CASE LAW COVER PAGE TEMPLATE

Name of the court [1] (English name in brackets if the court's language is not English): **Hof van Beroep Brussel (Court of Appeal Brussels)**			
Date of the decision:	17 /09/ 2014	**Case number:[2]**	2014/7124
Parties to the case: X. v. Belgian State, represented by the State Secretary for Asylum and Migration, social inclusion and poverty reduction, Aliens Office			
Decision available on the internet? ☒Yes ☐No If yes, please provide the link: http://www.kruispuntmi.be/sites/default/files/brussel_20140917.pdf (If no, please attach the decision as a Word or PDF file):			
Language(s) in which the decision is written: Dutch			
Official court translation available in any other languages? ☐Yes ☒No (If so, which):			
Countr(y)(ies) of origin of the applicant(s): Azerbaijan			
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): Belgium			
Any third country of relevance to the case:[3] Ukraine and Armenia			
Is the country of asylum or habitual residence party to:			
The 1951 Convention relating to the Status of Refugees ☒**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:		
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons ☒**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based: Article 1.1		
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness ☒**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:		
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa ☐**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:		
For EU member states: please indicate which EU instruments are referred to in the decision	Relevant articles of the EU instruments referred to in the decision: Articles1, 4, 20 and 21 of the Charter of Fundamental Rights of the European Union		

Topics / Key terms: (see attached 'Topics' annex):

Nationality and statelessness – Habitual residence

Key facts (max. 200 words)

The appellant has Armenian parents but was born in Baku, Azerbaijan on 23 December 1977.

He came through Ukraine to Belgium and applied for asylum in Belgium on 20 April 2000.

His asylum application was rejected by the Commissioner General for Refugees and Stateless Persons on 6 March 2003, and was rejected on appeal by the Council of State on 1 March 2006.

On 26 June 2007 the appellant was recognized as stateless in the sense of article 1.1 of the 1954 Convention relating to the Status of Stateless Persons by the Tribunal of First Instance of Antwerp.

The applicant submitted an application for regularization on the basis of article 9bis of the Aliens Act, which was declared unfounded on 8 July 2010.

This decision was annulled by the Council for Aliens Law Litigation on 11 January 2011, ruling that the facts that were submitted to demonstrate that the appellant as a stateless person was "irremovable" were not investigated, so that the duty to motivate was violated.

On 11 January 2011 the Council for Aliens Law Litigation also acknowledged that it was impossible to remove the appellants from the territory because no other state was prepared to issue a *laisser passer*.

Following the decision of the Council for Aliens Law Litigation of 11 January 2011. The administration on 11 May 2011 took a new decision refusing the application on the basis of article 9bis of the Aliens Act.

On 24 June 2011 the President of the Tribunal of First Instance of Brussels ordered the Belgian State (by interim order) to deliver a temporary residence permit to the appellants.

On 5 September 2011 the appellants summoned the Belgian State to deliver them a (permanent) residence permit.

Since 9 November 2011 the appellant holds a temporary residence permit.

Since his stay in Belgium, the appellant has also stayed in prison for offenses for which he was convicted by the Antwerp Court of Appeal.

On 15 May 2012 the Court of First Instance of Brussels declared that it has no jurisdiction to rule on the claim for a residence permit because the claimant could not demand a certain conduct from the government based on the provisions he cited (1954 Convention relating to the Status of Stateless Persons; articles 3, 13 and 15 of the European Convention on Human Rights; and articles 23 *jo.* 191 of the Belgian Constitution) and thus did not dispose of the required subjective right to establish jurisdiction.

On appeal the appellant adapted his claim and argued that the Belgian State committed a wrongful act in the sense of article 1382 of the Civil Code by not establishing a regulation for irremovable stateless persons, and that he is entitled to compensation in kind for damages suffered. According to him this compensation entails the granting of a residence permit.

Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]

16. The Courts and Tribunals have jurisdiction to rule on civil and political rights and thus on claims that are based on a subjective right.
With regard to an administration, a legal obligation on which a subjective right is based is only established if the competence of the administration is entirely circumscribed.

The Court however also has jurisdiction to rule on the unlawful interference with a subjective right as a result of the exercise by the administration of a discretionary competence, both to prevent such interference as to compensate it, it being understood that the Court is not allowed to take the place of the administrative authority and that it may not deprive that administration of its discretionary power.

The Court does not interfere with the exercise of powers reserved to the government by law, when it imposes a measure on the government to restore the injured party's rights (Court of Cassation 1 October 2007; Court of Cassation 24 April 2014).

17. Furthermore, the jurisdiction is not determined by the proof of the existence and the interference with the claimed subjective right, but by the actual and direct object of the dispute whereby the claimant alleges that his subjective right was violated.

The appellant submits that he lost his nationality involuntarily, and that the Constitutional Court ruled that he is discriminated against as a stateless person in comparison to a refugee, as he is an “orbit-situation” and cannot obtain a legal and durable right of residence. He also invokes the protection of the Statelessness convention and article 3 ECHR, which prohibits the submission of persons to inhuman or degrading treatment.

Furthermore, the appellant submits that the claim, *i.e.* the issuing of a residence permit, is required to put an end to the violation of his subjective right.

18. The thus submitted legal action falls within the jurisdiction of the Court.

19. By judgment of 26 June 2007 by the Tribunal of First Instance of Antwerp, the appellant was recognized as stateless in the sense of article 1.1 of the 1954 Convention relating to the Status of Stateless Persons.

This decision was taken on the basis of a favorable opinion by the office of the public prosecutor, after it had been established that sufficient evidence was at hand to demonstrate that the appellant was not considered as a citizen of the republics of Azerbaijan, Ukraine or Armenia.

It is therefore definitively established that the appellant is stateless.

20. The judgment of the Council for Aliens Law Litigation of 11 January 2011 states that the appellant claims not only that he is stateless, but also that he is irremovable and in this regard submits certifications from diplomatic missions certifying that no passport or *laisser passer* can be issued to him. This evidence was meant to prove that he found himself in a pressing humanitarian situation.
Because no account was taken of these factual elements in the negative decision of 8 July 2011 this decision was annulled.

The decision of 11 May 2011 whereby the application of 26 June 2009 on the basis of article 9bis of the Aliens Act was reexamined, states with regard to the pressing humanitarian situation that notwithstanding the submitted certificates, the appellant does not demonstrate that he no longer enjoys right of residence in one of the three states mentioned or even in another country. It also states that the fact that the appellant could not be repatriated and would thus be irremovable, does not imply that he cannot voluntarily undertake the necessary steps to fulfill his

legal obligation to leave the country.

21. It cannot be accepted that when an applicant submits certificates from three diplomatic missions of countries with which he previously had a link through residence (Azerbaijan, Armenia and Ukraine) from which it is clear that they could not issue a passport or *laisser passer* to him, he should undertake additional steps to prove that he is irremovable.

The administration itself gives no indication of actions the appellant could still undertake to obtain a durable right of residence as a stateless person in another country. In particular, it is difficult to understand why another country than the three countries mentioned, with which the person concerned has no connection, would grant right of residence if the respondent himself [State Secretary for Asylum and Migration, social inclusion and poverty reduction, Aliens Office] denies it to him.

Consequently, it must be held that the appellant is indeed irremovable, and that in this regard he cannot be blamed for negligent inaction.

22. On the legal situation in which the appellant finds himself as an "irremovable stateless person" the Constitutional Court held repeatedly (17 December 2009 and 11 January 2012) that recognized stateless persons and recognized refugees find themselves in largely comparable situations, not only taking into account the international legal provisions applicable to their situation (the Convention of New York of 28 September 1954 versus the Geneva Convention of 28 July 1951), but also the fact that, by granting the status of, respectively, stateless person or refugee, certain duties are imposed on the government with respect to the persons concerned.

"When it is established that the stateless person was granted this status because he involuntarily lost his nationality and that he proves that he cannot obtain a legal and durable right of residence in another State with which he has ties, the situation in which he finds himself infringes his fundamental rights in a discriminatory way. It follows from this that, what right of residence is concerned, the difference in treatment between a stateless person that finds himself in such a situation on the Belgian territory and a recognized refugee, is not reasonably justified" says the Constitutional Court (paragraphs B.7 judgment 17 December 2009 and B.10 judgment 11 January 2012).

23. Because this discrimination does not flow from article 49 of the Aliens Act – that only concerns the situation of refugees -, but from the lack of a legal provision in the Aliens Act that grants a right of residence, comparable to the one enjoyed by refugees, to stateless persons recognized as such in Belgium, it is up to the legislator to determine the conditions under which certain categories of stateless persons can obtain a residence permit in Belgium, the Constitutional Court held (paragraphs B.11 and B12.1 judgment 11 January 2012).

The resulting conclusion of the Constitutional Court states that the Aliens Act violates articles 10 and 11 of the Constitution to the extent that it does not provide that stateless persons recognized as such in Belgium of whom it is established that they involuntarily lost their nationality and who prove that they cannot obtain legal and durable right of residence in another State with which they have ties, have a right of residence comparable to the one that refugees enjoy on the basis of article 49 of this Act (dictum judgment 11 January 2012).

24. There can be no doubt that in the present case subjective rights of the appellant were violated.

The Constitutional Court ascertained a violation of the principle of equality and non-discrimination of which the irremovable stateless person is the victim.
The right of the appellant to equal treatment and to not be discriminated against, that is moreover also guaranteed by articles 20 and 21 of the Charter of Fundamental Rights of the European Union, is violated.

Furthermore the legal vacuum connected to the orbit-situation in which the irremovable stateless person finds himself, entails the consequence that during years he has to live under constant fear for expulsion, is not allowed to work and cannot enjoy social benefits.

Thereby, he is not given the opportunity to live a dignified live, which is contrary to article 3 ECHR which prohibits submitting a person to degrading or inhuman treatment. Such treatment is also contrary to articles 1 and 4 of the aforementioned Charter of Fundamental Rights of the European Union.

25. Moreover, reference can be made in this regard to a judgment of the European Court of Human Rights in the

case of Sisojeva and others v. Latvia (EctHR, No. 60654/00, 16 June 2005).

It concerns a case in which the Latvian government for several years refused to regularize the stay of a stateless woman and her family. The persons concerned had been living in Latvia for years, had established economic and social ties there and had become stateless as a result of the dissolution of the Soviet-Union. On this The Court held that de persistent refusal to grant a permanent residence permit to a stateless person and her family, constituted a violation of the right to respect for family life. The fact that the persons concerned were not expelled and thus tolerated, offered no *in*adequate [*Sic* "geen ontoereikende"] solution.

26. The Constitutional Court also held that, pending the required legislative action concerning the Aliens Act, it is up to the court seized to put an end to the consequences of the established unconstitutionality, as this determination was made in sufficiently precise and complete terms (paragraph B.11 judgment 11 January 2012).

In view of all of the above considerations, the only way to put an end to the violation of the subjective rights of the appellant, connected to the established unconstitutionality of the Aliens Act, is to grant him a residence permit in anticipation of the realization of the legislation that is required by the Constitutional Court.

In this context it is irrelevant that the appellant was criminally sentenced twice since his stay on Belgian territory.

Other comments or references (for example, links to other cases, does this decision replace a previous decision?)

Based on to two rulings by the Belgian Constitutional Court dated 11 January 2012 and 17 December 2009 in which the Constitutional Court found that the difference in treatment as regards their right of residence between recognized refugees and recognized stateless persons who involuntarily lost their nationality and cannot obtain a legal and durable right of residence in another state is discriminatory since different treatment is applied to persons who find themselves in comparable situations.

Reference to European Court of Human Rights, *Sisojeva and others v. Latvia* – EctHR, No. 60654/00, 16 June 2005 (partially overturned by the Grand Chamber on 15 January 2007).

EXPLANATORY NOTE

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.

2. Where applicable, please follow the court's official case reference system.

3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

Please submit this form to:

Protection Information Unit
Division of International Protection
UNHCR
Case Postale 2500
1211 Genève 2 Dépôt
Switzerland
Fax: +41-22-739-7396
Email: refworld@unhcr.org