Federal Court

2C_587/2021

Judgment of 16 February 2022
II. Public Law Department

Panel:
Federal Judge Aubry Girardin, President,
Federal Judge Hänni, Federal Judge Beusch,
Clerk Seiler.

Parties to the proceedings:
1. A.A._____,
2. B.A._____,
acting through her father A. A._____,
3. C.A _____,
4. D.A._____,
Complainants,
all four represented by Ms. Dr. iur. Stephanie Motz,

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 9 June 2021 (F-3785/2019, F-3786/2019, F-3788/2019).

Facts:

A.
A.A. _____ (born 1966) and his children B.A _____ (born 2007), C.A. _____ (born 1998) and D.A._____ (b. 1999) are Palestinian refugees with unknown citizenship from Syria. On 3 September 2014, they left their country of origin together with his wife resp. their mother (born 1970, Syrian nationality) and traveled to Switzerland with Syrians travel documents for Palestinian refugees and visas for visiting purposes on 5 September 2014.

The applications for asylum filed in Switzerland were rejected on 28 August 2015 (confirmed with judgment of the Federal Administrative Court of 25 January 2018). At the same time, the preliminary admission of A.A. _____, B.A _____, C.A. _____, and D.A._____ was ordered due to the unreasonableness of the enforcement of removal.

B.
A.A. _____ and B.A. _____ applied for recognition of statelessness on 5 November 2018, C.A. _____ on 15 January 2019 and D.A _____ on 17 January 2019. In support of this they stated that they were registered with the United Nations Relief and Works Agency for Palestine Refugees in

the Near East (UNRWA). Because of their departure, however, they no longer fell under the protection of UNRWA, which is active in Syria.

With three separate decrees of 25 June 2019, the State Secretary for Migration rejected these requests for recognition of statelessness.

The appeals filed against this were united in one proceeding by the Federal Administrative Court and were dismissed in its judgment of 9 June 2021.

C.
With an appeal in public matters of 23 July 2021, A.A. _____ (hereinafter: Complainant 1), B.A _____ (hereinafter: Complainant 2), C.A. _____ (hereinafter: Complainant 3) and D.A. _____ (hereinafter: Complainant 4) request that the judgment of the Federal Administrative Court of 9 June 2021 should be set aside. They also request that their statelessness be recognized and that they be granted a residence permit. They also apply for free administration of justice and free legal assistance for the federal court proceedings.

The State Secretary for Migration requests that the complaint be dismissed. The Federal Administrative Court waived a consultation. The complainants replicate and submit a cost note.

Considerations:
1.
1.1 With the judgment of 9 June 2021, a decision of the Federal Administrative Court in a matter of public law, which is subject to appeals in public law matters, is contested (cf. Art. 82 lit. a and Art. 86 para. 1 lit. a FSCA). With regard to the recognition of statelessness, there is no reason for exclusion (cf. Art. 83 FSCA; judgments 2C_330/2020 of 6 August 2021 E. 1.1; 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)

Because the subject matter of the dispute can only be limited in the course of the appeal proceedings, not extended (BGE 136 V 362 E.3.4.2; 136 II 165 E. 5), and the lower court proceedings (insofar as of interest here) only dealt with the recognition of the complainants as stateless persons, the application that they should be granted a residence permit is not to be considered (cf. judgment 2C_330/2020 of 6 August 2021 E. 1.1).

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). Complainants 1, 2 and 4 are entitled to appeal because, as stateless persons 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), they would enjoy legal advantages to which they are not entitled as temporarily admitted persons (cf. Art. 2 et seq of the Stateless Persons Convention as well as judgements 2C_330/2020 of 6 August 2021 E. 1.2; 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 However, according to the State Secretariat for Migration, complainant 3 has meanwhile received a residence permit within the framework of Art. 84 para. 5 AIG (Art. 105 para. 2 FSCA; act. 11, p. 4). In this situation, it is questionable whether and, if so, to what extent the recognition as a stateless person still grants her any legal advantage at all.

Statelessness conveys to the person concerned entitlement for a residence permit in the canton in which they reside (Art. 31 para. 1 Federal Act of 16 December 2005 on Foreign Nationals and Integration [Foreign Nationals and Integration Act, AIG; SR 142.20)) and allows her to work anywhere in Switzerland (Art. 31 para. 2 AIG). Furthermore, the recognition of statelessness also grants a right to the issuance of travel documents by the state of residence (cf. Art. 28 Stateless Persons Convention; Judgment 2C_763/2008 of 26 March 2009 E. 1.1). A person who has already been granted a residence permit has at least the same status as a stateless person concerning the possibility of taking up employment (cf. Art. 38 para. 2 AIG). However, it must be taken into account that in the present case it is also disputed as to what extent the complainants can apply for travel documents via the Syrian authorities at all, or to what extent they could travel abroad at all with Palestinian passports, which is why the right to be issued Swiss travel documents undoubtedly represents an advantage for them. In addition, further specific legal advantages for stateless persons result from various federal decrees (Art. 18 para. 2 Federal Act of 20 December 1946 on Old-age and Survivors' Insurance [AHVG; SR 831.10]; Art. 5 para. 2 Federal Act on Supplementary Benefits to Old-age, Survivors' and Disability Insurance [ELG; SR 831.30]; cf. judgment 2C_661/2015 of 12 November 2015). From this point of view, the recognition as a stateless person with the right to be issued Swiss travel documents would also represent a legal advantage for Complainant 3 compared to the current situation, which means that she also continues to have a legitimate interest in the annulment of the contested decision.

1.4 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).

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 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).

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 (cf. judgment 2C_330/2020 of 6 August 2021 E. 3).

4. The complainants complain that the lower court made an arbitrary finding of fact, firstly by assuming that UNRWA was capable of carrying out its mandate in Syria and secondly by assuming that the complainant's departure from Syria on 3 September 2014 was not forced but voluntary. They furthermore argue that, contrary to the findings of the lower court, it is not possible for them to obtain travel documents from the Syrian representation.

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 complainants left this state voluntarily on 3 September 2014, or whether they can apply for travel documents. 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 their home state (*de facto* stateless persons) are not to be regarded as stateless persons (cf. BGE 115 V 4 E. 2b; judgements 2C_330/2020 of 6 August 2021 E. 5.1; 2C_415/2020 of 30 April 2021 E. 5.1, intended for publication, with references).

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 (Judgements 2C_330/2020 of 6 August 2021 E. 5.2; 2C_415/2020 of 30 April 2021 E. 5.2, intended for publication, with numerous references).

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. 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 (Judgements 2C_330/2020 of 6 August 2021 E. 5.2; 2C_415/2020 of 30 April 2021 E. 5.2, intended for publication, with numerous references).

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_330/2020 of 6 August 2021 E. 5.3; 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). In 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, without valid reasons, refuse 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 (Judgements 2C_330/2020 of 6 August 2021 E. 5.3; 2C_415/2020 of 30 April 2021 E. 5.3, intended for publication, with references).

5.4 There is no evidence that the applicants willingly renounced their nationality or have the opportunity to acquire a nationality. They are thus among the *de iure* stateless persons (cf. E. 5.1 above) and are considered stateless persons within the meaning of Art. 1 para. 1 of the Stateless Persons Convention.

6.

6.1 Art. 1 para. 2 subpara. i of the Stateless Persons Convention provides for an exception to the scope of the Convention, excluding persons who are at present receiving and still benefiting from the protection or assistance from a United Nations agency or body other than the United Nations High Commissioner for Refugees. UNRWA is currently the only existing organisation referred to in Art. 1 para. 2 subpara. i of the Stateless Persons Convention (judgment 2C_330/2020 of 6 August 2021 E. 6.2 with numerous references). This raises the question to what extent this can still be the case once those affected have left the UNRWA area of operations.

6.2 Just under two months after the contested decision of the lower court, the Federal Court ruled on a factual situation comparable to the one at hand in its judgement 2C_330/2020 of 6 August 2021. It concluded that the exclusion clause of Art. 1 para. 2 subpara. i of the Stateless Persons Convention does not apply if the person can objectively no longer claim the protection or assistance of UNRWA after leaving its area of operations. In such a situation, the Stateless Persons Convention is therefore applicable and the person is to be recognized as stateless (judgment 2C_330/2020 of 6 August 2021 E. 6 with numerous references).

6.3 The decisive factor in assessing whether such a situation exists is the extent to which the person concerned can reasonably go to one of the fields of operation of UNRWA's area of operations in order to make use of their protection or assistance there. However, a person cannot be expected to go to one of the organisation's fields of operations with which they have no connection in order to seek the protection or assistance of UNRWA. A mere transit is not enough for the corresponding personal point of contact; Conversely, however, it is not necessary for the person concerned to have once resided there (judgment 2C_330/2020 of August 6, 2021 E. 7.2).

7.
7.1 The applicants are registered with UNRWA and initially sought UNRWA’s protection or assistance in Syria. In September 2014 they left UNRWA’s area of operations.

7.2 According to the above, it is to be examined whether the complainants, viewed objectively, could avail themselves of the protection or assistance of UNRWA again (cf. above E. 6.2; judgment 2C_330/2020 of 6 August 2021 E. 6.6). This would not be the case if they had no concrete possibility of entering a field of operations of UNRWA with which they have at least a minimal relationship in order to claim the protection or assistance of this organization there (cf. E. 6.3 above; judgment 2C_330 /2020 of 6 August 2021 E. 7.2).

7.3 Against this background, it must first be clarified whether the complainants could reasonably be expected to return to Syria and whether they could claim UNRWA’s protection or assistance there.

The complainants are currently temporarily admitted to Switzerland, as the execution of their 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 the judgment under appeal from 2021. This raises the question of whether a foreign person can be required to go to the foreign country whose security situation gave rise to the temporary admission in order to seek UNRWA protection or assistance there, despite the fact that the enforcement of their removal has been judged to be unreasonable and their temporary admission has accordingly been ordered.

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 judgment, the Federal Court ruled that a Kurd of Syrian descent temporarily admitted to Switzerland cannot be obliged 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 security reasons could not be required to go to a certain state if the return there had been judged to be unreasonable in the decision on temporary admission.

In such a case, in the context of the application of the Stateless Persons Convention, the scope of a temporary admission should not be overlooked and it should not be assumed that the person temporarily admitted can easily return to their country of origin.

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 temporarily 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 (see in full judgment 2C_ 415 /2020 of 30 April 2021 E. 9.2, intended for publication, with reference to the message of the Federal Council 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 of the revision of the Act; BBl 2020 7509 ff., 7510; cf. also judgments of the Federal Administrative Court F-992/2017 of 24 September 2018 E. 5.3; E-3562/2013 of 17 December 2014 E. 5.3.4; likewise on a temporarily admitted refugee BVGE 2014/5 E. 11).

The principles expressed in the aforementioned Federal Court judgment must also apply mutatis mutandis in constellations such as the present one. Against this background, it is currently not reasonable for the applicants to return to Syria and they are currently unable to seek UNRWA’s protection or assistance there. This would apply even if this organization were to continue to operate in Syria (cf. judgment 2C_330/2020 of 6 August 2021 E. 8.3).

7.4 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. 6.3 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 connection 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.

7.5 Since, according to the above, the complainants are no longer able to seek UNRWA's protection or assistance, the refusal to recognise their statelessness violates the Stateless Persons Convention. The appeal therefore proves to be well-founded and must be upheld insofar as it is admissible. The further submissions of the complainants need not be further addressed. The contested judgment must be set aside. The State Secretariat for Migration must be ordered to recognise the complainants as stateless persons.

8.

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

Since the complainants prevail, they are entitled to party compensation, which the State Secretariat for Migration is obliged to their legal representative (cf. Art. 68 para. 1 FSCA; cf. judgement 2C_ 415/2020 of 30 April 2021 E. 10.2). The request for free administration of justice becomes irrelevant in this case (cf. Judgment 2C_415/2020 of 30 April 2021 E. 10.2).

8.2 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 Court finds:

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. The State Secretariat for Migration is ordered to recognise the complainants as stateless persons.

2.
No court costs shall be charged for the Federal Court proceedings.

3.
The State Secretariat for Migration shall pay the complainants' legal representative compensation of CHF 4,000 for the Federal Court proceedings.

4.
The request for free administration of justice for the Federal Court proceedings is written off as having become irrelevant.

5.
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.

6.
This judgment shall be communicated to the parties to the proceedings and to the Federal Administrative Court, Division VI.

Lausanne, 16 February 2022

On behalf of the II. public law department
of the Swiss Federal Court

The president: F. Aubry Girardin
The Clerk: Seiler