



## Italy - Court of Cassation, judgment no. 4262/2015

The appellant requested that the decision of the Court of Appeal be overturned, and her stateless status be recognised. The appeal raises two points of principle: first, the burden of proof applicable to the determination of whether a person qualifies for stateless status as defined in the 1954 Convention; and secondly, the consideration of stateless persons as a particular category of foreigners comparable to beneficiaries of international protection. The court recognised the stateless status of the applicant and overruled the decision of the Court of Appeal.

**Case name (in original language) :** Cassazione Civile Sez. 6 Num. 4262 Anno 2015

**Case status:** Decided

**Case number:** 4262

**Citation:** 4262/2015

**Date of decision:** 03/03/2015

**State:** Italy

**Court / UN Treaty Body:** Supreme Court (Corte di Cassazione)

**Language(s) the decision is available in:** Italian

**Applicant's country of birth:** Bosnia Herzegovina

**Applicant's country of residence:** Italy

**Legal instruments:** 1954 Statelessness Convention, European Convention on Human Rights (ECHR)

**Key aspects:** Burden of proof, Determination/confirmation of nationality, Standard of proof, Stateless status and documentation, Statelessness determination

**Relevant Legislative Provisions:**

Article 1 of the Convention relating to the Status of Stateless Persons (1954 Convention)

Article 2 of the Italian Constitution

Article 3 of the European Convention on Human Rights (ECHR)

Art. 1 d.lgs n. 286/1998 Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Immigration Act and Norms Regulating the Condition of Foreigners)

Art. 2 d.lgs n. 251/2007 Attuazione della direttiva 2004/83/CE (Incorporation of 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted)

Art. 2 d.lgs. n.25/2008 Attuazione della direttiva 2005/85/CE (2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status)

## **Facts**

The applicant has Bosnian origin, but her birthplace is not clearly stated in the judgment. She has lived in Italy since birth. It is also inferred that at least one of her parents holds Bosnian nationality. In accordance with article 1 of the 1954 Convention, the applicant was recognised as stateless by the Tribunal of first instance of Rome. The Court of Appeal of Rome overturned the Tribunal's decision, on the grounds that the applicant had not met the burden of proof in providing sufficient evidence to establish that she could not acquire Bosnian nationality from her parents. Moreover, the Court of Appeal held that the lack of registration at the Civil Registry of Mostar was not sufficient to prove her statelessness.

The applicant then lodged an appeal before the Supreme Court against the Court of Appeal's decision, claiming that the Court of Appeal did not take due account of the lower burden of proof applicable in her case, as recognised by relevant case-law. The applicant further claimed her situation was not adequately assessed, as the Court of Appeal failed to evaluate relevant facts demonstrating her statelessness.

## **Legal arguments by the applicant**

The Court of Appeal did not correctly apply art. 115 of the Code of Civil Procedure and Art. 1 of the 1954 Convention. The applicant argued that, in relation to the

recognition of the status of stateless persons, the burden of proof on the applicant must be less onerous and the judge can obtain additional evidence *ex officio*.

The applicant stated that she could not have acquired Bosnian nationality due to the fact that a Bosnian law establishing that, a child born on foreign territory would acquire citizenship, provided that at least one of his/her parents held Bosnian nationality, entered into force in 1995, while she was born in 1986. Accordingly, she filed an appeal ex art. 365 n. 5 Code of Civil Procedure.

### **Legal arguments by the opposing party**

Stateless status refers to people who do not have or are unwilling to obtain any documentation. The applicant should be entitled to Bosnian nationality because she has not demonstrated otherwise. In particular, the applicant's failure to register in the civil registry was not considered sufficient to prove that she was not a Bosnia Herzegovinian citizen.

### **Decision & Reasoning**

The Supreme Court, following the view expressed in its previous judgement 28873/2008, determines that statelessness determination should consider not only the conditions for acquisition of nationality of the applicant's country of origin, but also other substantial considerations.

Stateless persons and foreigners enjoy equality of treatment in the Italian legal system. This condition is established by article 1 of d.lgs n. 286/1998, Art. 2 d.lgs n. 251/2007 and Art. 2 d.lgs. n.25/2008. As a result, in Italy a stateless person is entitled to all fundamental rights recognised to foreigners.

Moreover, in accordance with the 1954 Convention, ratified by Italy, stateless persons enjoy the same treatment accorded to Italian nationals regarding freedom of religion and belief (art. 4), intellectual and industrial property (art. 14), access to courts (art. 16), public relief (art. 23), labour legislation and social security (art. 24) and fiscal charges (art. 29). In addition, stateless persons receive additional protection with regard to expulsion (art. 31) and naturalisation (art. 32), equivalent to the protection granted to beneficiaries of international protection.

In fact, stateless persons receive a treatment very similar to the one accorded to foreigners who seek international protection. For instance, a stateless person is

subject to an expulsion regime which is narrower than the one generally applicable to extra-European foreign citizen.

Furthermore, the direct access to judicial review in the statelessness determination procedure instead of the more complicated administrative procedure (See Supreme Court, Sez. Unite, case no. 23338/2008) demonstrates the importance of the fundamental rights in question. Moreover, the judicial process follows common element with international protection. This is due to the statelessness determination process being subjected to the same processes as asylum applications. This is due to the fact that, as stated by the “Sezioni Unite” (“United Sections”) of the Supreme Court, in its decision no. 19393/2009, “since the individual legal condition of a foreigner has the nature of a subjective right, it must be included among the fundamental rights recognised by art. 2 of the Italian Constitution and art. 3 of ECHR” (*par. 6 in quanto la situazione giuridica soggettiva dello straniero ha natura di diritto soggettivo, che va annoverato tra i diritti umani fondamentali che godono della protezione apprestata dall'art. 2 della Costituzione e dall'art. 3 della Convenzione Europea dei Diritti dell'Uomo". S.U. ord. 19393 del 2009*).

Considering that statelessness benefits from international protection, the Supreme Court endorsed the applicant’s arguments that she should be subject to a lower burden of proof. In particular, any potential need for further investigation should be addressed *ex officio* by the judge by requesting further information or documentation from the competent authority in Italy, the applicant’s country of origin or another country with which the applicant has relevant links. Although the reduced burden of proof is not transposed into national law (on the contrary, it was transposed into art. 3 of the Legislative Decree no. 251/2007 and art. 8 of Legislative Decree no. 25/2008), it should nevertheless be accorded to a stateless person, by the judge in light of a constitutional rights-oriented interpretation, according to which a stateless person is entitled to the same rights granted to a foreigner requesting a residence permit or to an asylum seeker.

According to the aforementioned judgment (case no. 2338/2008), the “Sezioni Unite” of the Supreme Court held that, in order to assess the entitlement to stateless status, a formalistic examination that only takes into account documentary evidence would not be suitable. On the contrary, the statelessness determination requires an overall substantial assessment of the applicant’s situation.

In the Supreme Court's view, the Court of Appeal did not consider the above principles, limiting its investigation to the lack of evidence without further verifying if, with respect to the *iura novit curia* principle, there were any provisions under Bosnian citizenship law could be relevant for the applicant to be recognised as a Bosnian national.

The Court did not assess whether the applicant was entitled to Italian nationality.

The Supreme Court considered that the applicant is not entitled to Bosnian nationality. In accordance with art. 6 on the acquisition of nationality "by origin", Bosnian nationality can only be granted to those born abroad when at least one of their parents is a Bosnian national. However, this provision only entered into force in 1995 and the applicant was born in 1986. The applicant is not entitled to Bosnian nationality on any other grounds.

In conclusion, taking into account the applicable Italian and Bosnian laws, the Supreme Court held that the Court of Appeal had wrongly decided that the applicant was not stateless. The Court of Appeal failed to take into account the reduced burden of proof applicable to the applicant, and it did not resort to its *ex officio* investigative powers in order to clarify the questions raised in the case.

### **Decision documents**

[4262\\_2015.pdf](#)

### **Outcome**

The Supreme Court overruled the decision of the Court of Appeal and recognised the applicant's stateless status.

### **Caselaw cited**

Cassazione Civile Sezioni Unite Sentenza n. 1108/2006

Cassazione Civile Sezioni Unite Sentenza n. 28873/2008

Cassazione Civile Sezioni Unite Sentenza n. 19393/2009

Cassazione Civile Sezioni Unite Sentenza n. 25212/2013