FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

Federal Administrative Court 10 C 50.07
Higher Administrative Court 3 L 54/03

Released
on 26 February 2009
Ms. Röder
as Clerk of the Court

in the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

the Tenth Division of the Federal Administrative Court
upon the hearing of 26 February 2009
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
with Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Beck and
Prof. Dr. Kraft

decides:

Upon appeals by the Federal Officer for Asylum Affairs and the Respondent, the judgment of the Mecklenburg-Western Pomerania Higher Regional Court of 16 May 2007 is set aside.

The matter is remanded to the Higher Regional Court for further hearing and a decision.

The disposition as to costs is reserved for the final judgment.

R e a s o n s :

I

1 The Complainants seek refugee status and, alternatively, a finding of prohibitions on deportation in regard to Azerbaijan and Armenia.

2 Complainant 1, born in 1969 in Baku, Azerbaijan, and Complainant 2, her son, born in 1994 in the Stravopol district, Russia, are by their own account ethnic Armenians. In June 2002, they applied for asylum status in Germany. In her reasons, Complainant 1 asserted that she grew up in Baku. Her father, who died in 1975, was of Armenian ethnicity, and her mother, who died in 1987, was an ethnic Russian. Because she, Complainant 1, was constantly threatened on account of her Armenian ethnicity, she left Azerbaijan in 1992 and went to Russia. There she resided illegally in city B., but had an apartment and engaged in commerce. There she also met her life companion, the father of Complainant 2, who is likewise of Armenian ethnicity. Because the situation for people from the Caucasus was also poor in Russia, in 2002 she came to Germany with Complainant 2. The Federal Office for the Recognition of Foreign Refugees (now the Federal Office for Migration and Refugees) – the ‘Federal Office’ – rejected their applications in a decision of 16 October 2002, finding that neither the conditions under Section 51 (1) of the Aliens Act nor impediments to deportation under Section 53 of the Aliens Act were present, and threatening the Complainants with deportation to Azerbaijan or Armenia.

3 In a decision of 4 February 2003, the Administrative Court rejected the appeal concerning the application for refugee status and seeking a finding of prohibitions on deportation under Section 53 of the Aliens Act.

4 In a decision of 16 May 2007 the Higher Administrative Court modified the lower court’s decision, ordered the Respondent to find that the conditions under Section 60 (1) of the Residence Act exist, and set aside the appealed decision of the Federal Office insofar as it opposed that order. The court based its decision substantially on the following considerations: On account of their Armenian eth-

nicity, it found, the Complainants were threatened with political persecution if they returned to Azerbaijan, because of their loss or non-possession, respectively, of nationality, and their concomitant unprotected status. It found that the Complainants are stateless. An examination of the persecution threatening them should focus on Azerbaijan, as the country of their habitual residence. Following the collapse of the Soviet Union, Complainant 1 had acquired Azerbaijani nationality under the Azerbaijani Nationality Act of 1991, but had subsequently lost it or in any case did not acquire or reacquire it. Under the Act of 1991, it was grounds for loss of nationality if a person with a continuous residence abroad failed for five years, without good cause, to comply with his or her obligation to report to the consulate. Since Complainant 1 left Azerbaijan in 1992 and there was no reason to believe that she had been registered with the Azerbaijani representation in Russia by 1997, the court found she could be ‘alleged with reason to have lost her Azerbaijani nationality as early as that time’ (Copy of the Decision p. 8).

5 Nationality law underwent an amendment in the Nationality Act of the Republic of Azerbaijan of 30 September 1998. It defined as citizens those persons who held Azerbaijani nationality as of the effective date of that Act. The basis for nationality was registration at the person’s place of residence in Azerbaijan at the effective date of the Act. In any event, the court found, the Act took effect no later than 2000. Under the application of that Act, Complainant 1 could in any case de facto not be considered an Azerbaijani national (Copy of the Decision p. 11). The Higher Administrative Court assumes that in the practical application of the Act, persons of Armenian ethnicity were discriminated against in comparison to Azeris, because the latter were not deleted from the reporting registers even if they had stayed abroad for a considerable time. In any case, said the court, in contrast to ethnic Azeris, ethnic Armenians could not recover the citizenship they lost due to long residence abroad.

6 The court held that Complainant 2 did not acquire Azerbaijani nationality by birth because his mother was not an Azerbaijani national. The Complainants, it said, also had not obtained Russian nationality. It found that they therefore had the legal status of stateless persons under the Convention on the Status of

Stateless Persons, even though it should be taken into account that the Complainants might be only de facto stateless persons (Copy of the Decision p. 13). Since Complainant 1 had left Azerbaijan after previously being persecuted, with reference to the indirect group persecution of ethnic Armenians that must be assumed until 2000, the court held that the question of endangerment upon return fell under the mitigated standard of probability (Copy of the Decision p. 19). Under this standard, the Complainants were threatened with political persecution if they returned, on account of the unprotected status imposed on them by the Azerbaijani state in connection with their loss or non-acquisition of nationality (Copy of the Decision p. 16). The refusal of admission into Azerbaijan, which was to be expected ‘in all probability’, was also based on their Armenian ethnicity, and thus represented political persecution (Copy of the Decision p. 15).

7 The assessment of the risk of persecution, said the court, should focus on Azerbaijan as the persecuting state, since this was the country of the Complainants’ last habitual residence. Complainant 1 lived in Azerbaijan, as an Azerbaijani national, from her birth until she left the country in 1992. Her residence in Russia did not come into consideration as a ‘habitual residence’, said the court, because by her own account she stayed there illegally. Lacking papers, she neither was registered there nor was able to document her refugee status (Copy of the Decision p. 15). For Complainant 2, born in Russia, the Russian Federation was also out of consideration as a country of habitual residence because of the lack of the requisite lasting relationship in the sense of lawful residence (Copy of the Decision p. 16).

8 The Complainants also could not reasonably be assumed to have an alternative refuge available in Nagorno-Karabakh, the court found. This region could not reasonably be considered accessible to the Complainants. They could only reach it through Armenia. Since the Complainants did not have valid travel documents and it was ‘neither argued nor otherwise evident’ that they could obtain such documents, the court held, they were barred from entering Armenia (Copy of the Decision p. 26).

9 Nor was a grant of refugee status precluded under Section 27 of the Asylum Procedure Act, said the court (Copy of the Decision p. 27). A referral to their sojourn of some years in Russia was out of the question because the Complainants had stayed there illegally and did not have nationality there, and thus a repatriation or lawful return was ‘clearly not possible.’

10 The Respondent and the Federal Officer for Asylum Affairs (Intervener 2) appealed this decision to the present Court. They argue substantially the following reasons for their appeal: The Higher Administrative Court erroneously focused on Azerbaijan, not the Russian Federation, as the country of the last habitual residence. That court had impermissibly narrowed the concept of habitual residence under asylum law when it required that the residence must be a lawful residence. Rather, it must suffice that the residence was de facto tolerated, and that the stateless person could therefore remain in the country without concrete fear of being expelled or deported. If, in regard to the Russian Federation, there is a presumption of a permanent refusal of readmission, without a connection to characteristics relevant to asylum, then there was no entitlement to a finding of refugee status in regard to Russia.

11 The present appellants argue that insofar as the Higher Regional Court concluded that the loss of Azerbaijani citizenship was a measure relevant to asylum, the judgment suffered from an unclearly reasoned basis for a prognosis, or an improper formation of conviction under Section 108 (1) of the Code of Administrative Court Procedure. The appealed decision, they say, considered only the non-obtainment of Azerbaijani nationality under the 1998 Act as a factor relevant to asylum. But the decision does not examine the possibility that Complainant 1 might already have lost her Azerbaijani nationality under the Act of 1991. If she no longer held Azerbaijani nationality even before 1998, the amended law of 1998 and the authorities’ practices based thereon can no longer represent an exclusion of the Complainants that is relevant to asylum.

12 The Complainants oppose the appeals. They defend the appealed decision and believe that Complainant 1 did not lose Azerbaijani nationality under the 1991 Act. Nor did the Higher Administrative Court arrive at such a finding, they say; it

only commented that the loss might be ‘alleged’ against Complainant 1. This did not mean a de jure loss of nationality, but only the de facto denial of the rights that would proceed from nationality. In regard to the 1998 Act as well, the problem relevant to asylum lies in the de facto denial of rights under that Act, and not in the creation of a de jure condition of statelessness. However, even if the Complainants were stateless, in concurrence with the Higher Administrative Court, the focus should be on Azerbaijan as the country of last habitual residence.

13 The representative of federal interests before the Federal Administrative Court has intervened in the proceedings. He views the appealed decision as erroneous in law, and objects in particular that the court accepted de facto statelessness as sufficient reason to apply the rules that are applicable only to de jure statelessness. Moreover, he argued, the concept of a ‘habitual residence’ must not be interpreted too restrictively, and particularly must not be made contingent on lawfulness of residence, since otherwise no refugee status could be granted because of persecution in the country concerned.

II

14 The appeals have merit. The appealed decision is founded on a contravention of federal law (Section 137 (1) No. 1 Code of Administrative Court Procedure). The court below affirmed the Complainants’ entitlement to refugee status on grounds that are incompatible with federal law. Since this Court cannot itself finally decide on the asserted claim to refugee status for lack of sufficient findings of fact by the court below, the matter must be remanded to the court below for a new hearing and for a decision (Section 144 (3) sentence 1 No. 2 Code of Administrative Court Procedure).

15 The legal assessment of the prayer from the appeal against the original administrative decision is governed by the Asylum Procedure Act as amended in the notification of 2 September 2008 (BGBl I p. 1798) and Section 60 of the Residence Act as amended in the notification of 25 February 2008 (BGBl I p. 162). If

it were to decide now, under Section 77 (1) of the Asylum Procedure Act the court below would have to base its decision on the status of law presently in effect. For that reason, the changes in law that took effect with the Act to Implement European Union Directives on Residence and Asylum Law of 19 August 2007 (BGBl I p. 1970) – the Guideline Implementation Act – which are taken into account in the aforesaid notifications, must also serve as a basis for the present Court's decision (decision of 11 September 2007 - Federal Administrative Court 10 C 8.07 - BVerwGE 129, 251, Marginal No. 19, settled case law).

16 1. In its approach, the court below correctly assumed that a deprivation of citizenship for reasons relevant to asylum may represent persecution within the meaning of Section 60 (1) of the Residence Act in conjunction with Article 9 of Directive 2004/83/EC, and may thus result in recognition of asylum status under Section 3 (1) of the Asylum Procedure Act.

17 a) The case law of the Federal Administrative Court has recognised that the withdrawal of citizenship may also constitute persecution relevant to asylum (see decision of 24 October 1995 - Federal Administrative Court 9 C 3.95 - Buchholz 402.25 Section 1 Asylum Procedure Act No. 180). Here the focus must always be on the state whose nationality was held by the person affected by the withdrawal until the act of withdrawal. No other actor – such as a third state or a private adversary – comes into consideration for this specific act of exclusion.

18 A state measure of persecution need not consist solely of interference with life, limb and liberty. Violations of other rights to protection and freedom may also qualify as characterising elements of persecution, depending on the circumstances of the case. In terms of the intensity of interference, persecution must also fundamentally be seen in a state's withdrawing the material rights of citizenship from a citizen, thus excluding him from the general system of peace within the national unit (see decision of 24 October 1995, op. cit., p. 62). This also applies taking account of Article 9 (1) a of Directive 2004/83/EC of 29 April 2004 (known as the 'Qualification Directive'), whose application is ordered un-

der Section 60 (1) sentence 5 of the Residence Act. Accordingly, persecution relevant to asylum includes acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the ECHR. While it is true that deprivation of citizenship does not violate a right that persists even in public emergencies within the meaning of the ECHR, this is also not necessary, since Article 9 (1) a of the Directive mentions it only as a non-limiting example. But it does violate Article 15 of the Universal Declaration of Human Rights of 10 December 1948 (Resolution 217 A<III> of the UN General Assembly), which reads as follows:

Article 15
(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

19 In the view of this Court, the critical factor in regard to the severity of the violation of rights caused by deprivation of citizenship, within the meaning of Article 9 (1) a of the Directive, is that the state deprives the individual in question of his or her fundamental status as a citizen, and thus necessarily denies residency protection, thereby rendering the person stateless and unprotected – in other words: It excludes him or her from the state's system of protection and peace. The case law of other European states likewise views deprivation of citizenship, when linked with characteristics relevant to asylum, as an act of persecution (see Court of Appeal for England and Wales, decision of 31 July 2007 in the matter of EB <Ethiopia> v Secretary of State for the Home Department <2007> EWCA Civ 809 – especially Marginal Nos. 54 and 75).

20 We may leave open the question as to whether a severe violation within the meaning of Article 9 (1) a of the Directive also exists if the individual who has been deprived of citizenship still has a second nationality. However, Article 15 (1) of the Universal Declaration of Human Rights of 1948 argues against such a position, granting the right only to 'a' nationality.

21 In assessing the severity of the violation of rights caused by deprivation of citizenship, under Article 4 (3) c of the Directive, attention must also be given to the individual position and personal circumstances of the person concerned. This means that the individual must also be personally severely affected by the deprivation of citizenship. In assessing the severity of the violation of rights in an individual case, it may also be significant whether and to what extent the individual has endeavoured to reverse the deprivation of citizenship, and to recover the nationality that had been withdrawn, and if applicable, what reasons prevented him or her from doing so.

22 The effects of a deprivation of citizenship that are relevant to asylum do not cease with the act of deprivation itself. Rather, the 9th Division of the Federal Administrative Court, in its decision of 24 October 1995 (op. cit., p. 62), has already emphasised that such an act of exclusion causes ongoing, significant harm to the individual concerned. The present Court, the 10th Division, concurs with that case law.

23 De facto deprivations of citizenship may be relevant to asylum when the state leaves the individual with the formal legal position, but de facto denies him or her the resulting rights of citizenship, and in particular does not grant him or her the protection of the state. The assessment of exclusion measures in asylum law depends on the actual de facto consequences that are thus produced.

24 b) However, a deprivation of citizenship constitutes persecution within the meaning of Section 60 (1) of the Residence Act only if it is linked with characteristics relevant to asylum within the meaning of that Act. A deprivation of citizenship that merely represents an administrative sanction for a breach of a duty that is incumbent upon all citizens alike cannot be considered a persecution that is relevant under asylum law. This is consistent with the settled case law of the Federal Administrative Court. For example, the 9th Division of the Federal Administrative Court ruled that the withdrawal of the citizenship of a Turkish national who did not comply with the summons to complete his military service was not relevant to asylum (decision of 24 October 1995, op. cit. p. 63 et seq.).

In that case the court based its findings on a provision of the Turkish Nationality Act under which the Council of Ministers may withdraw the Turkish nationality of those who reside abroad and fail, without good cause, to comply with the official conscription for military service within three months. That case law was confirmed in a decision of 7 December 1999 - Federal Administrative Court 9 B 474.99 - (Buchholz 402.25 Section 1 Asylum Procedure Act No. 224), concerning the de facto deprivation of citizenship of a Cuban woman after she had exceeded the permitted residency period abroad. The Cuban authorities' refusal of admission was not viewed as a political persecution, because treating as emigrants those Cubans who remain abroad without permission was linked in general only to the circumstance of exceeding the deadline for return, and thus affected all persons who did not wish to return to Cuba, without distinguishing whether that wish derived from personal, family, economic or political motives.

25 c) The court below also based its decision on these principles. However, it incorrectly assumed that even in the case of a deprivation of citizenship by the Azerbaijani state, with relevance to asylum, the Complainants' claim to refugee status should be judged by the standards for stateless persons, and therefore it additionally examined whether the Complainants – now as stateless persons – also had their previous habitual residence in that country within the meaning of Section 3 (1) of the Asylum Procedure Act. But this examination is not necessary in the case of a deprivation of citizenship that is relevant to asylum. If the persecution lies precisely in the creation, by the state of the individual's former nationality, of a condition of statelessness that is relevant to asylum, this must be viewed under asylum law as a (continuing) persecution specifically by that state of the person's (former) nationality. Equivalent considerations apply to the case, which the court below deemed possible, that the Complainants were only stateless de facto, but de jure might still have Azerbaijani nationality (Copy of the Decision p. 13). In this case as well, they would not be considered stateless persons within the meaning of Section 3 (1) of the Asylum Procedure Act, since only those persons whom no state views as nationals under its laws are to be deemed stateless, i.e., de jure stateless persons (see also the decision of 23 February 1993 - Federal Administrative Court 1 C 45.90 - BVerwGE 92, 116 <119> with further authorities, on the Convention Relating to the Status of

Stateless Persons of 28 September 1954). In the event of de facto statelessness, threatened persecution within the meaning of Section 60 (1) of the Residence Act would therefore also have to be examined with regard to the state that continues to view the individual as a national on the basis of its own laws. Since the court below ultimately correctly – albeit on partially incorrect grounds – focuses on Azerbaijan as the crucial state in the case of what it assumes to be a deprivation of citizenship with relevance to asylum (whether de facto or de jure), its erroneous approach to review did not affect the decision.

26 d) Nevertheless, the appealed judgment does not withstand review by this Court. The finding as to the loss of Azerbaijani nationality by Complainant 1, and as to the statelessness of Complainant 2, as well as the operative grounds for the finding, does not support the conclusion drawn by the court below that the Azerbaijani state withdrew nationality from Complainant 1, and thus ultimately also from Complainant 2, for reasons relevant to asylum, i.e., in connection with the characteristics stated in Section 60 (1) of the Residence Act. The court below assumed that the non-recognition of the Complainants' Azerbaijani nationality under the Azerbaijani Nationality Act of 1998 was based on grounds relevant to asylum, but it did not arrive at any adequate and clearly reasoned findings as to whether the Complainants were still Azerbaijani nationals at all at that date. For Complainant 2, the court itself does not presuppose a former Azerbaijani nationality. In regard to Complainant 1, in any case, the court's findings do not seem to preclude the possibility that she may already have lost her nationality under the Nationality Act of 1991, and that this did not result from reasons relevant to asylum.

27 According to the findings of the court below, Complainant 1 originally held Soviet nationality, with national status in the Azerbaijani Republic or state. At the beginning of 1991 she also acquired Azerbaijani nationality under the Azerbaijani Nationality Act of 1991 (Copy of the Decision p. 8 centre). Then the court lists reasons why Complainant 2 could be 'alleged with reason to have lost her Azerbaijani nationality as early as that time' (Copy of the Decision p. 8 bottom). 'That time' presumably means 1997. This is explained as follows: Under Article 18 (2) sentence 2 of the 1991 Nationality Act, nationality could lapse through

renunciation or loss. One reason for loss was if a person with a continuous residence in another country failed for five years, without good cause, to meet his or her obligation to report to the consulate (Article 20 (1) No. 2 Azerb. Nationality Act 1991). Since Complainant 2 left Azerbaijan in 1992 and there was no indication that she had registered with an Azerbaijani representation in Russia by 1997 (five years), she could be alleged to have lost Azerbaijani nationality, the court found. From these arguments it might be concluded that the court below does not rule out a loss of citizenship even before 1998. Such an interpretation is also argued by the fact that elsewhere the court apparently assumes that Complainant 1 was already no longer an Azerbaijani citizen by the time of the birth of Complainant 2 (Copy of the Decision p. 11 bottom). At the least, the court's findings are so unclear that they do not suffice as a basis for assuming that the Complainants had Azerbaijani nationality at the effective date of the 1998 Act.

28 The court below also made no findings of any kind as to whether a loss of nationality before 1998, if any, occurred for reasons relevant to asylum. Its comments on practices by the authorities, who gave worse treatment to ethnic Armenians who had been absent abroad for extended times than they did to ethnic Azeris, refer exclusively to the practice of recognising or refusing nationality under the 1998 Nationality Act (see Copy of the Decision pp. 8 through 12). If Complainant 1 may already have lost her Azerbaijani nationality under the 1991 Nationality Act, there is a lack of findings and reasons why a discriminatory application of the 1998 Act should be relevant to asylum for Complainant 1 – and thus also for her son, Complainant 2. In any case the findings up to this point do not bear out the conclusion as to the relevance for asylum of the creation or perpetuation of statelessness as a consequence of the 1998 Act. Equivalent considerations apply to the refusal of re-entry, which the court below views as relevant for asylum (Copy of the Decision p. 15), where it likewise remains an open question whether that refusal might proceed from a purely administratively-based loss of nationality under the 1991 Act. The appealed decision must therefore be set aside and remanded to the court below to add the missing findings as to the loss of nationality and the operative reasons therefor. Consequently no further decision is needed as to the complaints of insufficient forma-

tion of judicial conviction and an unclearly reasoned basis of prognosis, as the present appellants raise in regard to this question.

29 2. If, in its re-examination, the court below arrives at the conclusion that Complainant 1 already lost her Azerbaijani nationality under the 1991 Act, for reasons irrelevant to asylum, and that she became de jure stateless, the Complainants' claim to recognition would have to be examined under the standards that apply to stateless refugees. For this, it would be necessary for the Complainants to be threatened with persecution in the state of their habitual residence, within the meaning of Section 60 (1) of the Residence Act (Section 3 (1) Asylum Procedure Act, Article 2 c of Directive 2004/83/EC). In this examination, the court below will have to assume that the Complainants had their habitual residence in the Russian Federation.

30 a) In assessing the danger of persecution, Section 3 (1) of the Asylum Procedure Act focuses on the country where the foreigner, as a stateless person, last 'had' his habitual residence. This wording first of all makes clear that in this regard, what is of concern is not the person's present habitual residence (here: Germany), but rather the crucial country is the one of his former habitual residence. Consistently, in terms of content, Article 2 c of the Directive focuses the definition of a refugee on the country 'of former habitual residence' (German: 'seines vorherigen gewöhnlichen Aufenthalts'; French: 'il avait sa résidence habituelle' – likewise Article 2 e of the Directive with regard to subsidiary protection).

31 Contrary to the opinion of the court below, habitual residence within the meaning of these provisions does not presuppose that the stateless person's residency must be lawful. Rather, it is sufficient if the stateless person actually focused his life in that country, and therefore did not merely remain there transiently, while the competent authorities initiated no measures to end his residency.

32 In its decision of 23 February 1993 - Federal Administrative Court 1 C 45.90 - (BVerwGE 92, 116 <125>) on the interpretation of Article 2 of the Act Imple-

menting the Convention on the Reduction of Statelessness of 29 June 1977 (BGBl I, p. 1101), the Federal Administrative Court has already pointed out that a distinction must be made between the duration of a stateless person's residence and the lawfulness of his or her residence. Under Article 1 (2) b of the Convention on the Reduction of Statelessness, a state may make a grant of nationality to a stateless person contingent on the individual's having 'habitually resided' in the territory of the state for a period of five to ten years. Article 2 No. 2 of the German Act Implementing the Convention on the Reduction of Statelessness of 29 June 1977 requires 'lasting residence' in Germany for at least five years. The Federal Administrative Court ruled that the term 'lasting residence' in the Act Implementing the Convention on the Reduction of Statelessness represents substantially the same meaning as the term 'habitual residence' in the Convention Relating to the Status of Stateless Persons and the Geneva Convention Relating to the Status of Refugees (the 'Geneva Convention on Refugees'). In the German version of the Convention for the Reduction of Statelessness, the binding (along with other languages) English and French wording of the treaty – 'has habitually resided' and 'ait résidé habituellement' – is translated as 'dauernden Aufenthalt gehabt' ('has had a lasting residence'). By contrast, in the Geneva Convention, the wording in the original text, 'habitual residence/résidence habituelle', which is based on the same root words, is accurately translated as 'gewöhnlicher Aufenthalt' (see Article 14 sentence 1, Article 16 (2), Convention Relating to the Status of Stateless Persons; Article 1A No. 2, second half of the sentence, Geneva Convention on Refugees). Under these circumstances it can be assumed that 'lasting residence' within the meaning of Article 2 of the Act Implementing the Convention on the Reduction of Statelessness means substantially the same as the term 'habitual residence' used in refugee law (decision of 23 February 1993, op. cit., 123). Such a lasting residence does not require formal consent from the aliens authority. This consent is in principle necessary only in order to establish a lawful residence. Lawfulness must be distinguished from the duration of residence. For a lasting residence, it is sufficient if, irrespectively of its legal options, the aliens authority refrains from terminating the stateless person's residence, for example because it considers such a termination unreasonable or unfeasible (decision of 23 February 1993, op. cit., 125).

33 In foreign case law as well, the concept of habitual residence within the meaning of the Geneva Convention on Refugees is interpreted to mean that de facto residence is sufficient if it is characterised by a certain duration. For example, the Federal Court of Canada based its decision of 13 December 1993 (Maarouf v. Canada <1994> 1 F.C. 723) on the assumption that more than a transient residence is necessary. Rather, the stateless person must have found a residence with the prospect of a certain duration (‘with a view to a continuing residence of some duration’). He must furthermore have spent a substantial period of de facto residence in the country concerned (‘a significant period of de facto residence’). The court refers to Hathaway’s opinion that a year’s residence can be considered a meaningful defining standard. The residence is not required to be lawful.

34 If a habitual residence under Section 3 (1) of the Asylum Procedure Act requires only that the stateless person must in fact have focused his life in the country in question, and thus has not merely spent time there transiently, while the competent authorities did not initiate measures to terminate his residence, then on the basis of the findings of the court below, the Complainants had their habitual residence in the Russian Federation. In view of Complainant 1’s ten-year residence in Russia, the fact that she engaged in commerce there for a number of years, and that her son – Complainant 2 – was born and reached a certain age there, the Russian Federation became the place where she and Complainant 2 focused their lives, and the Russian authorities did not initiate measures to terminate her residence there.

35 b) If, accordingly, the Russian Federation must be considered the state of the Complainant’s last habitual residence, in this Court’s opinion there can be no link to Azerbaijan as a further country in which she had a previous habitual residence.

36 If during his life a stateless person has lived more than just transiently in more than one country, then in assessing the danger of persecution one must fundamentally focus on the country of his last habitual residence. To be sure, in its

Handbook on Procedures and Criteria for Determining Refugee Status under the Geneva Convention on Refugees of September 1979, the UNHCR argues, under No. 104/105, the opinion that stateless persons may have more than one country of former habitual residence, and their fear of persecution may be justified in regard to each of these countries. A change of country of residence does not affect the person's refugee status. Foreign case law as well includes decisions that follow this opinion, although with certain restrictions (see Decision of the Federal Court of Canada of 11 May 1998 in the matter of Thabet v. Canada <Minister of Citizenship and Immigration> <1998> 4 F.C. 21). This Court does not find such an interpretation persuasive. The aim of the provisions both in the Geneva Convention on Refugees and in national law is to place both stateless persons and persons possessing a nationality on an equal footing, so far as possible, in obtaining refugee status. Persons with a nationality enjoy protection against persecution in regard to the country of their present nationality, but not also in regard to countries where they formerly had nationality. For stateless persons, the state of nationality is replaced by the state of their last habitual residence. They would be positioned more advantageously than those with a nationality if they could claim a danger of persecution not only with reference to the country of their last habitual residence, but also with reference to countries where they had their habitual residence before that. This is not altered at all by the fact that a person having a nationality may in certain cases have more than one nationality. In that case, the person cannot immediately be recognised as a refugee because of a danger of persecution in one of those countries, as the UNHCR would have it for stateless persons. Rather, the person is not granted refugee status if he can claim the protection of the other country or countries in which he has nationality. Nor does a stateless person have any less protection in regard to the threat of deportation to a state of former residence than a person with a nationality has in regard to a state of former nationality. In this regard, both can claim protection from deportation under Section 60 (2) through (7) of the Residence Act.

37 At any event, in a case like the present one where Complainant 1 focused her life in the Russian Federation for ten years, and Complainant 2 was born and reached a certain age there, there is no reason to resort additionally to Azerbai-

jan as the country of Complainant 1's previous residence. On the basis of the findings to date of the court below, in the event that statelessness occurred for reasons not relevant to asylum, refugee status for the Complainants would be out of the question because a danger of persecution in the Russian Federation has been neither claimed nor found.

38 Furthermore, this Court notes that even in cases in which the state that revokes citizenship is identical with the state of habitual residence, special circumstances are necessary if a later refusal to reinstate citizenship is to be considered relevant to asylum. Fundamentally, a state is free to decide which non-nationals can be naturalised, and which persons whose citizenship has been duly revoked – here, under the 1998 Nationality Act – can have their citizenship reinstated.

39 3 a) If the court below arrives at the conclusion that Complainant 1 has not been deprived of citizenship de jure, but is only de facto denied central rights of citizenship (e.g., the right of entry), a grant of refugee status may come under consideration if the conduct of the authorities is founded on grounds relevant to asylum. However, in that case more detailed findings would be needed that Complainant 1 has indeed been denied the rights associated with citizenship, and this also presupposes that she demonstrates she has made serious and unsuccessful efforts to recover the denied rights. Such findings are absent as yet. Instead, the appealed decision merely presumes that 'in all probability' Complainant 1 would be refused entry to Azerbaijan (Copy of the Decision p. 15). But if she has omitted to make reasonable efforts to re-enter the country, the necessary severity of violation of rights under Article 9 (1a) of the Directive may well be absent.

40 If applicable, the court below would also have to clarify whether the Complainants, which it considers to have suffered previous persecution, would currently still be threatened on account of an indirect group persecution of ethnic Armenians, under the facilitated standard of proof pursuant to Article 4 (4) of the Directive (this question has been left undecided so far, see Copy of the Decision p. 19 et seq.). In this regard, this Court points out that the findings to date by the

court below regarding the Complainant's prior persecution on account of an indirect group persecution that lasted until 2000 (Copy of the Decision p. 19) are based on too narrow a foundation of fact.

41 b) If the court below does find that the Complainants suffered persecution relevant to asylum, it will again have to address the question of obtaining internal protection in Nagorno-Karabakh. Its findings on the lack of accessibility of this part of the country are based on too narrow a foundation of fact. In that regard, it is not sufficient to find that the Complainants do not have valid travel documents, nor is it evident that they would be able to obtain them (Copy of the Decision p. 26). Rather, most recently in its decision of 29 May 2008 - Federal Administrative Court 10 C 11.07 - (BVerwGE 131, 186-198, Marginal No. 29), this Court has pointed out that such practical impediments are typically remediable. Moreover, in the present case it seems rather unlikely that the Complainants have no papers of any kind, and also cannot obtain any. Complainant 1 would at least have to have, or be able to recover, papers about her described attendance at school in Baku from 1977 to 1987; Complainant 2 must have papers relating to his birth in Budyonnovsk, Russia. Accordingly it should presumably be possible and reasonable for both Complainants to obtain the necessary papers for entry into Nagorno-Karabakh. On this point, the court below – insofar as its decision depends on it – must make the necessary findings.

42 c) Because of its previous findings that refugees of Armenian ethnicity are legally entitled to Armenian nationality (Copy of the Decision p. 14), the court below will have to consider Article 4 (3) e of Directive 2004/83/EC. According to that Article, an assessment of applications for international protection on an individual basis includes the question of whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship. This provision implements, in the form of an official call for review, substantive requirements governed elsewhere, and this call for review in particular relates to the requirement to investigate the possession of more than one nationality (see Article 1A No. 2 of the Geneva Convention on Refugees). The absence of a transposal of Article 4 (3) e of the Directive into internal law after the deadline for transposal would in any case cause no harm, if the provi-

sion were limited to this scope of examination. Further investigation and examination must be given to the question of whether its content – particularly in view of the situation of the collapse of a state and apparent possibilities of acquiring nationality in a successor state, for example merely by registration – extends beyond that point, and whether such a situation exists here in which the Complainants might be referred to claim Armenian nationality and Armenian protection.

43 d) If persecution by Azerbaijan relevant to asylum is affirmed, and if internal protection cannot be obtained, it must be re-examined whether the Complainants already found safety against persecution in the Russian Federation, and can return there (on this point see the decision of 8 February 2005 - Federal Administrative Court 1 C 29.03 - BVerwGE 122, 376 <386 et seq.>). The Respondent, in its appeal to this Court, rightly objects that the court below based its findings on the refusal of re-entry on too narrow a foundation of fact. The reference to the Complainants' lack of Russian nationality and the absence of permission for their residence there does not bear out the resulting conclusion that clearly neither a repatriation nor a (lawful) return is possible (Copy of the Decision p. 27).

44 e) If Complainant 1 is ultimately to be granted refugee status, presumably Complainant 2 also has an entitlement to family refugee protection under Section 26 (4) of the Asylum Procedure Act.

45 4. If the Complainants are not entitled to refugee status, a decision must be reached as to granting subsidiary protection under the Qualification Directive in regard to the Russian Federation, as their country of origin, and (as an alternative) regarding national protection from deportation under Section 60 (2) through (7) of the Residence Act, with reference to the states of Azerbaijan and Armenia identified in the threat of deportation.

Dr. Mallmann Prof. Dr. Dörig Richter

Beck Prof. Dr. Kraft

Field:

Asylum law

BVerwGE: Yes

Professional press: Yes

Sources in Law:

Act Implementing the Convention on the Reduction of Statelessness	Article 2
Asylum Procedure Act	Section 3 (1), Section 26 (4)
Residence Act	Section 60 (1) Sentences 1 and 5, (2) through (7)
Universal Declaration of Human Rights	Article 15
Geneva Convention on Refugees	Article 1A (2)
Directive 2004/83/EC	Article 2 c, Article 4 (3) c, e, Article 9 (1a)
Convention Relating to the Status of Stateless Persons	Article 1 (1)

Headwords:

Deprivation of citizenship; administrative deprivation of citizenship; deprivation of citizenship relevant to asylum; refusal of entry; statelessness; de facto statelessness; de jure statelessness; habitual residence; lawful residence; internal protection; accessibility of alternative refuge.

Headnotes:

1. Deprivation of nationality may be a serious violation of basic human rights within the meaning of Article 9 (1) a of Directive 2004/83/EC of 29 April 2004 (known as the ‘Qualification Directive’).

2. In assessing the severity of the violation of rights caused by a deprivation of citizenship, under Article 4 (3) c of the Qualification Directive the individual position and personal circumstances of the person concerned must also be taken into account.

3. A person is stateless within the meaning of Section 3 (1) of the Asylum Procedure Act if no state views him or her as a national under its own law, i.e., a de jure stateless person. For de facto stateless persons, therefore, a threat of persecution must be examined with reference to the state of their de jure nationality.

4. The habitual residence of a stateless person under Section 3 (1) of the Asylum Procedure Act need not be lawful. It is sufficient if the stateless person focused his or her life in the country, and therefore did not merely transiently spend time there, and the competent authorities did not initiate measures to terminate his residence.

Decision of the 10th Division of 26 February 2009 - Federal Administrative Court 10 C 50.07

I. Schwerin Administrative Court, 04.02.2003 - Case No.: 5 A 2919/02 As -
II. Greifswald Higher Administrative Court, 16.05.2007 - Case No.: 3 L 54/03 -