Federal Court

2C_330/2020

Judgment of 6 August 2021

II. Public Law Division

Panel

Federal Judge Seiler, President
Federal Judge Aubrey Girardin,
Federal Judge Donzallaz,
Federal Judge Hänni,
Federal Judge Beusch,
Clerk König

Parties to the proceedings

A._____,
Complainant,

Represented by lic. iur. Gabriella Tau,

against

State Secretariat for Migration, Quellenweg 6, 3003 Bern.

Subject:

Recognition of statelessness,

Appeal against the judgment of the Federal Administrative Court, Division VI, of 2 March 2020 (F-6833/2017).

Facts:

A.

A.a. On 17 May 2014, A._____, a Palestinian refugee from Syria born in 1972, left Syria on a Schengen visa issued by the Swiss Embassy in Beirut. After seeking asylum in the Netherlands, he arrived in Switzerland under the Dublin procedure, where he also applied for asylum. Thereby he deposited his Syrian passport for Palestinian refugees and a confirmation of registration from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

The asylum application filed in Switzerland was rejected on 30 April 2015 (confirmed by a ruling of the Federal Administrative Court of 13 April 2017). At the same time, temporary admission of A._____ was ordered due to the unreasonableness of the enforcement of removal.

A.b. On 23 December 2015, A._____, his Syrian spouse and his four children, who (all five) had also been provisionally admitted to Switzerland in the meantime, applied for recognition of statelessness.

By decision of 31 October 2017, the State Secretariat for Migration (State Secretariat) rejected the application.

B.

An appeal against this was dismissed by the Federal Administrative Court in its ruling of 2 March 2020, as far as A._____ was concerned. In connection with A._____'s wife and children, the Federal Administrative Court dismissed the proceedings as having become devoid of purpose because these family members had in the meantime voluntarily left Switzerland to settle in Turkey.

C.

In his appeal in public law matters of 2 May 2020, A._____ requests that the Federal Administrative Court's judgment of 2 March 2020 and the State Secretariat's order of 31 October 2017 be set aside. He further requests that his statelessness be recognised and that he be granted a residence permit.

The State Secretariat was not heard. The Federal Administrative Court waived its right to be heard. In a submission dated 26 July 2021, the complainant submitted various documents.

D.

The Federal Court publicly deliberated and ruled on the matter on 6 August 2021.

Considerations

1.

1.1 The ruling of 2 March 2020 challenges a decision of the Federal Administrative Court in a matter of public law, which is subject to appeal in matters of public law (cf. Art. 82 lit. a and Art. 86 para. 1 lit. a FSCA). In connection with the recognition of statelessness, there is no ground for exclusion (cf. Art. 83 FSCA; judgments 2C_357/2020 of 20 August 2020 E. 3.4.2; 2C_661/2015 of 12 November 2015 E. 1; 2C_36/2012 of 10 May 2012 E. 1).

The object of challenge in the present Federal Court proceedings can only be the decision of the Federal Administrative Court and not, for example, also the first-instance order of the State Secretariat of 31 October 2017 (cf. Art. 86 para. 1 lit. a FSCA). Insofar as the appellant's submission is directed against the order of the State Secretariat, the appeal is not admissible (devolutive effect). However, the order is at least still considered to be co-contested in relation to content (cf. BGE 134 II 142 E. 1.4 with reference).

Since the subject matter of the dispute can only be limited, but not extended, in the course of the appeal proceedings (BGE 136 V 362 E. 3.4.2; 136 II 165 E. 5), and the proceedings before the court (insofar as they are of interest here) only concerned the recognition of the complainant as a stateless person, the application that he be granted a residence permit must also be dismissed.

1.2 The filing of an appeal further requires that the complainant is particularly affected by the contested decision and has a legitimate interest in its annulment or amendment (cf. Art. 89 para. 1 FSCA). The complainant is entitled to appeal because, as a stateless person within the meaning of the Convention of 28 September 1954 relating to the Status of Stateless Persons (SR 0.142.40; hereinafter: Stateless Persons Convention), he would enjoy legal advantages to which he is not entitled as a provisionally admitted person (cf. Art. 2 ff. of the Stateless Persons Convention as well as judgments 2C_357/2020 of 20 August 2020 E. 3.4.2; 2C_661/2015 of 12 November 2015 E. 1; OLIVIA BRUNNER, *De iure* Staatenlose in der Schweizer Rechtsordnung, in: Alberto Achermann et al. [eds.], Jahrbuch für Migrationsrecht 2014/2015, Bern 2015, pp. 61 ff., p. 68 f. with references).

1.3 The other requirements for a decision on the merits are fulfilled. The appeal in matters of public law is to be allowed with the aforementioned limitations (cf. E. 1.1 para. 2 and 3).

2.

2.1 The Federal Court applies the law pursuant to Art. 106 para. 1 FSCA ex officio, but only examines the asserted violations of rights, taking into account the general obligation to provide evidence and justification according to Art. 42 para. 1 and para. 2 FSCA unless the legal violations are obvious (BGE 142 I 135 E. 1.5). With regard to the violation of fundamental rights, there is a qualified obligation to give notice of defects (Art. 106 para. 2 FSCA; BGE 136 I 49 E. 1.4.1 with references).

2.2.

2.2.1 The Federal Court is bound by the facts of the case as established by the lower court (Art. 105 para. 1 FSCA), unless they prove to be manifestly incorrect or incomplete in a material aspect of the decision. The assessment of the facts also includes the assessment of evidence based on circumstantial evidence (BGE 140 III 264 E. 2.3; judgment 2C_634/2018 of 5 February 2019 E. 2.2). The extent to which the assessment of evidence or the determination of the facts by the lower court is obviously untenable (i.e. arbitrary [cf. Art. 9 BV]) must be shown clearly and in detail in the notice of appeal (BGE 144 V 50 E. 4.2; 134 II 244 E. 2.2; 130 I 258 E. 1.3). A qualified obligation to state reasons also applies here (Art. 106 para. 2 FSCA; cf. BGE 133 II 249 E. 1.4.3).

2.2.2 New facts and evidence may only be submitted to the extent that the decision of the lower instance gives rise to them ("non-genuine" novelties pursuant to Art. 99 para. 1 FSCA). The party wishing to supplement the lower court's findings of fact must demonstrate, with references to the file, that it has already submitted the relevant legally relevant facts and suitable evidence to the lower courts in accordance with the procedure (BGE 140 III 86 E. 2; judgment 1C_186/2019 of 19 November 2019 E. 1.2).

Genuine novelties, i.e. facts or evidence that only occurred or arose after the contested judgment, are not taken into account in the Federal Court proceedings on appeal in public law matters (BGE 143 V 19 E. 1.2; 140 V 543 E. 3.2.2.2; 139 III 120 E. 3.1.2; 135 I 221 E. 5.2.4; 133 IV 342 E. 2.1).

The documents submitted by the appellant in its submission of 26 July 2021 arose only after the contested judgment of 2 March 2020 was delivered. As genuine novelties, they are therefore not to be included in the following assessment.

3.

UNRWA is a United Nations Relief and Works Agency created in view of the special situation of Palestine refugees in need of assistance and protection (United Nations General Assembly Resolution No. 302 [IV] of 8 December 1949). The purpose of the organisation is to provide direct assistance to Palestinian refugees located in one of the five fields of operation that form part of its area of operation (Lebanon, Syria, Jordan, West Bank and Gaza Strip). Its mandate was last extended until 30 June 2023.

4.

4.1 The complainant refers to information from various websites as well as reports from UNRWA on a) the activities of this organisation in Syria, b) the financial situation of this organisation, c) repeated attacks by government forces on Daraya (a suburb of Damascus), d) the precarious situation of Palestinians in Syria and e) the difficult situation in Daraya. He also submitted to the Federal Court photographs of his family allegedly taken at a police station in Alexandria, Egypt, and photographs of

a house in Daraya that he claimed belonged to him and was badly damaged. However, the complainant does not show that he had already introduced the relevant facts and evidence in the pre-instance proceedings in accordance with the procedure. Therefore, they are to be qualified as new and - insofar as they would be legally relevant at all - inadmissible (cf. E. 2.2.2). Furthermore, the complainant's assertion that his statelessness had been recognised by the Netherlands is also not to be taken into account under novena law.

4.2 The complainant next complains that the lower court made an arbitrary finding of fact by assuming, on the one hand, that UNRWA was capable of exercising its mandate in Syria and, on the other hand, that the complainant's departure from Syria on 17 May 2014 was not forced but voluntary.

As will become clear in the following, it is not decisive for the outcome of the present proceedings whether UNRWA can still exercise its mandate in Syria and whether the complainant left this state voluntarily on 17 May 2014. Since the above-mentioned complaint therefore does not concern legally relevant facts, it does not need to be addressed further.

5.

5.1 The Stateless Persons Convention defines a stateless person in Art. 1 para. 1 as " a person who is not considered as a national by any State under the operation of its law". According to the original French text, the term "apatride" stands for "une personne qu'aucun Etat ne considère comme son ressortissant par application de sa législation").

According to this definition, the term "stateless person" only covers persons who do not have any formal nationality (*de iure* stateless persons). On the other hand, persons who formally still have a nationality but to whom the home state no longer grants protection or who refuse the protection of the home state (*de facto* stateless persons) are not to be regarded as stateless persons (cf. BGE 115 V 4 E. 2b; judgment 2C_415/2020 of 30 April 2021 E. 5.1 with references [intended for publication]).

5.2 The Swiss administrative authorities do not recognise the status of statelessness within the meaning of the Stateless Persons Convention in the case of persons who deliberately lose their nationality or do not do everything reasonable to retain or regain their nationality (Judgement 2C_415/2020 of 30 April 2021 E. 5.2 with numerous references [intended for publication]).
The Stateless Persons Convention is primarily intended to help persons who are disadvantaged by their fate and who would be in need without assistance. It is not intended to enable any person who so desires to benefit from the status of stateless person, which in certain respects is more favourable than that of other aliens. Granting the status of stateless person to any person who has his or her nationality revoked for personal reasons would be contrary to the objective pursued by the international community. It would also mean encouraging abusive behaviour (Judgement 2C_415/2020 of 30 April 2021 E. 5.2 with numerous references [intended for publication]).

5.3 In the light of these principles, according to consistent case law of the Federal Court, Art. 1 of the Stateless Persons Convention is to be interpreted in such a way that stateless persons are persons who have been deprived of their nationality through no fault of their own and have no possibility of regaining it (judgments 2C_415/2020 of 30 April 2021 E. 5.3 [intended for publication]; 2C_661/2015 of 12 November 2015 E. 3.1; 2C_621/2011 of 6 December 2011 E. 4.2). By contrast, this Convention does not apply to persons who willingly dispose of their nationality with the sole aim of acquiring the status of stateless person, or who refuse without valid reasons to regain a lost nationality or to acquire a nationality despite a corresponding possibility. It is thus incumbent on a person claiming a nationality to take all appropriate steps to obtain that nationality and the identity documents

relating thereto (Judgement 2C_415/2020 of 30 April 2021 E. 5.3 with references [intended for publication]).

5.4 The complainant is a *de iure* stateless person and is thus considered a stateless person within the meaning of Article 1 para. 1 of the Stateless Persons Convention.

6.

6.1 According to Art. 1 para. 2 subpara. i of the Stateless Persons Convention, the Convention does not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance (official translation from the original French, Spanish and English texts). In the original French text, the provision reads as follows: "Cette Convention ne sera pas applicable aux personnes qui bénéficient actuellement d'une protection ou d'une assistance de la part d'un organisme ou d'une institution des Nations Unies autre que le Haut-Commissaire des Nations Unies pour les réfugiés, tant qu'elles bénéficieront de ladite protection ou de ladite assistance").

6.2 UNRWA is currently the only existing organisation referred to in Art. 1 para. 2 subpara. i of the Stateless Persons Convention (see decision of the French Conseil d'État No. 427017 of 24 December 2019 E. 3; cf. judgments of the European Court of Justice [ECJ] C-364/11 of 19 December 2012*, El Kott*, para. 48; C-31/09 of 17 June 2010, *Bolbol*, para. 44).

6.3 According to Art. 1 para. 2 subpara. i of the Stateless Persons Convention, only persons who are "at present" receiving protection or assistance from an organisation within the meaning of this provision and are still enjoying its protection or assistance are excluded from the scope of this Convention. In the present case, the legal question that poses itself in advance is whether the absence from UNRWA's area of operation ipso facto leads to a lapse of the exclusion from the scope of application of the Stateless Persons Convention provided for in this provision, because UNRWA's services are regularly provided only to persons who are physically present in its area of operation.

In order to clarify the above-mentioned question and to determine which consequential questions arise from it, Art. 1 para. 2 subpara. i of the Stateless Persons Convention must be interpreted. The interpretation of this provision must be done in accordance with the rules for the interpretation of international treaties set out below (E. 6.4).

6.4.

6.4.1 The interpretation of international treaties is governed by Art. 31 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT; SR 0.111), which in this respect constitutes codified customary international law (Advisory Opinion of the International Court of Justice [ICJ] of 9 July 2004 "Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé", C.I.J. Recueil 2004, p. 174 § 94; BGE 146 II 150 E. 5.3.1; 125 II 417 E. 4.d; 122 II 234 E. 4.c; 120 Ib 360 E. 2.c; judgment 2C_510/2018 of 6 February 2020 E. 4.2.1).

6.4.2 Pursuant to Art. 31 para. 1 VCLT, Contracting States shall interpret an intergovernmental agreement in good faith in accordance with the ordinary meaning to be given to its provisions in their context and in the light of its object and purpose. In addition to the context (Art. 31 para. 2 VCLT), according to Art. 31 para. 3 VCLT, account must be taken in the same way of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (lit. a), of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (lit. b), and of any relevant rules of

international law applicable in the relations between the parties (lit. c). The preparatory works and the circumstances of the conclusion of the treaty are supplementary means of interpretation according to Art. 32 VCLT and may be used to confirm the meaning determined according to Art. 31 VCLT or to determine the meaning if the interpretation according to Art. 31 VCLT leaves the meaning ambiguous or obscure (Art. 32 lit. a VCLT) or leads to a result that is manifestly absurd or unreasonable (Art. 32 lit. b VCLT; cf. BGE 145 II 339 E. 4.4.2; 144 II 130 E. 8.2; 143 II 136 E. 5.2, each with references).

Art. 31 para. 1 VCLT determines an order of consideration of the various elements of interpretation, without establishing a fixed order of precedence among them. However, the starting point for the interpretation of international treaties is the ordinary meaning of their provisions (BGE 146 II 150 E. 5.3.2; 144 II 130 E. 8.2.1; 143 II 202 E. 6.3.1; 143 II 136 E. 5.2.2). This ordinary meaning is to be determined in good faith and taking into account its context and the object and purpose of the treaty (BGE 146 II 150 E. 5.3.2; 144 II 130 E. 8.2.1; 143 II 202 E. 6.3.1; 143 II 136 E. 5.2.2). The aim and purpose of the treaty is what the treaty was intended to achieve. Together with the interpretation in good faith, the teleological interpretation ensures the "effet utile" of the treaty (BGE 146 II 150 E. 5.3.2; 144 II 130 E. 8.2.1; 143 II 136 E. 5.2.2; 142 II 161 E. 2.1.3; 141 III 495 E. 3.5.1).

6.4.3 If an international treaty has been established as authentic in two or more languages, the text in each language is equally authoritative according to Art. 33 para. 1 VCLT, unless the treaty provides or the parties agree that a particular text shall prevail in case of discrepancies. The expressions of the treaty are presumed to have the same meaning in each authentic text (Art. 33 para. 3 VCLT).

6.5.

6.5.1 According to the wording of Art. 1 para. 2 subpara. i of the Stateless Persons Convention, as mentioned above (E. 6.3), only persons who are "currently" receiving protection or assistance from an organisation within the meaning of this provision and who are still receiving such protection or assistance are excluded from the scope of this Convention (in the original French, Spanish and English versions declared authentic: "tant qu'elles bénéficieront de ladite protection ou de ladite assistance" resp. "mientras estén recibiendo tal protección o asistencia" resp. "so long as they are receiving such protection or assistance"; in the official translation of the French, Spanish and English original text: "*solange sie diesen Schutz oder diese Hilfe geniessen*"). It is implicitly assumed that the person receiving the assistance of the organisation is in principle domiciled or habitually resident in the state or territory in which the organisation is active. The background to Art. 1 para. 2 subpara. i of the Stateless Persons Convention (resp. the exclusion of the applicability of the Stateless Persons Convention provided for in this clause) is the assumption that such assistance is to be regarded as equivalent to the recognition of the rights that a *de iure* stateless person usually enjoys under the Convention (cf. on the whole decision of the French Conseil d'État No. 427017 of 24 December 2019 E. 3).

6.5.2 A question comparable to the one raised here arises in connection with Art. 1 D of the Convention relating to the Status of Refugees of 28 July 1951 (SR 0.142.30, hereinafter: Refugee Convention), according to which this Convention does not apply to persons who are currently receiving protection or assistance from a United Nations organ or agency other than the United Nations High Commissioner for Refugees (para. 1), and that such persons shall enjoy all the rights of this Convention if such protection or assistance ceases for any reason without the status of such persons having been definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations (para. 2).

On the interpretation of Art. 1 D Refugee Convention, the United Nations High Commissioner for Refugees (UNHCR) stated in May 2013 (insofar as it is of interest here) that, in its view, a Palestinian refugee who is covered by the personal scope of Art. 1 D of the Refugee Convention and is entitled to assistance from UNRWA "automatically" enjoys the protection of the Refugee Convention if UNRWA fails to provide him with assistance "for any reason" within the meaning of Art. 1 D of the Refugee Convention (p. 5 of the Note of May 2013 on UNHCR's interpretation of Article 1 D of the 1951 Convention relating to the Status of Refugees and Article 12 [1][a] of the EU Qualification resp. Status Directives in the context of Palestinian refugees seeking international protection [German language version of July 2016]). The phrase "has ceased for any reason" in Article 1 D para. 2 of the Refugee Convention is not to be interpreted narrowly; the relevant clause applies in particular to any objective reason beyond the control of the person concerned which has the effect that the person cannot (re)claim protection or assistance from UNRWA (p. 4 of the Note).

According to the CJEU, Art. 1 D para. 1 of the Refugee Convention or Art. 12(1)(a) first sentence of the former Council Directive 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 (hereinafter: Directive 2004/83/EG), which refers to this provision of the Refugee Convention, is to be interpreted in such a way that a ground for exclusion from the scope of the Refugee Convention exists not only in the case of those persons who are currently enjoying the assistance of UNRWA in its area of operation, but also, in principle, in the case of those who have actually availed themselves of the assistance of this organisation shortly before leaving this area of operation (cf. CJEU judgment C-364/11 of 19 December 2012, El Kott, para. 47 ff.). According to the corresponding case law of the CJEU on the Refugee Convention and on Directive 2004/83/EC, a relevant cessation of protection or assistance is only to be assumed if a person has received protection or assistance from UNRWA - according to a registration with this organisation (cf. on registration as sufficient proof of actual recourse to UNRWA assistance, ECJ judgment C-31/09 of 17 June 2010, Bolbol, para. 52) - and is no longer granted such protection or assistance for reasons beyond his control and independent of his will.

6.5.3 Since the exclusion clause of Art. 1 para. 2 lit. i of the Stateless Persons Convention has the same historical background as the exclusion clause of Art. 1 D para. 1 of the Refugee Convention, and since in both cases it was the intention of the contracting states to place persons originating from the original Palestine under the special responsibility of the aid organisations specifically created for them, following the aforementioned opinion of the UNHCR and the CJEU on the Refugee Convention (and Art. 12(1)(a), first sentence of Directive 2004/83/EG, respectively), it is to be assumed that the departure of a person registered with UNRWA from the area of operation does not per se lead to the applicability of the Stateless Persons Convention (or, as the case may be, to the non-applicability of the exclusion clause of Art. 1 para. 2 subpara. i of the Stateless Persons Convention) (cf. [also on the following] Conclusions of the "rapporteur public" Alexandre Lallet in proceedings 427017 of the French Conseil d'État, pp. 10 ff. with further references; in contrast, the UNRWA Liaison Office, which, according to a ruling of the Federal Administrative Court of 7 July 2011 on 20 December 2005 provided the following information [Judgment C-6841/2008 E. 7.3]: *"If your client is registered, or eligible to be registered, with UNRWA, but leaves or is outside UNRWA's area of operation, he or she would no longer be in receipt of protection or assistance of UNRWA. Furthermore, in the Agency's view, such a person would not be excluded from the operation of the 1954 Convention on Stateless Persons merely by the fact of being registered, or eligible for registration, with UNRWA.*"). The fact that the two conventions regulate different problem areas cannot change that. The Refugee Convention is dedicated to the issue of persecution in the country

of origin, while the Stateless Persons Convention addresses the consequences or disadvantages associated with the status of statelessness and aims to prevent the statelessness of persons.

6.6 A cessation of UNRWA protection or assistance that precludes the application of the exclusion clause in Article 1 para. 2 subpara. i of the Stateless Persons Convention is only to be affirmed if a person has actually availed himself of UNRWA's protection or assistance and is no longer receiving it for a reason beyond his control and independent of his will.

If, objectively, the person can again avail himself of the protection or assistance of UNRWA, it must be assumed that the person concerned still enjoys the protection or assistance of UNRWA within the meaning of Article 1 para. 2 subpara. i of the Stateless Persons Convention. The application of the Statelessness Convention is thus possibly excluded.

If, on the other hand, the person is no longer objectively able to benefit from UNRWA's protection or assistance, the exclusion clause of Article 1 para. 2 subpara. i of the Stateless Persons Convention does not apply. In such a constellation, the Stateless Persons Convention is therefore applicable (cf. on this and on the relevance of the possibility of return also the conclusions of the "rapporteur public" Alexandre Lallet in proceedings 427017 of the French Conseil d'État, p. 15 f. On the whole, see also decision of the French Conseil d'État No. 427017 of 24 December 2019 E. 6 f.).

7.

7.1 The question arises as to which area is relevant for assessing whether a person registered with UNRWA who has left its area of operation can again claim the protection or assistance of this organisation. This assessment could be based either solely on the field of operation (Lebanon, Syria, Jordan, West Bank or Gaza Strip) in which the person concerned actually resided when leaving UNRWA's area of operations, or on the entire area of operations (or all areas of operation) of UNRWA. The applicability of the Statelessness Convention would depend on whether the person concerned could return to the field of operation in which he or she was previously present, or whether the person concerned could move to one of the five fields of operation to seek UNRWA's protection or assistance.

7.2 According to the wording of Art. 1 para. 2 subpara. i of the Stateless Persons Convention, the focus is not on the (previous) residence of the person concerned or a specific area of operation, but on the protection or assistance of the organisation. This means that consideration must be given to the possibility of the person concerned being granted protection or assistance by UNRWA in its entire mandate or area of operations (also with regard to Art. 1 D of the Refugee Convention, CJEU Judgment C-507/19 of 13 January 2021, paras. 52 et seq.; in contrast the French Conseil d'État in its decision no. 427017 of 24 December 2019, according to which the only decisive factor is whether the person concerned can return to the place where he or she had his or her "résidence habituelle" [see E. 6 of the decision]). In principle, it is therefore decisive whether the person concerned can voluntarily go to one of the operational areas of UNRWA in order to avail himself of the protection or assistance of this organisation.

However, the person concerned cannot be expected to go to one of UNRWA's fields of operation, to which he has no connection whatsoever, in order to avail himself of UNRWA's protection or assistance. This is already the case because UNRWA's area of operations includes areas that differ greatly from one another in cultural terms and are located in different states.

Against this background, the recognition of statelessness is only excluded for a person registered with UNRWA who has left its area of operations if he or she has the possibility of (re)availing of the

protection or assistance of this organisation in an UNRWA field of operations with which he or she has at least a minimal relationship. A mere transit is not sufficient for a corresponding personal connection in the field of operation; conversely, however, it is not necessary for the person concerned to have once resided there.

8.

8.1 The complainant is registered with UNRWA and had originally sought its protection or assistance in Syria. He left UNRWA's area of operations in May 2014. The fact that he is no longer in this area does not prevent him from being recognised as a stateless person (cf. E. 6.5.3 above).

8.2 According to what has been said, it must be examined whether the complainant, viewed objectively, could again avail himself of the protection or assistance of UNRWA (cf. E. 6.6 above). This would not be the case if he had no concrete possibility of entering an operational area of UNRWA with which he had at least a minimal relationship in order to avail himself of the protection or assistance of this organisation there (cf. E. 7.2 above).

8.3 Against this background, it must first be clarified whether the complainant could voluntarily return to Syria and avail himself of UNRWA's protection or assistance there.

The complainant is currently provisionally admitted to Switzerland, as the execution of his removal (in view of the security situation in Syria) was deemed unreasonable. The temporary admission was ordered in 2015, and no legally relevant changes were found in this regard in the contested judgment from 2020. This raises the question of whether, despite the fact that the execution of his or her removal has been judged unreasonable and accordingly his or her provisional admission has been ordered, a foreign person can be required to go to the foreign state whose security situation gave rise to the provisional admission in order to avail himself or herself of UNRWA's protection or assistance there.

In a recent judgement, the Federal Court ruled that a Kurd of Syrian origin who is provisionally admitted to Switzerland cannot be required to return to Syria in order to take the necessary steps to acquire citizenship. In its reasoning it stated that a person temporarily admitted for reasons of security could not be required to go to a specific state if the return there had been judged unreasonable in the context of the decision on temporary admission. Accordingly, when applying the Stateless Persons Convention, the scope of a temporary admission should not be overlooked and it should not be assumed that the provisionally admitted person could return voluntarily to his or her country of origin without further ado. Last but not least, it should be taken into account in this context that an amendment to the law is in preparation, according to which provisionally admitted persons (as well as refugees) are to be expressly prohibited from travelling to their country of origin under threat of losing their residence status (for the whole, see judgment 2C_415/2020 of 30 April 2021 E. 9.2 [intended for publication], with reference to the Federal Council Dispatch of 26 August 2020 on the amendment of the Foreign Nationals and Integration Act [restrictions on travel abroad and adjustments to the status of temporary admission], BBl 2020 7457 ff., 7485 f., and the associated draft revision of the Act, BBl 2020 7509 ff., 7510; see also judgments of the FAC F-992/2017 of 24 September 2018 E. 5.3; E-3562/2013 of 17 December 2014 E. 5.3.4; likewise on a provisionally admitted refugee BVGE 2014/5 E. 11).

The assessment expressed in the aforementioned Federal Court judgment must also apply mutatis mutandis in constellations such as the present one. Against this background, the complainant cannot be expected to return to Syria. Contrary to the opinion of the lower court, he is therefore currently not in a position to avail himself of the protection or assistance of UNRWA there. This would apply

even if this organisation were to continue to be active in Syria. The fact that the complainant holds a Syrian passport for Palestinian refugees (see E. 8.6 of the contested judgment) also does not change the fact that he is unable to avail himself of UNRWA's assistance in Syria.

8.4 In this state of affairs, the decisive factor is whether the complainant could enter one of the other four UNRWA operational areas (i.e. Lebanon, Jordan, the West Bank or the Gaza Strip) in order to benefit from the protection or assistance of this organization there. A corresponding possibility can only be assumed if the complainant has a minimal relationship with the area of operation in question (cf. E. 7.2 above).

According to the findings in the contested judgment, which are binding on the Federal Court (cf. Art. 105 para. 1 FSCA; E. 2.2.1 above), it must be assumed that in the present case there are no at least minimal personal links in one of the four fields of operation mentioned. Consequently, in the absence of a minimal relationship between the complainant and one of these areas, from the outset it cannot be assumed that he is entitled to protection or assistance from UNRWA in the relevant legal sense in one of these areas.

8.5 Since, according to the above, the complainant can no longer avail himself of UNRWA's protection or assistance, the refusal to recognise his statelessness violates the Stateless Persons Convention. The appeal therefore proves to be well-founded and must be upheld insofar as it is admissible. The contested judgment must be set aside in respect of the complainant. The State Secretariat for Migration must also be ordered to recognise him as a stateless person.

9.

9.1 In view of this outcome of the proceedings, no costs are to be charged for the Federal Supreme Court proceedings (cf. Art. 66 para. 1 and 4 FSCA).

Since the appellant prevails, he is entitled to party compensation, which the State Secretariat for Migration is obliged to pay him (cf. Art. 68 para. 1 FSCA). The fee for legal representation for the Federal Court proceedings is determined in accordance with the Rules of 31 March 2006 on the Compensation of Parties and the Compensation for Official Representation in Proceedings before the Federal Court (SR 173.110.210.3; hereinafter: Rules), which are applied mutatis mutandis in the present case, as the legal representative is not a practising lawyer (Art. 9 Rules; cf. also judgment 2C_172/2016 / 2C_173/2016 of 16 August 2016 E. 6.2). According to Art. 6 of the Rules, the fee for legal representation for disputes without pecuniary interest is between CHF 600 and CHF 18,000, depending on the importance and difficulty of the matter and the amount of work involved. No circumstances have been invoked, nor is it apparent why this fee range should be deviated from.

The complainant's representative submitted a bill of costs which shows a time expenditure of 30 hours at an hourly rate of CHF 180 (or CHF 194 including VAT). The estimated hourly rate appears to be too high in view of the fact that the representative is not a patented lawyer. It is justified to set the party fee at CHF 4,000.

9.2 The case is to be referred back to the lower court for a reassignment of the costs and the compensation of the parties of the previous proceedings (Art. 67 FSCA, Art. 68 para. 5 FSCA).

Accordingly, the Federal Supreme Court recognises:

1.

The appeal in matters of public law is upheld insofar as it is admissible, and the judgment of the Federal Administrative Court of 2 March 2020 is set aside insofar as it relates to the complainant. The State Secretariat for Migration is ordered to recognise the complainant as a stateless person.

2.

No court costs shall be charged for the Federal Court proceedings.

3.

The State Secretariat for Migration shall pay the complainant compensation of CHF 4,000 for the federal court proceedings.

4.

The case shall be referred back to the Federal Administrative Court for a reassignment of the costs and compensation of the parties in the previous proceedings.

5.

This judgment shall be communicated in writing to the parties to the proceedings and to the Federal Administrative Court, Division VI.

Lausanne, 6 August 2021

On behalf of the II. Public Law Division
of the Swiss Federal Court

The President: Seiler

The Clerk: König