STATELESSNESS
Case Law Database

Switzerland - Federal Administrative Court, judgment no. F-6147/2015

Applicants requested to be recognised as stateless in addition to having already been recognised as refugees. The judgments deals with the question of whether refugee status is comparable in rights to the status of nationals within the meaning of the exclusion clause in Article 1(2) of the 1954 Convention. The Court sides with the applicants confirming their right to be recognised as stateless persons in addition to having been granted asylum-based residence status.

Case name (in original language) : A, B, and C v. State Secretary for Migration
Case number: F-6147/2015
Date of decision: 05/01/2017
State: Switzerland
Court / UN Treaty Body: Federal Administrative Court (Bundesverwaltungsgericht)
Language(s) the decision is available in: German
Applicant's country of birth: Syria
Applicant's country of residence: Switzerland
Legal instruments: 1954 Statelessness Convention
Key aspects: Access to social and economic rights, Burden of proof, Childhood statelessness, Determination/confirmation of nationality, Exclusion grounds, Protection, Stateless status and documentation, Statelessness and asylum, Statelessness determination
Relevant Legislative Provisions:

Article 1 of the 1954 Convention

Facts

The first applicant was born in 1988, and is a Syrian Kurd. His partner was born in 1984 and is a Syrian national. Their children (one born in 2009 in Greece and the

other in 2012 in Switzerland) are also applicants in this case (applicant 2 and 3). All applicants were recognised as refugees in Switzerland in 2014.

On 25 March 2015 the applicants requested be recognised as stateless persons. They claimed that statelessness status will place them in a more advantageous position than their asylum status. This request was rejected by the State Secretariat for Migration on the basis that asylum seekers have rights equivalent to those of nationals, and therefore are excluded from protection as stateless persons.

Decision & Reasoning

The Court reasoned as follows:

“1.2 [The applicants] have an interest in the (additional) recognition as stateless person, which is worthy of protection […]. This legitimate interest arises from the fact that, as recognised stateless persons with the right to a residence permit […], they would be entitled to a permanent residence permit after five years of legal residence in Switzerland. As recognised refugees with a refugee residence status they do not have a corresponding entitlement.”

“3.1 Art. 1 Para. 1 of the Statelessness Convention states that, within the meaning of the Convention, a person is stateless if no state considers him to be a national under the operation of its law (in the original English or French text: "under the operation of its law", "par application de sa législation "). According to this definition, statelessness means lack of legal membership in a state (so-called "de iure" - stateless persons). In contrast, the Convention does not apply to persons who formally still have a nationality, but whose home country no longer grants them protection (so-called "de facto" stateless persons […].”

The Court considers exclusion grounds of article 1 of 1954 Convention.

“3.3 According to the case law of the Federal Supreme Court, a person can only be regarded as stateless if he or she is not culpable in their lack of nationality. This is the case if such a person never had a nationality, or has lost an a former nationality without any action on their part, or if it is not possible for them to acquire or re-acquire a nationality. If a nationality is voluntarily renounced or if the person concerned fails to acquire or reacquire it without a valid reason, such behaviour does not deserve any protection […]. This prevents the status of statelessness from losing its protective nature as intended by the Convention, and becoming a matter

of personal preference. It cannot be within the meaning and purpose of the Convention on Stateless Persons if it improves the position of stateless persons compared to refugees, where the status of the latter is not based on their will, especially since the international community has long tried to reduce the number of stateless persons. The Convention on Stateless Persons was not created so that individuals could obtain privileged legal status at will. It primarily serves to help people who get into an difficult situation without having caused that themselves […].”

“3.4 [In its earlier judgment], the Federal Administrative Court came to the conclusion that the application of the Convention on Stateless Persons to persons who already enjoy the protection of the Refugee Convention is not excluded […]. With regard to Kurds from Syria who belong to the group of the Ajanib, and who are recognised as refugees in Switzerland, the Federal Administrative Court held that the established refugee status is to be viewed as a valid reason for not having gone through the naturalization procedure in Syria, leading to the conclusion that they are stateless within the meaning of Art. 1 Para. 1 [of the 1954 Statelessness Convention].”

“4.1 The files show that applicant 1 is a Kurd from Syria and belongs to the group of registered Kurds (Ajanib). The nationality status of the children, applicants 2 and 3, was - as far as can be seen - not investigated in the prior proceedings. Since the mother is a Syrian national, it must be checked whether the children also have Syrian nationality, or have the opportunity to acquire it. According to the Syrian nationality law, the status of the children follows the status of the father, i.e. children can only acquire nationality by birth if the father is a Syrian national. The fact that the mother has Syrian nationality in this case is irrelevant under Syrian law, since the father is known. It can therefore be assumed that applicants 2 and 3 are Ajanib or possibly Maktumin (unregistered Kurds) […] Applicant 2 was born in Greece, applicant 3 in Switzerland. Since none of these states confer nationality (solely) on the basis of the place of birth (ius solis), acquisition of nationality in this way does not need to be considered […] It can therefore be assumed that none of the three applicants have a nationality.”

“4.2 As an Ajnabi who holds a refugee status in Switzerland, applicant 1 is to be considered as stateless within the meaning of Art. 1 Para. 1 of the Statelessness Convention, unless there is a reason for exclusion (Art. 1 Para. 2 Statelessness Convention […]). The same applies to applicants 2 and 3, regardless of whether

they belong to the Ajanib group or the Maktumin group. It is therefore necessary to examine how the applicability of the exclusion clauses."

5.2 […] What is disputed, however, is the meaning of "in possession of the rights and obligations of the nationals of that country" (in the English or French original texts: "as having the rights and obligations which are attached to the possession of the nationality of that country" , "comme ayant les droits et les obligations attachées à la possession de la nationalité de ce pays"; […]). Insofar as it is discussed at all in literature and is not viewed or criticized as outdated, or criticized due to the historical context, this open formulation is understood in the sense that it includes all rights and obligations with the exception of political rights […]. In addition to the general, unspecified reference to social and economic rights enjoy by nationals, the (absolute) protection against expulsion and deportation is particularly important […]."

"5.3 Contrary to the view taken by the lower instance court, the rights and obligations associated with the applicant's status as a refugee cannot be equated to those of Swiss nationals within the meaning of the exception clause of Art. 1, Para. 2 of the Statelessness Convention. It is not necessary at this point to go into detail on the areas referred to by the applicants in which recognised refugees disadvantaged compared to Swiss nationals […] Rather, it is sufficient at this point to mention the protection against deportation and extradition […], according to which Swiss nationals may not be expelled, and can only be extradited with their consent […]. Refugees, on the other hand, can be expelled under certain circumstances […], and the prohibition on deportation is not absolute […]. Foreigners only enjoy absolute protection against deportation if there is a risk of torture or inhuman treatment or punishment in the country of destination […]"

"In summary, it should be noted that the application of the Convention on Stateless Persons to refugees who have been granted asylum in Switzerland is not excluded based on Art. 1 Para. 2 of the Convention. In view of the applicants' legitimate interest in the additional recognition as stateless persons (E. 1.2), [the earlier decision is declared unlawful] and the complainants are to be recognised as stateless."

Decision documents

Bundesverwaltungsgericht_5Jan2017.pdf

Outcome

The Court confirms the applicants' right to be recognised as stateless.