

CASE NOTE

GERMANY: DETERMINING STATELESSNESS THROUGH CIRCUMSTANTIAL EVIDENCE

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I INTRODUCTION

Germany has reached a historical high of registered stateless people in its territory following the migration waves of the past 15 years.¹ At the same time, the German Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* or ‘BAMF’) noted a dramatic increase of persons with ‘unclear’² or rather, undetermined nationality.³ This is appalling and is due to Germany’s lack of a national statelessness determination procedure, which would facilitate the identification of statelessness and support the receipt of a stateless travel document (*Reiseausweise für Staatenlose*),⁴ a settlement permit (*Niederlassungserlaubnis*)⁵ and, ultimately, access to German nationality. Instead, many people are trapped in complex administrative and legal procedures that keep their lives in limbo. To date, statelessness remains an incidental legal issue addressed in the context of stateless travel documents, asylum applications, deportations and naturalisation.

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¹ The Federal Statistical Office (Destatis) listed 29,455 stateless persons by the end of 2022: Statistisches Bundesamt [Federal Statistical Office], ‘29,455 People Recognised as Being Stateless at the End of 2022’ (Press Release No 091, 9 March 2023) <https://www.destatis.de/EN/Press/2023/03/PE23_091_125.html>, archived at <<https://perma.cc/9TXE-AZGH>>.

² This case note will use the term ‘unclear nationality’ (*ungeklärte Staatsangehörigkeit*).

³ Statistisches Bundesamt [Federal Statistical Office], ‘Ausländer: Bundesländer, Stichtag, Geschlecht, Aufenthaltstitel/Ausgewählte Aufenthaltstitel, Ländergruppierungen/Staatsangehörigkeit’ [‘Foreigner: Federal Lands, Reporting Date, Sex, Residence Permit/Selected Residence Permit, States/Nationality’] (Code 12521–0026) <<https://www-genesis.destatis.de/genesis/online?operation=table&code=12521-0026&bypass=true&levelindex=0&levelid=1680038999952#abreadcrumb>>, archived at <perma.cc/6A3U-7W4F>.

⁴ *Aufenthaltsverordnung vom 25 November 2004 (AufenthV)* [Ordinance Governing Residence of 25 November 2004], Bundesgesetzblatt I 2945 (Germany) amended by *Artikel 4 der Verordnung vom 20 August 2021* [Article 4 of the Act of 20 August 2021], Bundesgesetzblatt I 3682, § 4(1) (Germany).

⁵ *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz — AufenthG)* [Law on the Residence, Employment and Integration of Foreigners in Germany (Residence Act)], Bundesgesetzblatt I 1950 (Germany) amended by *Artikel 3 des Gesetzes vom 20 April 2023* [Article 3 of the Laws of 20 April 2023], Bundesgesetzblatt I Nr 106, § 9 (Germany).

To illustrate some of the difficulties individuals face when trying to establish their statelessness, this piece deals with the case of a Maktoum Kurd woman from Syria who sought to obtain a travel document from the competent local foreign office (*Ausländerbehörde*).⁶ After several years in limbo, the Administrative Court of Gelsenkirchen gave the plaintiff a favourable judgment in 2019.⁷ The motion was dismissed by the Higher Administrative Court of the Land of North Rhine-Westphalia two years later.⁸

The dispute reveals some issues people have to navigate from the administrative to judicial levels to regularise their status as de jure stateless persons in Germany, including the burden and standard of proof, the duty to cooperate with the local foreign office, complicated and lengthy administrative procedures and (partly) confusing decisions. More importantly, though, the judgment underpins that statelessness does not need to be proven entirely but can be determined through different pieces of circumstantial evidence.

II FACTS

The female plaintiff claimed to be a Maktoum Kurd born in northern Syria. She entered Germany with her siblings and mother in 1998 and applied for asylum. Her father had previously arrived in the country to initiate his asylum procedure. During his hearing at the BAMF, her father stated that his nationality was undetermined and that he could only provide an identification certificate (*Identifikationsbescheinigung*) issued by the village chief.⁹ Upon rejecting the plaintiff's request for asylum, the BAMF granted her a 'tolerated stay' (*Duldung*) due to her inability to present travel documents.¹⁰

In 2002, as part of her application for a short-term residence permit (*Aufenthaltsbefugnis*), the plaintiff submitted as proof of identity a document issued by the mayor of her village, who claimed to know her 'personally'. According to the document, she was not registered with the authorities in Syria. It seemed evident that she did not have Syrian nationality and thus obtained the residence permit in Germany.¹¹

Later, the plaintiff moved to the city of Minden where the local foreign office tried to determine her nationality. The Minden foreign office reviewed her siblings' and father's records, which included her parents' 'certificates of residence' issued by the (local) mayor in Syria. The family's records also contained a 'certificate for stateless persons' from the Syrian Ministry of Interior for each family member. Her father's records further offered an opinion (*Stellungnahme*) by the German Oriental Institute (*Deutsches Orient-Institut*) gauging the authenticity of the documents, which appeared to prove the family's lack of Syrian nationality and non-existent registration as foreigners in Syria. His record also contained a judgment of the Administrative Court of Hannover

⁶ Based on Germany's federal system, stateless people need to apply for travel documents with the local foreign office in charge of their residence area.

⁷ VG Gelsenkirchen [Administrative Court of Gelsenkirchen], 17 K 950/18, 23 September 2019.

⁸ OVG Nordrhein-Westfalen [Higher Administrative Court for the Land North Rhine-Westphalia], 17 A 4237/19, 21 October 2021.

⁹ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 2.

¹⁰ *ibid* 3.

¹¹ *ibid*.

concerning a dispute about his residence permit in 2010. In that case, the Court had not found the father to be a Syrian national.¹²

Upon her return to Essen in 2017, the woman applied to the Essen foreign office for a stateless travel document, referring to the evidence presented by her parents. She explained that she belonged to the Maktoum Kurds, who are not recognised as nationals by the Syrian Government.¹³ She also pointed to her sister's Syrian marriage certificate, which categorised the latter's nationality as 'unknown'. While Essen's local foreign office accepted the outcome of the Minden foreign office's investigation that the plaintiff was not a Syrian national, it did not recognise the plaintiff's statelessness. According to Essen's foreign office, the plaintiff should have been registered in Syria's register for foreigners and should possess an orange identity card as a stateless person. Moreover, Essen's foreign office found her to have Turkish nationality due to her siblings' marriages to Turkish nationals. However, it also acknowledged that since her grandparents were already born in Syria, her registration with the Turkish authorities seemed unlikely — even if her great-grandparents were Turkish.¹⁴

Following a hearing at Essen's foreign office in January 2018, the plaintiff's application for a stateless travel document was rejected as she could not present the requested 'DIN A4 or DIN A5-like red document' typically issued to Syrian stateless persons.¹⁵ Therefore, the woman submitted an action for failure to act (*Verpflichtungsklage*) to the Administrative Court of Gelsenkirchen in February 2018. The Essen foreign office, the respondent, refused this measure. While it did not doubt the plaintiff to be Maktoum Kurd, it insisted on receiving an extract from the Syrian register for foreigners. It also argued that Maktoum Kurds could have an undetermined nationality and do not need to be classified as stateless.¹⁶

III ISSUES

The dispute is based on art 28 of the 1954 *Convention relating to the Status of Stateless Persons* ('1954 Statelessness Convention') implemented in German legislation:

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents.¹⁷

¹² VG Hannover [Administrative Court of Hannover], 1 A 457/10, 9 June 2010, cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 3–4.

¹³ See 'From Syria to Europe: Experiences of Stateless Kurds and Palestinian Refugees from Syria Seeking Protection in Europe' (Report, Institute on Statelessness and Inclusion, 10 January 2019) 9.

¹⁴ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 4.

¹⁵ See Haqqi Bahram, 'Too Little Too Late? Naturalisation of Stateless Kurds and Transitional Justice in Syria' in Tenday Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021) 264, 264.

¹⁶ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 5.

¹⁷ *Convention relating to the Status of Stateless Persons*, signed 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 28 ('1954 Statelessness Convention'); *Gesetz zu dem Übereinkommen vom 28 September 1954 über die Rechtsstellung der Staatenlosen vom 12 April 1976* [Law on the Convention of 28 September 1954 Relating to the Status of Stateless Persons of 12 April 1976], Bundesgesetzblatt II 473 (Germany).

IV FINDING

The Administrative Court of Gelsenkirchen found the action for failure to act justified and ruled that the local foreign office had wrongfully rejected the plaintiff's application and thus violated her rights.¹⁸ The plaintiff was entitled to the issuance of a stateless travel document given the binding nature of art 28 of the *1954 Statelessness Convention*.¹⁹ The plaintiff met all three required conditions to receive a travel document: 1) she was legally staying in Germany; 2) she was stateless; and 3) there were no compelling reasons regarding the security of the state or public order that could prevent the issuance of the requested document.²⁰

The Administrative Court of Gelsenkirchen provided the following reasoning for its determination of the plaintiff's statelessness: the plaintiff was stateless within the meaning of 'art 1 para 1 of the 1954 [*Statelessness*] *Convention* (implemented into German law) if no State recognis[ed] the person as a national under the operation of its law'.²¹ Thus, to determine statelessness, it was essential to comprehend how the foreign local authorities and courts applied the nationality law provisions.²² In this regard, it was the individual's responsibility to show and prove the claimed statelessness. This was

because the required information — such as the detailed presentation of the parentage and the details of the ancestors with dates of birth, places of birth and places of residence — are basically those from the area of life of the person concerned and [their] family of origin, which are largely not accessible to an official investigation.²³

In the Court's view, statelessness is sufficiently proven when there is no reasonable doubt that the states of which the person concerned might be a national do not consider the individual a national.

The Court was convinced about the woman's lack of Syrian nationality and found that the plaintiff belonged to the Maktoum ethnic group like her parents in Syria and was, therefore, stateless. Relying on a report on Syrian asylum seekers published by the Federal Foreign Office in 2004, the Court pointed to the Maktoum Kurds' descendants' loss of Syrian citizenship following the census in 1962.²⁴ According to Syrian law, these descendants were staying illegally in the country at this point and, thus, recognised as foreigners. Those without any other

¹⁸ 'Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff's rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication': *Verwaltungsgerichtsordnung in der Fassung der Bekanntmachung vom 19 März 1991* [Code of Administrative Court Procedure of 19 March 1991], §113(5) (Germany).

¹⁹ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 6.

²⁰ *ibid.*

²¹ BVerwG [Federal Administrative Court], 1 C 15.88, 16 October 1990, cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 7 [tr author]; OVG Nordrhein-Westfalen [Higher Administrative Court of the Land North Rhine-Westphalia], 18 E 1084/11, 6 July 2012, 1 [5], cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 7.

²² OVG Nordrhein-Westfalen [Higher Administrative Court of North Rhine-Westphalia], 18 E 1084/11 (n 21), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 7.

²³ VG Hannover [Administrative Court of Hannover], 2 A 6108/08, 27 April 2010, 1 [tr author].

²⁴ Auswärtiges Amt [Federal Foreign Office], *Bericht über die asyl- und abschiebungsrelevante Lage in Syrien* [Report on the Situation in Syria Relevant to Asylum and Deportation] (Report, 13 December 2004), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 9–10.

nationality became stateless.²⁵ Whilst the so-called *ajnabis* ('foreigners') had been issued red-orange cards since the 1962 census and had been given rights as foreigners, Maktoum Kurds were stripped of any rights.²⁶ Overall, the census was carried out in a rushed and arbitrary manner.²⁷ The Court further stressed the lack of registration of those children born out of relationships between Syrian, Ajanib or Kurdish women, and Kurdish men. They could only obtain a white identity document from the mayor or village chief.²⁸

Against this backdrop, the Court noted that it was impossible to provide direct proof of a person's belonging to the Maktoum group. Instead, authorities needed to rely on circumstantial evidence like — in the case of the plaintiff — a detailed explanation of the person's origin. The explanation should offer 'precise and comprehensive information on the time and place of birth of parents and grandparents as well as their current and past whereabouts'.²⁹ In this regard, the Court dismissed the respondent's unreasonable request to the Maktoum plaintiff to prove her statelessness by presenting an extract from the Syrian register for foreigners.³⁰

The Court also disagreed with the respondent's assumption concerning the plaintiff's possible Turkish nationality. By relying on the same report by the Federal Foreign Office, the Court followed the suggestion that some Kurds captured by the 1962 census may have other nationalities (particularly Turkish and Iraqi ones) compared to many others who did not receive nationality documents. For these cases, it would be 'impossible' to prove statelessness.³¹ Building on this, the Court recommended considering the evidence provided in the plaintiff's case. The plaintiff and her father explained that all her ancestors were from Syria; therefore, there were no direct links with Turkey. Minden's foreign office's investigation concluded likewise; the respondent even admitted the unlikelihood of the plaintiff's registration in Turkey. Considering the facts, the Court condemned the respondent's misjudgement of the legal standard of proof for statelessness by maintaining the view that the Maktoum plaintiff could hold an 'unclear' nationality. Once again, it emphasised that statelessness can be proven if there are no reasonable doubts about a person's nationality.³²

²⁵ Bahram (n 15) 264.

²⁶ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 9.

²⁷ *ibid* 10.

²⁸ *ibid*.

²⁹ OVG Nordrhein-Westfalen [Higher Administrative Court for the Land North Rhine-Westphalia], 17 E 552/05, 3 June 2005, cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 16–17 [tr author]; *Auskunft des Auswärtigen Amtes an das BAMF* [Information from the Federal Foreign Office to the BAMF], (Document, No 508-9-516.80/48974, 2 January 2017), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 10.

³⁰ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 16.

³¹ Auswärtiges Amt [Federal Foreign Office] (n 24), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 16–7. The report served in similar cases, see OVG Nordrhein-Westfalen [Higher Administrative Court for North Rhine-Westphalia], 17 E 552/05 (n 29), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 17. It should be noted that the Court consulted and referenced other reports — including foreign reports — for its reasoning as well.

³² VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 17.

V ANALYSIS

The judgment of the Administrative Court of Gelsenkirchen sheds light on some of the interrelated challenges people need to overcome when trying to regularise their statelessness through their applications for travel documents under art 28 of the *1954 Statelessness Convention*. First, the standard of proof that the applicant must meet is beyond reasonable doubt.³³ However, as emphasised by different administrative and higher administrative courts, the competent authority should not make excessive demands on the person who is obliged to prove their statelessness.³⁴ The Maktoum plaintiff demonstrated her proactivity and willingness to provide evidence of her origin and lack of nationality since her arrival in Germany.³⁵ Moreover, her family's evidence (documents and oral statements) remained consistent throughout the process with various foreign offices.³⁶ To support the plaintiff's standpoint, it seems noteworthy to point to Berlin's Administrative Court which ruled on the inadmissibility of denying an applicant's claim of statelessness simply because of their unclear nationality status.³⁷

Secondly, the Administrative Court of Gelsenkirchen made use of previous case law relating to the determination of statelessness which emphasised the importance of understanding how foreign authorities and courts apply the nationality law provisions in their countries.³⁸ As previously described, this approach had an impact on the evaluation of the respondent's application of the standard of proof, the expectation with regards to the plaintiff's burden of proof and ultimately the Court's attitude towards its assessment. This is suggested by the Court's ruling following its investigation on the respondent's misjudgement of the legal standard of proof for statelessness and the permissibility of determining statelessness, even if it cannot be proven entirely, through different pieces of circumstantial evidence.

Thirdly, the ruling highlights a few troubling issues concerning an applicant's burden of proof and duty to cooperate with the competent government body. German legislation makes it the individual's responsibility to submit evidence of their identity and lack of nationality and to take any reasonable steps to gather relevant evidence, including evidence of their inability to obtain any other nationality.³⁹ During this process, the person has to follow the authority's guidance regarding the provision of the required documents and associated responsibilities. Both the burden of proof and duty to cooperate are quite contested in German courts and have been shaped by jurisprudence over time. Previous case law suggests applying a shared burden of proof between the individual and the

³³ *ibid.*

³⁴ OVG Lüneburg [High Administrative Court of Lüneburg], 2 LA 441/07, 10 December 2007, 3; OVG Niedersachsen [Higher Administrative Court for the Land Lower Saxony], 2 LA 441/07, 10 December 2007. See also VG Schleswig-Holstein [Administrative Court of Schleswig Holstein], 4 A 34/07, 13 June 2007, 4.

³⁵ On the lack of cooperation of a Maktoum man from Syria with a 'Maktoum certificate' stating 'identity proof for persons of unclear nationality', see OVG Nordrhein-Westfalen [Higher Administrative Court for the Land North Rhine-Westphalia], 17 E 552/05 (n 29).

³⁶ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 12–5.

³⁷ VG Berlin [Administrative Court of Berlin], 11 A 655/84, 12 June 1985.

³⁸ OVG Nordrhein-Westfalen [Higher Administrative Court of North Rhine-Westphalia], 18 E 1084/11 (n 21), cited in VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 7.

³⁹ VG Gelsenkirchen [Administrative Court of Gelsenkirchen] (n 7) 8.

government body.⁴⁰ Yet, this seems to be little practised and mainly encouraged by the courts. However, as shown in this case, the inability to provide comprehensive evidence as to an applicant's lack of nationality is not always an individual's fault but depends on contextual circumstances. More concerningly, though, it can create long-term legal limbos for individuals affected. This is particularly appalling as statelessness is determined at the discretion of local foreign offices, which might not necessarily recognise various pieces of circumstantial evidence. However, as outlined above, it is often only these indications that can guide officers in their decision-making.

VI CONCLUSION

The determination of statelessness remains a complicated and lengthy process in Germany due to its incidental legal nature. Both research and case law hint at a tendency not to recognise *de jure* statelessness at the administrative level.⁴¹ This may partly relate to the federal system where each federal state (*Land*) is in charge of the implementation of federal legislation. It may also result from local politics, which can influence decision-making substantially due to the structure of immigration administration, with influence flowing from the local to the federal and vice versa.⁴² To close current gaps and support people in long-term limbo, it appears imperative to harmonise current practices through a dedicated determination procedure. Such a measure may help to identify and recognise statelessness through circumstantial evidence and reduce discretion in the decision-making of local offices.

⁴⁰ See Friedrich Schoch, Jens-Peter Schneider and Wolfgang Bier (eds), *Verwaltungsgerichtsordnung: Band I Kommentar* [Administrative Court Code: Volume I Commentary] (CH Beck, 32nd edn, 2016) vol 1, §86 recital 19-21, §123 recital 97; VGH Bayern [Bavarian Administrative Court], 20 B 12.30003, 9 July 2012; BVerwG [Federal Administrative Court], 9 C 109/84, 16 April 1985, 71.

⁴¹ See, eg, Holger Hoffmann, 'Welche Rechte haben Staatenlose?' ['What Rights Do Stateless Persons Have?'] [2004] (10) *Asylmagazin* 8.

⁴² Tobias G Eule, *Inside Immigration Law: Migration Management and Policy Application in Germany* (Ashgate 2014) 14.