities by executive authorities where the individual can also get guidance are important in the return process.

Partly because of limited statistics, it is not possible to say how many people in Sweden or Europe, among those living as undocumented today, are subject to practical impediments. An undocumented individual may also very well be subject to such obstacles without knowing it.

From the analysis of my investigation, I conclude that one reason the number of irregularised migrants is increasing in Sweden and Europe is that the legislation is interpreted and applied in a certain direction where the core issue – the practical obstacle – is denied.

Swedish law allows for granting residence permits because of practical enforcement barriers, as does that of other European countries. However, despite these regulations, a number of people are in a situation where the expulsion decision cannot be enforced for practical reasons, but where a residence permit is not granted.

This problem was the starting point for my enquiry, which included a number of proposals that would prevent people from becoming legally stranded.

I propose a clarification of the legislation so that people whose expulsion decisions cannot be enforced for reasons beyond the control of individuals, are granted residence permits.

I propose that a residence permit may be granted if a removal order has been barred, in cases where the individual’s own actions have not been the decisive reason for the decision not being enforced.

I propose that an inquiry be opened into the statutory status of stateless persons in Sweden. The directive should include the submission of proposals for the introduction of a statelessness procedure. Statelessness is a common circumstance in the judgments and decisions on which the issue of practical barriers is brought into effect, including in the very few cases that have given rise to a residence permit.

Other countries in the EU, and the European Commission, should take into consideration the problems my investigation points to in their policy development concerning return migration.

Even though my proposals concern Sweden, they are nevertheless relevant at EU level. We do not know how many of the rejected asylum seekers actually leave, but those who cannot do so should not be placed in detention. Nor are further restrictions on welfare benefits, aiming to enforce self-return, sustainable.

Either the legally stranded leave the state and become undocumented residents of another EU country, or they end up in a completely destitute situation socially and economically, which stands in stark contrast to European welfare state ideals.