

Stateless Status and Expulsion from Italian Territory

Some Remarks on the Recent Case Law of the Corte di Cassazione

Note to: Corte di Cassazione (Sez. I penale), D.A., 22 June 2021, No. 24407

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Abstract

In this judgment the *Corte di Cassazione* addresses the issue of the prohibition on the expulsion of stateless persons guaranteed by Article 31 of the New York Convention of 1954 Relating to the Status of Stateless Persons and affirms that it represents an exception to the general rule under international law according to which every State has, in principle, the right to expel at any moment an alien from its territory. The decision is particularly interesting because it allows a reflection on the vulnerable condition of stateless persons, on the distinction between *de jure* and *de facto* statelessness, and on the burden and standard of proof in establishing statelessness.

Keywords

statelessness – *de facto* and *de jure* stateless – *Corte di Cassazione* – New York Convention of 1954 – expulsion of stateless persons – burden of proof

Abstract of the Decision

On 22 June 2021, the *Corte Suprema di Cassazione* annulled the conviction by the *Giudice di Pace di Brescia* of the defendant for the crime, provided for in the Italian Immigration Act (*Testo unico sull'immigrazione*, Legislative Decree of 25 July 1998, No. 286, Article 14, para. 5-*quater*), of failing to comply with an order to leave Italian territory. According to the *Corte di Cassazione*, the trial judge had failed to consider that the defendant was a stateless person and that,

consequently, Article 31 of the New York Convention of 1954 Relating to the Status of Stateless Persons (hereinafter: “New York Convention”),¹ according to which a stateless person cannot be expelled except for reasons of national security or public order, was applicable.

Key Passages from the Ruling

(Paragraph 1) “[...] the condition of *de facto* statelessness is not a condition preventing the expulsion of a foreigner, since, according to the New York Convention of 1954 [...], the status of stateless person can be recognized only to those who lack citizenship in the State with which they have had or have a connection [...].

The New York Convention of 1954 considers stateless only those who are deprived of nationality and have not been able to obtain it in any State under its own legislation; those who, being able to obtain nationality under the legislation of their country of origin, have not taken steps to obtain it are not stateless.

In the present case, [...] the defendant was unable to obtain the citizenship of his mother’s country of origin (Serbia) and his father’s country of citizenship (Kosovo).

The trial judge should have verified whether the defendant, since he was born and raised in Italy, a country with which he actually had a significant connection, should be considered stateless. If so, it should have held that the protection under Article 31 of the New York Convention of 1954, under which a stateless person may not be expelled except on documented grounds of national security and public order, extended to the person concerned”.

Comment

1 Background to the Case

The police authority of Brescia (Italy) ordered twice, in 2015 and 2016, Mr. D.A. to leave the national territory. As a result of his failure to comply with such orders, Mr. D.A. was convicted by the *Giudice di Pace di Brescia* of the crime provided for in the Italian Immigration Act (*Testo unico sull’immigrazione*,

¹ New York Convention Relating to the Status of Stateless Persons, 28 September 1954, entered into force 6 June 1960.

legislative decree of 25 July 1998, No. 286, Article 14, para. 5-*quater*) and sentenced to a fine of 10,000 euros.

The defendant appealed against the judgment to the *Corte di Cassazione*, claiming that the trial court had not considered that he was a *de facto* stateless person. In fact, the defendant had been born in Italy to a Serbian mother and a Kosovar father, but he did not have Italian, Serbian, or Kosovar nationality. The defendant, having no nationality, could not have complied with the expulsion order, as he could not go to any other country. According to the defendant, the *Giudice di Pace* should have noticed the absence of the subjective element of the crime, given the circumstances of *force majeure* consisting of the fact that he had no country of origin or of nationality to which to return.

2 The Judgment

The *Corte di Cassazione*, in the brief ruling discussed in this article, allowed the appeal, but incidentally stated that the condition of *de facto* statelessness is not an obstacle to the expulsion of a foreigner. In fact, the New York Convention only applies to *de jure* stateless persons. However, according to the *Corte di Cassazione* the defendant was unable to obtain citizenship from his mother's country of origin (Serbia) or his father's country (Kosovo). For this reason, the *Giudice di Pace* should have made a proper investigation in order to ascertain whether the applicant could be considered a stateless person. In the event that such an assessment had proved positive, the *Giudice di Pace* should have held that the protection under Article 31 of the New York Convention, according to which a stateless person may not be expelled except on documented grounds of national security and public order, applied to the person concerned.

3 The Scope of Application of the New York Convention of 1954 and the Opportunity to Extend its Regime to *de facto* Stateless Persons

The first issue raised by the commented decision concerns the allegedly different regimes applicable to *de facto* stateless persons and *de jure* stateless persons.

2 For these terms, see WEISSBRODT and COLLINS, "The Human Rights of Stateless Persons", *Human Rights Quarterly*, 2006, p. 245 ff., pp. 251–252. There are many different reasons why a person may not be able to prove her or his nationality. According to MASSEY, "UNHCR and *De Facto* Statelessness", *Legal And Protection Research Series*, LPPR/2010/01, April 2010, p. 1 ff, pp. 41–45, difficulties in proving nationality may exist, for example, in the following cases: a) some people may never have been registered in the civil registration system of the country of their nationality; b) civil registries may have been destroyed or have gone

Persons who are *de facto* stateless often have a nationality according to the law, but this nationality is not effective or cannot be proved or verified.² In fact, according to the “Prato Conclusions” adopted by the United Nations High Commissioner for Refugees (“UNHCR”), *de facto* stateless persons “are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country”.³

By contrast, a *de jure* stateless person is a person who is not considered as a national by any country under the operation of its law. Only people in this latter category are covered by the definition of stateless persons included in Article 1(1) of the New York Convention, a definition that – according to the International Law Commission – can be considered to have acquired a customary nature.⁴

One may wonder why the New York Convention excludes *de facto* stateless persons from its scope, and whether this exclusion is fair and reasonable. In fact, it must be considered that *de facto* stateless persons are deprived of an effective nationality and – at the same time – cannot benefit from the status of stateless persons provided for by the same Convention.⁵

As regards the reasons underlying the choice made by the Convention, the context in which the Convention was drawn up should be remembered. Only a few years before its adoption, in 1951, the Geneva Convention Relating to the Status of Refugee (hereinafter: “Geneva Convention”) had been adopted, and at the time there was a common (erroneous) belief that the latter Convention

missing; c) some people may have difficulties proving their identity; d) countries may be unable or unwilling to cooperate in identifying persons who are their nationals; e) nationality legislation may be unclear or be misinterpreted or misapplied by the Executive; f) a State may consider that a person has the nationality of another State and therefore that the person has not acquired its own nationality.

- 3 See UNHCR, *The Concept of Stateless Persons under International Law*, Summary Conclusions, Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, 27–28 May 2010. However, as noted by the UNHCR, “the term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons”. See UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p. 5. It must also be stressed that the definition of *de facto* statelessness “is used in different senses as a term descriptive of a condition which in one or more respects is considered to be parallel to, but different from, statelessness”, FRIPP, *Nationality and Statelessness in the International Law of Refugee Status*, Oxford, 2016, p. 101.
- 4 See International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, *Report of the International Law Commission on the work of its Fifty-eighth session*, 2006, UN Doc. A/61/10.
- 5 CORDOVA, *Nationality Including Statelessness – Third Report on the Elimination or Reduction of Statelessness*, A/CN.4/81, YILC, 1954, Vol. II, p. 27 ff., p. 30.

covered all those without an effective nationality, by considering that all *de facto* stateless persons were refugees.⁶ Indeed, the Geneva Convention, with its definition of refugees, does not cover all persons who *de facto* lack national protection, but rather covers only those who are unwilling or unable to return to their country of origin because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.⁷ However, in the Final Act of the Conference that led to the adoption of the 1954 Convention it was recommended that each Contracting State give sympathetic consideration to the possibility of according the same treatment as that provided for by the Convention to persons who have renounced the protection of the State of which they are nationals. Although this recommendation does not expressly use the term *de facto* stateless persons, it is commonly believed that it was referring to this category of subjects.

With reference to the Italian legal system, the implementing legislation⁸ says nothing that would extend the status of statelessness to *de facto* stateless persons.

However, in the case law of the *Corte di Cassazione*, it seemed to have been accepted that it is appropriate to equalize the regimes for the recognition of *de facto* and *de jure* stateless persons. In particular, according to Judgment No. 25212/2013 of the *Corte di Cassazione*,⁹ designation of the condition of statelessness is possible not only in the case of the formal lack of the possession of citizenship in the country of origin, but also when the interested person cannot, from a substantive point of view, take advantage of the rights linked to citizenship that he or she still formally possesses.¹⁰

By contrast, the decision discussed in this comment refers to another ruling of the *Corte di Cassazione* (No. 7458/2020)¹¹ in order to argue that the New York Convention applies only to *de jure* stateless persons and consequently that the

6 BATCHELOR, "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, 1998, p. 156 ff., p. 172.

7 VAN WAAS, *Nationality Matters. Statelessness under International Law*, Antwerp, 2008, p. 21.

8 Law No. 306 of 1 February 1962, *Ratifica ed esecuzione della Convenzione relativa allo status degli apolidi, adottata a New York il 28 settembre 1954*, *Gazzetta Ufficiale della Repubblica Italiana*, 7 June 1962, No. 142.

9 *Corte di Cassazione (Sez. I civile), Ministero dell'Interno v. Perez Lozada*, 8 November 2013, No. 25212.

10 Among other rulings extending stateless status to cases of people with a substantial loss of nationality (*de facto* statelessness), see *Corte di Cassazione (Sez. Unite Civili), M.J.C.A. v. Prefettura – Ufficio Territoriale del Governo di Bologna*, 9 December 2008, No. 28873; *Tribunale di Bologna, M.M.S.E. v. Ministero dell'Interno*, Order of 31 December 2018.

11 *Corte di Cassazione (Sez. I penale), Varuna Drago*, 25 February 2020, No. 7458.

prohibition on expulsion cannot apply to *de facto* stateless persons. In fact, a closer reading of Judgment No. 7458/2020 reveals that the case covered by that decision did not relate to a real situation of *de facto* statelessness. This latter judgment affirms that the condition of *de facto* statelessness is comparable to *de jure* statelessness (“condizione di apolidia di fatto, parificabile a quella formale”), but in the specific case the Court decided that proof of the relevant situation had not been given.

Moreover, the *Corte di Cassazione*, in Judgment No. 16489/2019¹² – in a case which, like the one at issue here, concerned an appeal against an order for expulsion from Italian territory – had already stated that the regime imposed by Article 31 of the New York Convention must also apply to *de facto* stateless persons.

Hence, the reference made by the judgment at issue here to the impossibility of extending the prohibition on expulsion to *de facto* stateless persons because the New York Convention does not apply to them seems to be something which, although not decisive for the resolution of this case, may mark a step backwards in relation to the protection provided by the *Corte di Cassazione* in its previous case law.

4 The Proof of Statelessness

The reference made by the defendant to his situation as a *de facto* stateless person was not, however, considered to be relevant by the *Corte di Cassazione*. In fact, the *Corte di Cassazione* held that in the present case it had been proven that the defendant was unable to obtain citizenship of his mother's country of origin (Serbia) or his father's country of citizenship (Kosovo). The trial court (the *Giudice di Pace di Brescia*) should have verified whether, since the applicant was born and raised in Italy, a country with which he actually had a significant connection, he should be considered stateless.

If so, it should have held that the protection under Article 31 of the New York Convention, according to which a stateless person may not be expelled except on documented grounds of national security and public order, extended to the person concerned.

The reasoning followed by the *Corte di Cassazione* recalls, albeit implicitly, the case law that the Court itself has developed on the burden of proof necessary for the purposes of demonstrating the status of a stateless person.¹³ In

¹² *Corte di Cassazione (Sez. I civile), T. v. P.*, 19 June 2019, No. 16489.

¹³ With reference to the need to alleviate the burden of proof in order to establish stateless status, see e.g. MARINAI, “La protezione internazionale degli apolidi”, Working Papers

fact, the Court has repeatedly stated¹⁴ that the burden of proof on the applicant to prove the status of statelessness must be considered to be mitigated, in the sense that any gaps or any need for additional information can be filled in by the exercise of investigative powers by the judge, which can be achieved by requesting information or documentation from the competent public authorities of the Italian State or of the State of origin or of the State with which a significant connection with the applicant for statelessness can be identified. Such a burden on the judicial authority must be inferred from a constitutionally oriented interpretation of the internal and international legal framework, which leads to the granting to stateless persons of similar rights to those affirmed in favour of applicants for international protection in order to implement their right to a free and dignified life.

If the person concerned were required to prove that he or she was not a national of any State, the relevant proof, being negative in nature, would be almost impossible to obtain, both because of the number of States in the international community and because it would have to be renewed *ad infinitum*, since it concerned a circumstance (namely, the possession of a nationality) that could change at any time and would therefore undermine the established status of statelessness.¹⁵

However, the *Corte di Cassazione* has also pointed out that the principle that the burden of proof should be mitigated does not exclude the fact that it is up to the applicant to allege specifically not only the condition of being a non-citizen of the State or States with which he or she has or has had significant links, but also the absence of the legal or factual prerequisites which allow recognition of the *status civitatis* by those States.¹⁶

This kind of reasoning is in line with the UNHCR's statement that the burden of proof for determining statelessness must be shared, with the consequence that the applicant and the examiner must cooperate to obtain evidence and to establish the facts.¹⁷

on European Migration Law, 2015, No. 1, pp. 30–31; FOSTER and LAMBERT, *International Refugee Law and the Protection of Stateless Persons*, Oxford, 2019, p. 113.

14 See e.g. *Corte di Cassazione* (Sez. VI-1 civile), *Halilovic Olga v. Ministero dell'Interno*, 3 March 2015, No. 4262; *Tribunale di Brescia*, *J.M. v. Ministero dell'Interno*, Order of 7 January 2019; *Tribunale di Firenze*, *XX v. Ministero dell'Interno*, Order of 22 July 2020; *Tribunale di Bologna*, *XX v. Ministero dell'Interno*, Order of 24 October 2020; *Tribunale di Roma*, *XX v. Ministero dell'Interno*, of 28 May 2021.

15 See e.g. *Tribunale di Firenze*, *XX v. Ministero dell'Interno*, Order of 2 February 2020; *Tribunale di Roma*, *XX v. Ministero dell'Interno*, Order of 16 February 2021.

16 See *Corte di Cassazione* (Sez. I civile), *M. v. G.*, 24 November 2017, No. 28153, and *Corte di Cassazione* (Sez. I Civile), *Ministero dell'Interno v. M.S.*, 18 January 2018, No. 1183.

17 UNHCR, *Handbook on Protection of Stateless Persons*, cit. *supra* note 3, p. 34.

It is therefore reasonable that the *Corte di Cassazione*, in the case discussed here, ruled that it was the duty of the trial judge to verify whether the defendant, since he was born and raised in Italy (a country with which he actually had a significant connection), should have been considered stateless.

5 Concluding Remarks

The short judgment here commented provides an opportunity to reflect on the particularly vulnerable situation of stateless persons. In the case at hand, the defendant – although he was born in Italy and had always lived in Italy – had not acquired Italian citizenship, nor had he proven to have Serbian nationality, despite having a Serbian mother, as his father was a citizen of Kosovo, a country not recognized by Serbia. Similarly, he had failed to prove that he had Kosovar nationality. The establishment of statelessness is relevant in this case because, in the event of such a condition occurring, the prohibition on expulsion laid down in the New York Convention of 1954 would also be applicable. Since the trial court did not make such a finding, the appeal was upheld by the *Corte di Cassazione*. For the assessment of statelessness it is not necessary to establish that the individual is not a national of any State. Rather, it is sufficient to establish that the individual is not a national of one of the countries with which he or she has significant links. To that end, the trial court must take into account the need to mitigate the burden of proof on the person concerned.

With reference to the prohibition on the expulsion of stateless persons guaranteed by Article 31 of the New York Convention, it should be stressed that the importance of such a provision can be appreciated considering that it represents an exception to the general rule under international law according to which every State has, in principle, the right to expel at any moment an alien from its territory.¹⁸ However, according to the aforementioned Article 31, the prohibition on expulsion only applies when the stateless person is *lawfully* on the State's territory. In fact, if the stateless person has been admitted to or legalized on the State's territory, he or she is entitled to stay in that country

¹⁸ This principle has been affirmed by the International Law Commission in Article 3 of the Draft Articles on the Expulsion of Aliens. See the text of the Draft Articles with commentaries (2014) in *Report of the International Law Commission on the work of its sixty-sixth session*, 2014, UN Doc. A/69/10, p. 22 ff. With reference to the general freedom of States to decide on the expulsion of aliens from their territory and the limits to that discretion under international law, see also for further references DI FILIPPO, "L'allontanamento dell'individuo straniero", in CALAMIA et al. (eds.), *Lineamenti di diritto internazionale ed europeo delle migrazioni*, Milano, 2021, p. 237 ff.

indefinitely, and only grounds of national security or public order could lead to his or her removal from the national territory.¹⁹ By contrast, no such safeguards exist when the stateless person is unlawfully on the territory of the State. It is undoubtedly an element of weakness in the Convention regime that it does not oblige States to grant a legal stay to a stateless person (both before and after their status of statelessness has been recognized). The consequence is that a stateless person risks remaining in a legal limbo, bounced from one State to another, until one State recognizes his or her lawful presence.²⁰

This issue is not taken into account by the judgment here commented. The Italian *Corte di Cassazione* merely set aside the decision of the *Giudice di Pace di Brescia* and referred the case back to another trial court for the determination of statelessness. This is certainly a necessary prerequisite before verifying the applicable rules on expulsion. However, what is not convincing about the decision of the *Corte di Cassazione* is the reference made to *de facto* statelessness. Although this reference was not decisive for the resolution of the case, the affirmation of the impossibility of extending the prohibition on expulsion to *de facto* stateless persons marks a potential step backwards in relation to the protection provided by the *Corte di Cassazione* in its previous case law.

19 See ROBINSON, *Convention relating to the Status of Stateless Persons: Its History and Interpretation*, Commentary on Art. 31, 1955 (reprinted by the Department of International Protection, UNHCR, 1997), p. 60 ff.

20 See VAN WAAS, *cit. supra* note 7, pp. 249–250.