

CASE NOTE

RECOGNITION OF THE STATUS OF STATELESS PERSONS AND RIGHT OF RESIDENCE FOR PALESTINIANS IN BELGIUM: APPLYING THE PRINCIPLE OF *RES JUDICATA* TO AVOID DIVERGENCE AMONG COURTS

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I INTRODUCTION

The recognition of the status of stateless Palestinians within the European Union ('EU') is complex and sensitive, notably due to the challenges in determining whether Palestine qualifies as a state. Moreover, not all EU Member states grant a right of residence to stateless individuals. In some states, including Belgium, recognising statelessness does not automatically confer a right of residence, creating a gap between statelessness recognition and this right.¹ This discrepancy has led to numerous legal actions in Belgian civil courts to seek this residence right.

Until August 2024, Belgium recognised stateless status solely through judicial procedure. More specifically, until 2017, the Tribunal de première instance ('Tribunal of First Instance') held jurisdiction in these matters. Since 3 August 2017,

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¹ For further information on statelessness in Belgium, see European Network on Statelessness ('ENS'), *Country Briefing: Belgium* (Report, September 2021) <https://index.statelessness.eu/sites/default/files/Country%20Briefing%20Belgium%20ENG_2020%20final.pdf>, archived at <perma.cc/S82G-GBQH> ; Valérie Klein, *Guide Pratique sur l'Apatrié en Belgique pour les Professionnels du Droit des Étrangers* ['*Practical Guide on Statelessness in Belgium for Professionals in Foreign Laws*'] (Practical Legal Guide, 2020) <<https://index.statelessness.eu/sites/default/files/NANSEN%20-%20Guide%20pratique%20sur%20l%E2%80%99apatrié%20%282020%29.pdf>>, archived at <perma.cc/BZ8V-K2HY>.

jurisdiction has shifted to the Tribunal de la famille et de la jeunesse (‘The Family and Juvenile Tribunal’) based on the residence of the applicant.²

The *Aliens Act*³ was amended on 10 March 2024,⁴ with a new administrative process introduced with effect from 1 September 2024. This process directly leads to a right of residence for applicants that meet the definition of a stateless person as defined by art 1 of the 1954 *Convention relating to the Status of Stateless Persons* (‘1954 Convention’).⁵ Consequently, two procedures currently exist side by side. The judicial procedure before the Family and Juvenile Tribunal directly relates to the recognition of the status of a stateless person. Whereas the administrative procedure before the Immigration Office of the Ministry of the Interior only relates indirectly to the recognition of the status of a stateless person. Indeed, the Immigration Office has to previously determine that a person is stateless before they can be granted permission to stay in Belgian territory on the grounds of statelessness.

Unlike the provisions for refugees, the *Aliens Act* does not provide for an automatic right of residence upon the recognition of statelessness.⁶ This right is subject to several conditions that,⁷ in practice, limit its enjoyment by stateless persons.⁸

² *Code Judiciaire* [Judicial Code] (Belgium) art 572bis(1°), and 632bis (‘Belgium Judicial Code’). Article 572bis provides that family courts have jurisdiction on proceedings relating to personal status, including claims related to Belgian nationality and to the recognition of the status of stateless persons. Article 632bis provides that family courts have jurisdiction on proceedings relating to recognition of the status of stateless persons, based on the place of residence of the applicant.

³ *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* [Law of 15 December 1980 on Access to the Territory, Residence, Settlement and Removal of Foreign Nationals] (Belgium) (‘Aliens Act’).

⁴ *Loi du 10 mars 2024 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers concernant la demande d'admission au séjour pour apatridie* [Law of 10 March 2024 Amending the Law of 15 December 1980 on Access to the Territory, Residence, Settlement and Removal of Foreign Nationals Concerning Application for the Grant of Residence on the Grounds of Statelessness] (Belgium) (‘Law of 10 March 2024’).

⁵ *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1 (‘1954 Convention’); See *Aliens Act* (n 3) art 57/37(1°).

⁶ Prior to the *Law of 10 March 2024*, recognised stateless persons could obtain a residence permit through procedures provided for foreign nationals in general, such as the humanitarian regularisation described in *Aliens Act* (n 3) art 9bis. According to art 9bis, a foreigner who cannot return to their country of origin may apply for this regularisation procedure when exceptional circumstances exist. The status of stateless person could be invoked as an exceptional circumstance.

⁷ These conditions include, in particular, the following: stateless persons must have involuntarily lost their nationality or they must have never had any nationality; they cannot acquire the nationality of any state; they cannot secure a legal and durable right of residence in another state; they must legally reside in Belgium for more than 3 months prior to their application for the right of residence as a stateless person or they must have a residence right for applicants for international protection: See *Aliens Act* (n 3) art 57/37(3°)–(5°) and 57/40(3°).

⁸ For further information on previous Bills amending the *Aliens Act* (n 3), see Aude Kuznia, *Apatridie: un Projet de Loi qui Déçoit* [Statelessness: a Disappointing Bill] (Newsletter No 204, Association pour le Droit des Étrangers [Association for the Rights of Foreigners], February 2024) 2 [tr author] <https://www.adde.be/images/2024/Newsletter_fevrier2024.pdf>, archived at <perma.cc/WB3C-TFSB>; United Nations High Commissioner for Refugees (‘UNHCR’), *Commentaires du Haut Commissariat des Nations Unies pour les réfugiés relatifs au projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers concernant la demande d'admission au séjour pour apatridie* [Commentary from the UNHCR relating to the Bill Amending the Law of 15 December 1980 on Access to the Territory, Residence, Settlement and Removal of Foreign Nationals Concerning Application for the Grant of Residence on the Grounds of Statelessness], UN Doc 3600/001 (5 December 2023) [16]–[18] [tr author].

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Prior to the *Law of 10 March 2024*, this legislative gap had been partially addressed by the case law of the Cour constitutionnelle (‘Constitutional Court’) and the Cour de cassation (‘Court of Cassation’) from 2009 and 2012 respectively.⁹

As of January 2023, 676 stateless persons hold a long-term residence permit in Belgium.¹⁰ However, there are no statistics regarding those with short-term residence permits or without a permit at all.¹¹

Given that statelessness determinations may be made by courts, alongside the absence of an automatic right of residence, variations in court interpretations of situations and conditions required for persons to obtain stateless status and residence permits may arise.

The judgment of the Belgian Court of Cassation on 8 April 2022,¹² the subject of this case note, relates to the recognition of statelessness and the granting of a right of residence. Specifically, the judgment concerns the application for a right of residence by a person of Palestinian origin recognised as stateless by a judicial decision.¹³ This judgment highlights the divergences among Belgian courts on the issue of statelessness, particularly regarding Palestinians, while emphasising the application of the principle of *res judicata* to judgments related to stateless status.

II BACKGROUND ON THE RECOGNITION OF THE STATUS OF STATELESS PERSONS FOR PALESTINIANS IN BELGIUM

The consistency of case law regarding the statelessness of Palestinians in Belgium is lacking.¹⁴ Whether a Palestinian, who is no longer under the assistance and

⁹ Cour constitutionnelle [Belgium Constitutional Court], No 198/2009, 17 December 2009 (‘Belgium Constitutional Court, No 198/2009’); Cour de cassation de Belgique [Court of Cassation of Belgium], No S.12.0020.F, 5 November 2012 (‘Court of Cassation, NoS.12.0020.F’). See also Cour constitutionnelle [Belgium Constitutional Court], No 1/2012, 11 January 2012 (‘Belgium Constitutional Court, No 1/2012’); Cour de cassation de Belgique [Court of Cassation of Belgium], No C.13.0042.F, 27 May 2016 (‘Court of Cassation, No C.13.0042.F’).

¹⁰ ‘*Cartes pour étrangers et Documents de Séjour/Vreemdelingenkaarten en Verblijfsdocumenten 2023*’ [‘*Residency Permits and Residence Documents*’] (Detailed Annex, IBZ Office des étrangers [IBZ Immigration Office], 2023) [tr author] <<https://dofi.ibz.be/fr/figures/access-and-stay/residency-permits-and-residence-documents/statistiques-nationales>>, archived at <perma.cc/244K-8YBN>.

¹¹ ENS and NANSEN – The Belgium Refugee Council, *Avis Conjoint du Réseau Européen sur l’Apatridie et de Nansen sur le projet de loi modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers, en vue de régler le droit de séjour des apatrides* [Joint Advice from the ENS and NANSEN on the Bill Amending the Law of 15 December 1980 on the Access to the Territory, Residence, Settlement and Removal of Foreign Nationals, with a View to Regulate the Right of Residence of Stateless Persons] (Joint Advice, Doc 55 3600/001, 29 September 2023) 5.

¹² Cour de cassation de Belgique [Court of Cassation of Belgium], No C.19.0197.F, 8 April 2022 (‘*MA’s Case*’).

¹³ *ibid.*

¹⁴ For the diverging approaches between the Belgian courts, see Wout Van Doren, Julie Lejeune, Marjan Claes and Valérie Klein, ‘The Broadening Protection Gap for Stateless Palestinian Refugees in Belgium’ (2020) *The Statelessness & Citizenship Review* 2(2), 301 (‘The Broadening Protection Gap’).

protection of the United Nations Relief and Works Agency ('UNRWA')¹⁵ and who is on Belgian soil, can be recognised as stateless often hinges on whether Palestine is considered to be a state.¹⁶ Belgium does not recognise Palestine as an independent state, and many judgments have based the recognition of the statelessness of Palestinians on the premise that Palestine is not a state.¹⁷ Indeed, without a Palestinian State, individuals of Palestinian origin cannot possess Palestinian nationality and thus may be recognised as stateless if they hold no other nationality. However, a November 2021 judgment by the Belgian Court of Cassation asserted that when examining personal status, judges possess the authority to determine an entity's statehood regardless of Belgium's official recognition.¹⁸ More recently in July 2022, the Cour d'appel de Mons ('Mons Court of Appeal') conducted a thorough analysis using international law and recognised the existence of a Palestinian State.¹⁹ Nonetheless, even if the appellants possessed identity documents issued by the Palestinian Authority that indicate Palestinian nationality, the Court concluded that these documents did not substantiate that the appellants had the nationality of the Palestinian State under the operation of its legislation.²⁰ Indeed, the Court considered that there was no law governing nationality matters in Palestine and therefore recognised the appellants' status as stateless persons. These judicial positions underscore the challenges in consistently determining whether an individual of Palestinian origin can be considered stateless and the basis for such a determination. In the next section, I analyse in more detail the case decided by the Belgian Court of Cassation on 8 April 2022,²¹ beginning with a summary of the facts and previous proceedings.

III FACTS OF THE CASE AND PREVIOUS DECISIONS

MA, originating from Palestine, held a legal residence permit and identity card issued by the Palestinian Authority. His case gave rise to two different claims. In the first claim before the Tribunal de première instance de Liège ('Liège Tribunal

¹⁵ The United Nations Relief and Works Agency for Palestine Refugees ('UNRWA') was established by the United Nations General Assembly, GA Res 302, UN Doc A/Res/302 (IV) (8 December 1949) to carry out direct relief and works programmes for Palestinian refugees. According to art 1(2)(i) of the *1954 Convention* (n 5), Palestinians receiving assistance from the UNRWA are excluded from protection as a stateless person.

¹⁶ According to customary international law, the existence of a state depends on four essential elements: a state must possess a permanent population; a defined territory; a government, and; the capacity to conduct international relations. See also *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1.

¹⁷ Van Doren, Lejeune, Claes and Klein, 'The Broadening Protection Gap' (n 14) 306.

¹⁸ Cour de cassation de Belgique [Court of Cassation of Belgium], No C.21.0095.F, 19 November 2021.

¹⁹ Cour d'appel de Mons [Mons Court of Appeal], No 2021/FQ/4, 18 July 2022; Cour d'appel de Mons [Mons Court of Appeal], No 2021/FQ/6, 18 July 2022; See also, to that effect, Cour d'appel de Mons [Mons Court of Appeal], No 2020/FQ/9, 28 April 2022. The solution adopted in these three recent judgments of the Mons Court of Appeal, differ from the solution previously adopted by the same Court. Indeed, in Cour d'appel de Mons [Mons Court of Appeal], No 2019/TF/481, 14 December 2020, the Court stated that the application for the recognition of the status of stateless person was unfounded.

²⁰ The *1954 Convention* provides that '[f]or the purpose of this Convention, the term stateless person means a person who is not considered as a national by any State under the operation of its law': *1954 Convention* (n 15) art 1.

²¹ *MA's Case* (n 12).

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of First Instance’),²² MA applied for recognition of the status of stateless person. In the second claim before the Cour d’appel de Liège (‘Liège Court of Appeal’) and the Court of Cassation, MA applied to secure a right of residence.²³

On 11 October 2013, the Liège Tribunal of First Instance ruled on MA’s status, determining that due to the nonrecognition of Palestine as an independent state by Belgium, MA could not be considered a Palestinian national. As he had not acquired another nationality, the Court recognised him as a stateless person. This decision became final.

Following this decision, given that Belgian legislation did not grant a right to remain in Belgium for recognised stateless persons, MA initiated legal proceedings against the Belgian State to secure a right of residence. He based his claim on the jurisprudence of the Belgian Constitutional Court, which has held that under certain conditions, stateless persons are entitled to a right of residence comparable to that enjoyed by recognised refugees pursuant to art 49 of the *Aliens Act*.²⁴ Specifically, to qualify for the same right of residence as a refugee, a stateless person needed to fulfil two conditions: they had to have involuntarily lost their nationality, and had to demonstrate that they could not secure a legal and durable right of residence in another state with which they had connections.

On 8 February 2019, the Liège Court of Appeal found MA’s request for recognition of a right of residence in Belgium to be unfounded.²⁵ The Court reasoned that the recognition of MA as a stateless person did not imply that he had lost Palestinian nationality, as his status of stateless person was solely due to the geopolitical situation of nonrecognition of Palestine as a state by the Belgian government. Furthermore, the Liège Court of Appeal held that since MA possessed an identity card issued by the Palestinian Authority, it was plausible that he could obtain a legal and durable residence permit in Palestine. In this regard, the Court concluded that MA had not demonstrated an absence of ties to Palestine or an inability to secure a legal and durable residence permit there.

MA appealed this decision to the Belgian Court of Cassation, which delivered its judgment on 8 April 2022.²⁶

IV ISSUES

The case before the Court of Cassation is based on art 49 of the *Aliens Act* and the related jurisprudence of the Belgian Constitutional Court and the Court of Cassation. MA’s primary contention was that while art 49 provided that persons recognised as refugees are entitled to residence in Belgium, no analogous provision existed for recognised stateless persons. The Constitutional Court in its judgment of 11 January 2012 ruled that the differential treatment in terms of residence rights between recognised refugees and recognised stateless persons, with the latter involuntarily losing their nationality and unable to secure a legal and durable right of residence elsewhere, constituted discrimination.²⁷ The

²² Tribunal de première instance de Liège [Liège Tribunal of First Instance], 11 October 2013 cited in *MA’s Case* (n 12) 4.

²³ Cour d’appel de Liège [Liège Court of Appeal], 8 February 2019, cited in *MA’s Case* (n 12) 1 (‘Liège Court of Appeal, 8 February 2019’).

²⁴ Belgium Constitutional Court, No 1/2012 (n 9).

²⁵ Liège Court of Appeal, 8 February 2019 (n 23).

²⁶ *MA’s Case* (n 12).

²⁷ Belgium Constitutional Court, No 1/2012 (n 9).

Constitutional Court found that recognised stateless persons and refugees were in comparable situations, with the absence of legislative provisions granting stateless persons a right of residence comparable to the right enjoyed by refugees obligating Belgian judges to address this legislative deficiency.

The case also involved the application of the *res judicata* principle enshrined in art 23 of the *Belgian Judicial Code*.²⁸ This principle states that once a matter has been finally adjudicated by a competent court, ‘it may not be reopened or challenged by the original parties or their successors in interest’.²⁹ MA’s secondary ground of appeal alleged a violation of this principle and of art 23.

V HOLDING

The Court of Cassation focused on the violation of the *res judicata* principle. Firstly, the Court held that a judgment recognising the status of a stateless person pertains to personal status, which therefore carries the force of *res judicata* as applying to third parties due to the indivisibility of personal status.³⁰ The Court emphasised that the decision by the Liège Tribunal of First Instance, which established MA’s status as a stateless person and thereby confirmed he held no nationality, was binding and could not be disregarded regardless of the rationale behind the decision. Secondly, the Court highlighted inconsistencies in the reasoning of the Liège Court of Appeal, particularly its assertion that the recognition of MA’s statelessness did not imply that he had lost Palestinian nationality. By accepting the existence of Palestinian nationality for MA, the Court of Appeal’s stance conflicted with the earlier judgment by the Tribunal of First Instance,³¹ effectively challenging its authority and disregarding the principle of *res judicata*. Consequently, the Court of Cassation ruled that the judgment of the Court of Appeal violated art 23 of the *Belgian Judicial Code*.

Given that the Court of Cassation found the second ground of appeal to be well-founded, it deemed it unnecessary to consider the first ground further. The Court annulled the contested judgment and remanded the case to another court of appeal.

VI ANALYSIS

Although the Court of Cassation was called upon to rule in the proceeding to secure a right of residence, it took into consideration the judgment from the proceeding relating to the recognition of stateless status.

As of the time of writing, the Belgian courts have yet to establish a consistent position on whether persons of Palestinian origin can be considered stateless as well as the basis for such a determination, but the judgment of the Court of Cassation of 8 April 2022 established important points.³² Firstly, the Court emphasised that the judgment recognising the applicant’s status as a stateless person meant that he has no nationality. While this may seem obvious, the Court felt this was necessary to clarify, particularly as the Court of Appeal considered MA to have Palestinian nationality.

²⁸ *Belgium Judicial Code* (n 2).

²⁹ *A Dictionary of Law* (10th ed, 2022) (def ‘res judicata’).

³⁰ *MA’s Case* (n 12) pt III.

³¹ *ibid.*

³² *MA’s Case* (n 12).

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Secondly, the Court unequivocally stated that Belgian courts must not challenge final judgments from other Belgian courts that have recognised statelessness, as these judgments carry the authority of *res judicata*. The Court of Cassation also emphasised that the underlying reasons for such a judgment were irrelevant and courts must therefore respect these decisions even if there is a disagreement. This clarification is significant within this context as Belgian courts have not uniformly agreed on the analysis of elements that define the *1954 Convention* definition of stateless person,³³ such as whether Palestine is considered a state, whether it regards the person concerned as a Palestinian national, and whether Palestine has relevant nationality legislation.

In this case, the Court of Cassation refrained from reiterating that stateless persons, particularly those who had involuntarily lost their nationality and could not obtain a legal and durable right of residence in another state, possessed a subjective right to residence. It also did not re-emphasise that civil judges were required to recognise this right of residence in disputes where recognised stateless persons challenged the refusal of Belgian authorities to issue them a residence permit. While a reaffirmation of this right could have further strengthened the respective jurisprudence, it is noteworthy that both the Court of Cassation and the Constitutional Court have previously affirmed the residence rights of stateless persons in several rulings.³⁴ Moreover, such a reaffirmation would not have altered the outcome in the matter at hand, as the Court of Cassation annulled the appealed judgment on the grounds of violating the *res judicata* principle, consequently referring the case to a different court of appeal.

VII CONCLUSION

The absence of legislation and consistent case law on the recognition of the status of stateless persons poses a risk that individuals in similar situations, particularly Palestinians may receive disparate treatment depending on the court assessing their applications. However, the possibility to appeal decisions may help ensure a certain uniformity while mitigating the risk of inconsistent outcomes.³⁵ Furthermore, the lack of Belgian legislative provisions granting an automatic right of residence to stateless persons undermines their ability to remain in Belgium. While the *1954 Convention* does not explicitly require contracting states to issue residence permits to stateless persons,³⁶ it ensures that they enjoy a minimum set of human rights. However, the practical enjoyment of these rights is contingent upon having a right of residence that allows them to stay regularly on Belgian territory.³⁷ To effectively implement the *1954 Convention*,³⁸ it is imperative that the Belgian legislature address these gaps by recognising a right of residence for stateless persons comparable to that granted to recognised refugees. The *Law of*

³³ *1954 Convention* (n 5).

³⁴ Belgium Constitutional Court, No 198/2009 (n 9); Belgium Constitutional Court, No 1/2012 (n 9); Cour constitutionnelle [Belgium Constitutional Court], No 18/2018, 22 February 2018; Court of Cassation, No S.12.0020.F (n 9); Court of Cassation, No C.13.0042.F (n 9).

³⁵ Christelle Chiarulli, *La protection des apatrides [The Protection of Stateless Persons]* (Anthemis 2014) 106 [tr author].

³⁶ *1954 Convention* (n 5).

³⁷ However, it should be noted that art 31 of the *1954 Convention* (n 5) provides that '[t]he contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order'.

³⁸ *1954 Convention* (n 5).

10 March 2024 merits recognition for establishing a right of residence for stateless persons. However, as it currently stands, it appears inadequate due to the introduction of additional conditions that stateless persons must meet to obtain a residence permit, thereby limiting their right to reside in Belgium.