



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 13 September 2012¹

Case C-364/11

**Mostafa Abed El Karem El Kott
Chadi Amin A Radi
Hazem Kamel Ismail**

v

Bevándorlási és Állampolgársági HivatalENSZ Menekültügyi Főbiztosság (intervening)

(Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary))

(Directive 2004/83/EC — Conditions to be met by third country nationals or stateless persons claiming refugee status — Stateless persons of Palestinian origin having availed themselves of UNRWA assistance — Meaning of ‘[w]hen such protection or assistance has ceased for any reason’ and ‘entitled to the benefits of this Directive’)

1. The Court is again asked to interpret Article 12(1)(a) of Council Directive 2004/83/EC² (which in effect transposes into EU law Article 1D of the Geneva Convention of 28 July 1951 relating to the status of refugees³) with regard to the meaning of ‘the benefits of this Directive’ to which Palestinian refugees who have been receiving protection or assistance from UNRWA⁴ are entitled when ‘such protection or assistance has ceased for any reason’.

2. Questions on the interpretation of both expressions were first raised – in almost identical terms – in *Bolbol*.⁵ In that case, however, the applicant had not *received* protection or assistance from UNRWA before she left the Gaza Strip to seek asylum in Hungary (her claim was based on *entitlement* to protection or assistance). The Court thus found it unnecessary to address the conditions under which protection or assistance can be said to have ceased for any reason or the nature of the benefits of the Directive to which such cessation gives entitlement.

3. In my Opinion in *Bolbol*, I did however deal with those issues. To a large extent, the relevant historical and legislative background is set out in that Opinion and in the judgment in that case; I shall repeat here only the key provisions. I refer also to my analysis in *Bolbol* of the two questions which are again before the Court. Again, I shall repeat only as much of it as seems necessary.

1 — Original language: English.

2 — Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12); ‘Directive 2004/83’ or ‘the Directive’. It has now been replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), which makes no change to the main provisions relevant to the present case.

3 — *United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954); ‘the Convention’.

4 — United Nations Relief and Works Agency for Palestine Refugees in the Near East. UNRWA’s mandate was most recently extended until 30 June 2014 by General Assembly Resolution 65/98 of 10 December 2010.

5 — Case C-31/09 [2010] ECR I-5539.

Key provisions

4. The first subparagraph of Article 1A(2) of the Convention defines a ‘refugee’ as any person who, ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’.

5. Article 1D of the Convention reads:

‘This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees [⁶] protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.’

6. It may be noted that, in French, the other authentic language of the Convention, the last clause of the second sentence reads ‘ces personnes bénéficieront de plein droit du régime de cette convention’ (‘these persons shall benefit as of right from the regime of this Convention’).

7. Echoing the Convention, Article 2(c) of the Directive defines ‘refugee’ as a ‘third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply’.

8. Article 12(1) of the Directive, in Chapter III (qualification for being a refugee), reflects Article 1D of the Convention. It states:

‘A third country national or a stateless person is excluded from being a refugee, if:

- (a) he or she falls within the scope of Article 1D of the Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive; [⁷]

6 — It is common ground that the phrase ‘organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees’ has referred in fact solely to UNRWA since 1958. The only other such organ or agency ever to have provided protection or assistance to refugees (the United Nations Korean Reconstruction Agency – UNKRA) ceased operations in that year. Except where otherwise specified, therefore, I shall treat ‘organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees’ and ‘UNRWA’ as equivalents. It is also common ground that UNRWA was not set up to provide, nor has it ever provided, ‘protection’ to Palestinian refugees. It is not in a position to provide anything other than ‘assistance’. I shall therefore refer to ‘UNRWA assistance’ rather than ‘UNRWA protection or assistance’.

7 — Although in the English version the last clause of the second sentence reproduces verbatim the wording of the Convention (replacing only the word ‘Convention’ by ‘Directive’), the French text uses a different formulation: ‘ces personnes pourront ipso facto se prévaloir de la présente directive’ (‘these persons may ipso facto rely on the present directive’). At the hearing, the agent for the Commission explained that the intention had been to draft all language versions of the Directive on the basis of the English version of the Convention – and, indeed, the French version is closer to the English in the second sentence of Article 12(1)(a) of the Directive than in the second subparagraph of Article 1D of the Convention.

...’

9. It may also be helpful to bear in mind the following provisions, which provide the context in which Article 12(1)(a) operates.

10. Under Article 13 of the Directive, in Chapter IV (refugee status), refugee status is to be granted to a third country national or a stateless person who qualifies as a refugee in accordance with Chapters II (assessment of applications for international protection) and III (qualification for being a refugee). With regard to assessment, Article 4 requires applications to be assessed on an individual basis, taking into account a wide range of relevant facts, evidence of which is to be submitted by the applicant.

11. Chapter V deals with qualification for subsidiary protection and Chapter VI with subsidiary protection status. Article 18 provides for the grant of such status to a third country national or stateless person eligible for that protection in accordance with Chapters II and V. The definition of a person eligible for subsidiary protection, in Article 2(e), is similar to that of a refugee but differs essentially in that the criterion of a well-founded fear of persecution (as a member of a group) is replaced by that of a real risk of suffering serious harm (as an individual).

12. Chapter VII of the Directive (Articles 20 to 34) lays down the content of international protection (both refugee and subsidiary protection status) without prejudice to the rights laid down in the Convention (Article 20(1) and (2)). Article 21(1) requires Member States to respect the principle of non-refoulement in accordance with their international obligations. In general, the content of the protection is the same for both refugee and subsidiary protection status. The principal differences concern the issuance of residence permits and travel documents, where refugee status confers rather greater rights.⁸

Facts, procedure and questions referred

13. The main proceedings concern three stateless persons of Palestinian origin who arrived in Hungary seeking refugee status after fleeing Lebanon, where they had lived in refugee camps within which UNRWA provided assistance such as education, health, and relief and social services.

14. According to the order for reference, Mostafa Abed El Kareem El Kott lived in the Ein el-Hilweh camp. He worked outside but, earning too little to support his family, began to sell alcohol inside the camp. Militants of the Jund el-Sham group then burned his house down and threatened him. He left the camp and fled Lebanon, where he felt certain to be found. In Hungary, the Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship, the ‘BAH’) has not recognised him as a refugee, but has made a non-refoulement order precluding his return.

15. Chadi Amin A Radi lost his home in the Nahr el Bared camp when it was destroyed in clashes between the Lebanese army and the Islamic Fatah. His family home and business were also lost. As there was no room in the nearby Baddawi camp, he, his parents and his siblings stayed with an acquaintance in Tripoli. However, Lebanese soldiers insulted and mistreated them, arrested them arbitrarily, tortured and humiliated them. Considering that, as Palestinians, they had no rights, Mr A Radi left Lebanon with his father. Again, the BAH has not recognised him as a refugee, but has made a non-refoulement order.

⁸ — Further differences with regard to access to employment, health care and access to integration facilities have now been eliminated by Directive 2011/95, cited in footnote 2.

16. Hazem Kamel Ismail lived with his family in the Ein el-Hilweh camp. During armed clashes between Fatah and Jund el-Sham, extremists wanted to use the roof of his house. When he refused, he was threatened and suspected as an enemy agent. Unable to call upon any organisation to protect him, he left for Beirut with his family. Not feeling safe there, they fled to Hungary. He has produced a certificate from the Palestinian People's Committee, to the effect that they had to leave Ein el-Hilweh for safety reasons and because of radical Islamist threats, together with photographs of their vandalised house. The BAH has not recognised Mr Kamel Ismail as a refugee, but has granted the family subsidiary protection.

17. It was confirmed at the hearing that, when dealing with their applications, the BAH treated Mr Abed El Kareem El Kott, Mr A Radi and Mr Kamel Ismail as ordinary applicants for refugee status, examined their applications in accordance with Directive 2005/85⁹ and reached the view that they do not meet the criteria laid down in Article 2(c) of Directive 2004/83. It thus regards them as falling within the personal scope of the Directive, but not as entitled to refugee status by virtue of the sole fact that they formerly received, but no longer receive, UNRWA assistance.

18. All three have brought actions before the Fővárosi Bíróság (Budapest Metropolitan Court) challenging the BAH's refusal to recognise them as refugees. The ENSZ Menekültügyi Főbiztosság (Office of the United Nations High Commissioner for Refugees, 'the UNHCR') has intervened in the main proceedings.

19. The Fővárosi Bíróság seeks a ruling on the following questions:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

- (1) Do the benefits of the Directive mean recognition as a refugee, or either of the two forms of protection covered by the Directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion within the scope *ratione personae* of the Directive?
- (2) Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an involuntary obstacle caused by legitimate or objective reasons such that the person entitled thereto is unable to avail himself of that protection or assistance?

20. The first of those questions is literally identical to the third question raised by the same court in *Bolbol*; the second is substantially identical to the second question raised in that case.

21. Written observations have been submitted by Mr Kamel Ismail, the UNHCR, the Belgian, German, French, Hungarian, Romanian and United Kingdom Governments, and the Commission, all of whom were represented at the hearing on 15 May 2012. Written observations on behalf of Mr Abed el Kareem el Kott and Mr A Radi were received 18 days after the expiry of the two-month period laid down in the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union. They were therefore returned. Their lawyer did not respond to the invitation to attend the hearing.

9 — Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

Assessment

Introduction

22. In my Opinion in *Bolbol*, I approached the questions raised by looking first at the interpretation of the Convention, then carrying the results of that interpretation across to the Directive in order to answer the actual questions referred.¹⁰

23. I first derived a number of guiding principles from the Convention. Briefly:

- all genuine refugees deserve protection and assistance;
- displaced Palestinians are to be given special treatment and consideration;
- those receiving UNRWA assistance may not apply for refugee status as overseen by the UNHCR;
- however, those falling within the second sentence of Article 1D are entitled to the benefits of the Convention and do not merely cease to be excluded from its scope;
- the condition that assistance must have ceased cannot be construed so as to trap such persons in the UNRWA zone, unable to claim refugee status elsewhere until the Palestine problem is resolved and UNRWA wound up;
- nor can it entitle every displaced Palestinian to leave the UNRWA zone voluntarily and claim automatic refugee status elsewhere;
- the two sentences of Article 1D should be read together to strike a fair balance between treatment of displaced Palestinians and of other potential refugees.¹¹

24. I then reached certain conclusions from those principles:

- while receiving UNRWA assistance, a displaced Palestinian is excluded from the scope of the Convention (no overlap between UNRWA and UNHCR);
- a displaced Palestinian not receiving UNRWA assistance is not excluded from that scope but must be treated like any other applicant for refugee status (universal protection; no overlap between UNRWA and UNHCR);
- a displaced Palestinian who has received UNRWA assistance but can no longer do so ceases to be excluded from the scope of the Convention (universal protection).

Whether he is then entitled to the benefits of the Convention depends on why he can no longer obtain such assistance:

- if it is as a result of circumstances over which he had no control, he has an automatic right to refugee status (special treatment and consideration);

10 — The Court addressed the interpretation of the Directive alone, but read in such a way as to ensure that the principles of the Convention, of the other relevant treaties referred to in Article 78(1) TFEU and of the Charter of Fundamental Rights are respected (see paragraphs 36 to 38 and case-law cited). Article 78(1) TFEU requires the common policy on asylum to comply with the Convention, its 1967 Protocol, and (unspecified) 'other relevant treaties'.

11 — See points 48 to 56 of the Opinion.

— if it is of his own volition, he cannot claim automatic refugee status but may apply for refugee status like any other (universal protection; fair treatment and proportionate interpretation).¹²

25. Transposing those conclusions to the interpretation of the Directive, I reached the view, with regard to the second and third questions referred, that

- ‘protection or assistance has ceased’ when, otherwise than of his own volition, the person concerned no longer benefits from the protection or assistance that he previously enjoyed; and
- ‘the benefits of this Directive’ mean recognition as a refugee and automatic grant of refugee status.¹³

26. Following the proceedings in the present case, the Court has at its disposal a fuller set of observations, developing further those put forward in *Bolbol* and taking account of the judgment in that case. After thorough consideration of the new observations, my conclusions are not fundamentally different from those which I reached in *Bolbol*. I therefore refer the Court to my detailed analysis in that case. On one aspect, however, my view has changed to a certain extent,¹⁴ though it is not an aspect which directly affects the answers to be given to the questions referred.

27. I think it useful, before looking again at those answers and still within this introductory section, to examine that aspect and to develop a number of other considerations whose relevance has become more apparent in the present proceedings and which may clarify the context in which my views should be seen. I shall accordingly consider (i) the texts which the Court should take into account when interpreting Article 12(1)(a) of the Directive, (ii) the suggestion that that provision may identify a separate category of refugee comparable to the category identified in Article 2(c), (iii) the types of situation in which a person may find himself in relation to Article 12(1)(a), (iv) the personal and temporal scope of the exclusion from being a refugee laid down in that provision (it is on this aspect that I have modified my view) and (v) the interlinked nature of the questions. I shall then briefly outline the range of answers proposed to those questions before going on to address the questions themselves, in turn.

The relevant text

28. The Court is asked to interpret Article 12(1)(a) of the Directive, in particular the expressions ‘ipso facto ... entitled to the benefits of this Directive’ and ‘[w]hen such protection or assistance has ceased for any reason’. That provision exists in 22 equally authentic language versions which, unfortunately, do not contain word-for-word equivalents of, in particular, the first phrase.

29. According to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for interpretation, or be made to override other language versions. Rather, the various versions must be given a uniform interpretation; in the case of divergence, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.¹⁵

12 — See point 90 of the Opinion.

13 — See point 111 of the Opinion. Expressed more fully, in relation to persons covered by Article 12(1)(a) of the Directive, the ‘benefits’ concerned mean recognition as a refugee, with the result that such persons become entitled, without more, to be granted refugee status.

14 — See point 52 et seq. below.

15 — See, most recently, Case C-19/11 *Geltl* [2012] ECR, paragraph 43 and case-law cited.

30. In the present case, the first sentence of Article 12(1)(a) of the Directive refers to (the first subparagraph of) Article 1D of the Convention, while the second sentence largely replicates the second subparagraph thereof. The Convention provides the context – and thus helps to indicate the purpose and general scheme – of the Directive, which makes frequent reference to it. It exists in only two equally authentic language versions, English and French. Again, however, the two versions of Article 1D do not contain word-for-word equivalents.¹⁶

31. The Commission has indicated that, where the Directive seeks to replicate provisions of the Convention, the text was intended to reflect the English version of the latter.¹⁷

32. It seems to me therefore that, while it is an interpretation of Article 12(1)(a) of the Directive which the Court is asked to provide, it must refer to Article 1D of the Convention when providing that interpretation. In doing so, it should have regard in the first instance to the English version of that provision, which was taken as the basis for the corresponding provision of the Directive. However, because the English and French versions of the Convention are equally authentic, it is necessary to ensure that the interpretation is consistent also with the French version of Article 1D.

Categories of refugee

33. The UNHCR submitted at the hearing that Article 1 of the Convention in fact provided for three categories of person who must be granted refugee status. Under Article 1A, refugees previously recognised under various instruments dating from before the Second World War ('historical' refugees), and those meeting the 'well-founded fear of persecution' criterion, were to be entitled to immediate recognition of refugee status. The third category, namely Palestinian refugees receiving UNRWA assistance, was in Article 1D. Their entitlement to such status, while real, was deferred until a certain event had occurred. Consequently, Article 12(1)(a) of the Directive should, in its view, also be construed as defining a category of persons entitled to deferred refugee status.

34. To evaluate that submission, one must consider the structure of Article 1 of the Convention as a whole, bearing in mind that the second subparagraph of Article 1D was a late amendment intended to clarify the scope of the first subparagraph.¹⁸ The content of Article 1 of the Convention is reflected, in so far as it is still relevant to applications for refugee status in Member States of the EU, in Articles 2(c), 11 and 12 of the Directive. There is no reason to suppose that the rearrangement was in any way intended to modify the structural relationship which is apparent from Article 1 of the Convention.

35. Article 1A does indeed provide for two categories of refugee: historical refugees and those meeting the 'well-founded fear of persecution' criterion.¹⁹ (Article 1B, which is now of only marginal relevance anywhere, and of none in the EU, provides for certain nuances in the definition of the second category.) Article 1C then lists a number of circumstances in which the Convention ceases to apply to any person falling under the terms of Article 1A.²⁰ The final three paragraphs – Article 1D, E and F²¹ – define categories of person to whom the Convention 'shall not apply'. Articles 2 to 34 of the Convention²² go on to define the status, rights and duties of refugees.

16 — See point 6 above.

17 — See footnote 7 above.

18 — See *Commentary on the 1951 Convention relating to the status of refugees and its 1967 protocol*, ed. Zimmerman, Oxford 2011, p. 543-4.

19 — See point 4 above, reflected in Article 2(c) of the Directive. The Directive does not, however, include the first category – presumably because, by 2004, there was no longer any scope for 'historical' refugees to apply for refugee status in a Member State.

20 — The same circumstances are set out in Article 11 of the Directive.

21 — These categories are set out in, respectively, Article 12(1)(a), (1)(b) and (2) of the Directive.

22 — Corresponding, essentially, to Articles 20 to 34 of the Directive.

36. That structure is coherent and clear. There are refugees, defined in Article 1A, to whom the Convention (in particular Articles 2 to 34) applies; there are those to whom, by reason of a change of circumstances, it ceases to apply (Article 1C); and there are those to whom, by reason of pre-existing circumstances, it does not apply. Of the latter, there are three categories: two (Article 1D and E) are excluded by reason of their present circumstances (receipt of protection or assistance, or recognition as having status equivalent to that of a national of the State of residence), the third (Article 1F) by reason of past circumstances (commission of certain criminal acts).

37. There is no ground for supposing that a provision which, like Article 1D, begins with the words ‘This Convention shall not apply to ...’ is in fact defining a category of person to whom the Convention does apply. The second subparagraph of that provision is clearly intended to elucidate the circumstances in which the exclusion by reason of receipt of protection or assistance comes to an end, and the status of those for whom it has come to an end.

38. I therefore cannot agree that Article 1D of the Convention – or, thus, Article 12(1)(a) of the Directive, which begins with the words ‘A third country national or a stateless person is excluded from being a refugee, if ...’ – defines a category of refugees. That does not, however, mean that the effect of the second subparagraph cannot be to confer subsequent entitlement to refugee status on those to whom it applies.

Possible implications of Article 12(1)(a) of the Directive

39. It is helpful when examining the questions referred to have a clear notion of the different situations a person may be in with regard to Article 12(1)(a) of the Directive, and what those situations may imply for the person concerned. There are, it seems to me, three possible such situations.

40. *First*, since Article 12(1) begins with the words ‘A third country national or a stateless person is excluded from being a refugee, if ...’, a person’s situation in relation to Article 12(1)(a) may be, when the ensuing condition is fulfilled, that of being ‘excluded from being a refugee’.

41. If a person is ‘excluded from being a refugee’ within the meaning of the Directive, he cannot rely on that instrument in order to assert a right to recognition as a refugee and to the status which flows from such recognition. Any application which he makes must be regarded as inadmissible, regardless of whether he may meet the definition in Article 2(c) of the Directive or not.

42. However, I would stress that such exclusion can extend only to the individual’s right to *claim* refugee status under EU law, and does not affect the State’s right to *grant* such status. Article 3 of the Directive specifically allows Member States to ‘introduce or retain more favourable standards for determining who qualifies as a refugee’. EU law in no way precludes a Member State from granting refugee status to any individual, whatever the circumstances.

43. In the same vein, it should be borne in mind that the Directive regulates not only refugee status in the Member States but also subsidiary protection, for persons under a real risk of suffering serious harm. Such harm includes, under Article 15(c), ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’ – a definition which may currently be of particular relevance to Palestinian refugees in Syria. Article 12(1)(a) refers solely to refugee status. It does not exclude anyone from subsidiary protection; nor do the provisions which do lay down exclusions from subsidiary protection (in Article 17 of the Directive) refer in any way to receipt of protection or assistance from any UN body or agency. Consequently, any entitlement to or grant of subsidiary protection is entirely unaffected by Article 12(1)(a).

44. Finally, regardless of exclusion from refugee status, Member States must respect the principle of non-refoulement in accordance with their international obligations (Article 21 of the Directive).

45. A *second* possible situation is, obviously, that a person is *not* ‘excluded from being a refugee’ by Article 12(1)(a) of the Directive, because he is not ‘at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance’ within the meaning of Article 1D of the Convention.

46. Where that is so – and no more – it is clear that the person concerned has no immediate and automatic entitlement to refugee status, but merely a right to have his application for such status considered in accordance with the appropriate procedures:²³ it is no longer inadmissible. He is entitled to refugee status only if, in the course of such procedures, it can be established that he meets the definition of a refugee in Article 2(c) of the Directive. That was the situation of the applicant in the main proceedings in *Bolbol*, who had never availed herself of UNRWA assistance.

47. In the absence of the second sentence of Article 12(1)(a) of the Directive (and of the second subparagraph of Article 1D of the Convention), it would seem logical to infer that a person who had ceased to receive such protection or assistance would also be in the same position.

48. However, that provision makes a specific statement with regard to cessation of protection or assistance: ‘When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive’.

49. The words ‘shall ipso facto be entitled to the benefits of this Directive [Convention]’ (or, in French ‘bénéficieront de plein droit du régime de cette Convention’) may thus suggest a *third* possibility, namely that a person in respect of whom UNRWA assistance ‘has ceased for any reason’ is to be recognised as a refugee, regardless of whether he meets the definition in Article 2(c) of the Directive or not. It is with that possibility in particular that the national court’s first question is concerned.

Personal and temporal scope of the exclusion from being a refugee

50. It is clear from the judgment in *Bolbol* that a person is not ‘excluded from being a refugee’ by the first sentence of Article 12(1)(a) of the Directive if he has not availed himself of UNRWA assistance. It is also clear from the second sentence of that provision that – whatever further entitlement may or may not also be conferred – a person is not excluded from being a refugee where ‘such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations’. By contrast, those who are ‘at present receiving’ UNRWA assistance are excluded.

51. At least two Member States – France and the United Kingdom – have argued (and it was implicit in my Opinion in *Bolbol*) that the exclusion therefore applies for only so long as the person concerned is physically present in the UNRWA area of operations (namely, Lebanon, Syria, Jordan, the West Bank and the Gaza Strip). As soon as the person leaves that area, he can no longer be ‘at present receiving’ UNRWA assistance and can therefore no longer be excluded from being a refugee. The conclusion I drew as to the precise situation of such a person – unlike that drawn by the United Kingdom – differentiated between the effects of voluntary and involuntary departure, but I agreed with its view as regards the ending of the exclusion.

23 — That is to say, in accordance with Chapter II of Directive 2004/83 (now, of Directive 2011/95) and with Directive 2005/85, cited in footnote 9 above.

52. I no longer consider that view tenable, particularly in the scheme of the Directive. In order to seek refugee status in a Member State of the EU, it is necessary to be physically present in that State and thus physically absent from the UNRWA area. Consequently, if mere absence from the UNRWA area were sufficient to end the exclusion laid down in the first sentence of Article 12(1)(a) of the Directive, no person applying for refugee status under the Directive could ever be excluded, and the exclusion would be meaningless.²⁴

53. Consequently, since the exclusion must be presumed to have some actual effect, it cannot cease merely on departure from UNRWA's area of operation, regardless of the reason for the departure. There must be some additional trigger. Clearly, there is such a trigger when assistance has ceased within the meaning of the second sentence of Article 12(1)(a). However, it remains to be decided whether the 'benefits' of the Directive referred to in that sentence are limited to cessation of the exclusion or involve actual conferral of refugee status, and it may also be considered whether other events may bring the exclusion to an end.²⁵

54. Having considered those preliminary issues, I turn now to look more particularly at the questions referred.

The questions referred

Interlinked nature of the questions

55. The two questions posed are interlinked and, moreover, relate to the two interdependent clauses of a single sentence. The first asks what is meant by the benefits of the Directive, the second what event triggers entitlement to those benefits. The answers proposed to the first question range from entitlement merely to submit an application for refugee or subsidiary protection status to entitlement to immediate and automatic recognition of refugee status, with all the benefits attached thereto. Those proposed to the second question range from any event, of whatever origin, which takes the person concerned out of the UNRWA area to, exclusively, cessation of the existence of UNRWA or at least some event rendering it incapable of providing assistance. It is noteworthy that several of the Member States submitting observations show a tendency to offset a 'more generous' answer to one question with a 'less generous' answer to the other. That suggests that they, at least, view the answers as exerting a reciprocal influence on each other.

Succinct outline of the answers proposed

56. Very broadly speaking, those submitting observations have put forward five suggested outcomes:

- (1) Entitlement to the benefits of the Directive arises only when UNRWA is wound up or otherwise rendered incapable of providing assistance. Until then, beneficiaries of UNRWA assistance are excluded from refugee status entirely; after that, they may apply for refugee status in the same way as any other claimant.
- (2) Entitlement to the benefits of the Directive arises only when UNRWA is wound up or otherwise rendered incapable of providing assistance. Until then, beneficiaries may apply for refugee status in the same way as any other claimant as long as they have good reason to be outside the UNRWA zone; after that, they are automatically recognised as having refugee status.

24 — Many courts and authorities throughout the EU have grappled with the interpretation of the exclusion clause in the first paragraph of Article 1D of the Convention. If the interpretation here advanced by France and the United Kingdom is correct, those courts and authorities have been wasting their time on the interpretation of a provision which was inapplicable to the proceedings before them.

25 — See further points 80 and 81 below.

- (3) Entitlement to the benefits of the Directive arises whenever a beneficiary is unable to receive UNRWA assistance for reasons beyond his control. Until then, beneficiaries are excluded from refugee status; after that, they may apply for refugee status in the same way as any other claimant.
- (4) Entitlement to the benefits of the Directive arises whenever a beneficiary is unable to receive UNRWA assistance for reasons beyond his control. Until then, beneficiaries are excluded from refugee status; after that, they are automatically recognised as having refugee status.
- (5) Entitlement to the benefits of the Directive arises whenever a beneficiary is unable to receive UNRWA assistance for whatever reason. Until then, beneficiaries may apply for refugee status in the same way as any other claimant as long as they are outside the UNRWA zone; after that, they are automatically recognised as having refugee status.

57. One further variant is suggested by the national court itself: entitlement to the benefits of the Directive may mean automatic recognition either of refugee status or of subsidiary protection status in accordance with a choice made by the Member State concerned.

Question 1 – the benefits of the Directive

58. It follows from my preliminary considerations that Article 12(1)(a) does not concern subsidiary protection in any way.²⁶ The proposed answers as regards the ‘benefits of this Directive’ to which the persons concerned are ‘ipso facto ... entitled’ may therefore be reduced to

- the right to apply for refugee status in the same way as any other claimant; or
- actual conferral of refugee status.

59. I remain of the view, expressed in points 85 to 89 and 103 to 109 of my Opinion in *Bolbol*, that the entitlement in question is to the substantive benefits of refugee status, which can be enjoyed only if that status is granted. Consequently, those to whom the second sentence of Article 12(1)(a) of the Directive applies are entitled to actual conferral of refugee status, regardless of whether they meet the definition in Article 2(c) in the same way as is required of other applicants. I would add the following considerations to those I have already expressed.

60. First, Article 1D of the Convention uses the terms ‘ipso facto’ in English and ‘de plein droit’ in French.²⁷ The clearly deliberate use of such wording cannot be treated as without significance. Whatever nuances of meaning there may be, those expressions make clear that cessation of protection or assistance, on its own and without any further conditions having to be met, gives rise to the entitlement in question. Since no conditions have to be met in order to *apply* for refugee status (even the most undeserving may submit an application, which will be refused unless the applicant meets the definition of a refugee and is not excluded by any other provision), the entitlement which arises on cessation of UNRWA assistance must be something more than the mere right to apply for such status. It must be something for which certain conditions would otherwise have to be met.

61. Second, I would draw attention to the full wording of the second sentence of Article 12(1)(a) of the Directive: ‘When such protection or assistance has ceased for any reason, *without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations*, these persons shall ipso facto be entitled to the benefits of this Directive’. The condition which I have italicised should not be ignored. If protection or assistance

²⁶ — See point 43 above.

²⁷ — See point 32 above.

ceases when the position of those previously receiving it *has* been definitely settled in that way, it seems to me that they can simply no longer be excluded from being a refugee. In that case, they must be able to claim refugee status if for any reason they meet the Article 2(c) definition. A contrario, therefore, when their position has *not* been thus settled (but assistance has still ceased for whatever reason) their status vis-à-vis the Directive must be different –again, ‘the benefits of this Directive’ must mean more than just not being excluded from the possibility of being recognised as a refugee if they meet Article 2(c).

62. It is inconceivable, however, as the German and Hungarian Governments rightly point out, that the mere fact of cessation of protection or assistance should automatically give rise to *totally unconditional* recognition of refugee status. It is not only Article 12(1)(a) which provides for exclusion from that status. Most importantly, Article 12(2) and (3) excludes (like Article 1F of the Convention) those who have committed, instigated or otherwise participated in the commission of a range of particularly serious crimes. In addition, under Article 11 or Article 12(1)(b), as the case may be, a change of circumstances involving, broadly speaking, a person’s attachment or reattachment to a country in which he enjoys satisfactory and secure rights means that he cannot, or can no longer, benefit from protection as a refugee.²⁸

63. It is also clear that – contrary to the fears of the Romanian Government – there can never be automatic recognition of refugee status, that is to say, recognition without any sort of procedure to establish that the relevant conditions are satisfied.²⁹

64. Consequently, the conditions waived by the very fact of cessation of UNRWA assistance can only be those required for recognition as a refugee in accordance with the definition in Article 2(c) of the Directive, and the entitlement can only be to recognition as a refugee without the specific need to prove fulfilment of those conditions. The benefits of the Directive to which the second sentence of Article 12(1)(a) refers are therefore those which flow from the granting of refugee status.

65. However, granting of that status must remain subject to the condition that the person concerned is not excluded from it by any other provision of the Directive. And it will still be necessary for a beneficiary to establish, in accordance with the judgment in *Bolbol*, that he actually availed himself of UNRWA assistance and, in accordance with the second sentence of Article 12(1)(a) of the Directive, that such assistance has ceased.

66. I would add that waiver of the requirement to demonstrate fulfilment of the conditions in Article 2(c) of the Directive is not as liberal as it might at first sight appear, with regard to those who are concerned by Article 12(1)(a). Article 2(c) and the second sentence of Article 12(1)(a) overlap to a certain extent, in that a condition for both is the absence of protection for the individual concerned. And, as I have pointed out,³⁰ UNRWA was not set up to provide, nor has it ever provided, ‘protection’ to Palestinian refugees. It is not in a position to provide anything other than ‘assistance’. Moreover, the facts given by the national court with regard to the three applicants in the proceedings before it suggest that little protection is available from the Lebanese authorities, and it seems highly unlikely that the Syrian authorities are currently in a position to protect any refugees in their territory. In short, many of those falling within the second sentence of Article 12(1)(a) may already meet a significant part of the definition of ‘refugee’ in Article 2(c), in that they are unable to avail themselves of the protection of the country of their (nationality or) former habitual residence.

28 — Those provisions reflect, respectively, Article 1C and E of the Convention.

29 — See my Opinion in *Bolbol*, cited in footnote 5 above, point 94 et seq., and paragraph 52 of the judgment.

30 — See footnote 6 above, and <http://www.unrwa.org/etemplate.php?id=87>: ‘UNRWA ... is not responsible for security or law and order in the camps and has no police force or intelligence service. This responsibility has always remained with the relevant host and other authorities.’

67. Those considerations confirm the view I have already expressed as to the answer to the first question referred in this case. However, I must deal also with a significant objection to that view, which has been put forward by several Member States. They submit that allowing a certain category of applicant to acquire refugee status without having to demonstrate fulfilment of the conditions laid down in the definition in Article 2(c) of the Directive, while requiring others to do so, gives rise to unjustified discrimination, precluded by the principle of equal treatment.

68. The principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.

69. In the present case, my proposed interpretation means that two categories of applicant for refugee status – those who have availed themselves of UNRWA assistance and those who, for whatever reason, have not – are entitled to recognition of that status (giving rise to the same benefits under the Directive) under different conditions. Those in the first group, which is a subgroup of those entitled to UNRWA assistance, must establish simply that they have availed themselves of that protection or assistance and that it has ceased. Those in the second group, which includes the remainder of those entitled to UNRWA assistance, together with all other applicants, must establish that they meet the definition of a refugee in Article 2(c) of the Directive.

70. However, the factual situations of the two categories are not comparable.

71. Those who are required to establish that they meet the definition of a refugee in Article 2(c) of the Directive have previously been living a relatively normal life independent of external assistance. However, circumstances have then evolved such that they have fled their country of nationality or habitual residence. The events that have occurred may have been so evil as to place them in a situation in which they have a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. If so and if they are ‘unable or, owing to such fear ... unwilling’ to return, they are entitled to refugee status.

72. Those who were previously receiving external assistance from UNRWA are not in a similar position. So far from living a normal life, they were in receipt of the specific support deemed necessary (on an ongoing basis) by the international community. In that respect, they were being looked after. They were already in a protected situation. An external event then occurs that means that their UNRWA assistance ‘ceases’, through no fault of their own. There is no particular reason to suppose, however, that that event will necessarily and simultaneously engender a ‘well-founded fear of being persecuted’ such as would bring them within the wording of Article 2(c) of the Directive. They are nevertheless no longer able to rely on their previous UNRWA assistance (and thus no longer benefit from the material support that previously justified their exclusion from the scope of the Convention altogether).

73. Consequently, in so far as the situations in issue are not comparable, the principle of equal treatment does not require that they must not be treated differently.

74. It may be objected that, to the extent that the two categories are in different factual situations, the ‘ordinary’ applicant for refugee status is often in a worse situation than the Palestinian whose assistance from UNRWA has suddenly ceased. Why then should the latter get preferential access to the benefits of refugee status?

75. Whether a Palestinian who can suddenly no longer receive UNRWA assistance is more or less deserving than some other category of potential refugee is an emotive question. For my part, I would say that, in the abstract, all genuine potential refugees are equally deserving of compassion and support. Had Article 1D of the Convention contained only its first sentence, I would thus have had little difficulty in reaching the view that, once UNRWA assistance had ceased, a Palestinian who had

been in receipt of it should be brought back within the scope of the Convention and then be treated like any other applicant for refugee status. But the plain fact is that Article 1D comprises not one sentence but two. As I read the full text, the international community deliberately chose to afford special treatment to displaced Palestinians – treatment that is in some respects negative (Article 1D, first sentence) and in other respects preferential (Article 1D, second sentence). Given the factual differences that I have identified above, that choice (which the Directive faithfully reflects) does not violate the principle of equal treatment.

Question 2 – cessation of protection or assistance

76. It follows from my preliminary considerations that a person who has availed himself of UNRWA assistance cannot be ‘entitled to the benefits’ of the Directive – indeed, he remains, in principle, ‘excluded from being a refugee’ – until that assistance has, with regard to him, ‘ceased for any reason’ within the meaning of Article 12(1)(a).³¹ The answers proposed as regards the event triggering that entitlement may therefore be reduced to

- exclusively, cessation of UNRWA or some other event rendering it incapable of providing assistance; or
- any event beyond a beneficiary’s control or independent of his volition which means that he is unable to receive assistance.

77. In my Opinion in *Bolbol* (at points 77 to 84 and 100 to 102), I reached the view that the latter interpretation was correct, and I am still of that view – though, of course, the former interpretation is subsumed within the latter, which will include any event rendering UNRWA incapable of providing assistance.

78. In support of that view, I do not think it necessary to adduce much further argument. I would merely point out that it seems the most consistent with the language used – which, here, does not differ significantly as between the English and French versions. ‘When such protection or assistance has ceased’ implies that it is the protection or assistance which must cease; the individual’s own withdrawal from it is not contemplated. This part of the sentence taken alone might favour the view that the event must concern UNRWA itself. However, ‘for any reason’ seems to broaden the meaning of the first part of the sentence to the maximum the words will support. Yet that cannot go as far as including individual decisions taken on grounds of personal convenience, which would empty the exclusion of any substance.³² I therefore consider that the phrase can only broaden the notion to cessation to the extent that the reason need not concern UNRWA itself.

79. I must, however, add two remarks as regards those who, of their own volition, leave the area outside which they are materially unable to receive UNRWA assistance.

80. First, as I have stated above, the mere fact of leaving the UNRWA area cannot in itself end the exclusion from ‘being a refugee’.³³ Coupled with my conclusion that entitlement to the benefits of the Directive can arise only as a result of an event beyond the control or independent of the volition of a recipient of UNRWA assistance, as a result of which he is unable to receive that assistance any longer, that might seem to mean that anyone who has once availed himself of UNRWA assistance can never claim refugee status in a Member State on the basis either of Article 2(c) of the Directive or of the second sentence of Article 12(1)(a).

31 — See point 52 et seq. above.

32 — See points 50 to 53 above.

33 — See points 50 to 53 above.

81. That inference should be qualified. Exclusion from being a refugee as a result of having availed oneself of UNRWA assistance can in my view logically extend only to exclusion from the possibility of claiming refugee status as a Palestinian entitled to such assistance. There is no reason for such exclusion to continue for life, if other grounds on which refugee status could be claimed should arise – for example, if a Palestinian refugee were to move voluntarily to a country outside the UNRWA area, perhaps acquiring the nationality of that country, and were then to encounter circumstances placing him within the definition in Article 2(c) of the Directive. In that regard, Article 5 of the Directive provides that a well-founded fear of being persecuted may be based on events which have occurred or, as the case may be, on activities which have been engaged in by the applicant, since he left the country of origin – at least as long as the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin and the risk of persecution is not based on circumstances which the applicant has created by his own decision since leaving that country.

82. Second, it is quite conceivable, as has been pointed out to the Court, that a person in receipt of UNRWA assistance may voluntarily leave the UNRWA area on a temporary basis – for example, in order to visit a relative elsewhere – while fully intending to return and genuinely believing that he will be able to do so, but finds that in fact his re-entry into the territory in which he received assistance is blocked. Such a person should, in my view, be considered as prevented from receiving UNRWA assistance for a reason beyond his control or independent of his volition.

83. With regard to both those circumstances, and indeed to any circumstances in which it must be established that ‘protection or assistance has ceased for any reason’, there will be problems of proof, as I noted at point 102 of my opinion in *Bolbol*. Any such problems must be resolved in conformity with Article 4 of the Directive, ‘Assessment of facts and circumstances’, which provides a framework for the types of proof or evidence which Member States may or may not require. Whilst it is in general legitimate to require an applicant to substantiate his claim, rather than merely relying on his statements, Article 4(5) sets out circumstances in which Member States may not insist on documentary confirmation of all aspects of the application.

Conclusion

84. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Fővárosi Bíróság to the following effect:

In the second sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted:

- (1) the words ‘these persons shall ipso facto be entitled to the benefits of this Directive’ mean that the persons in question are entitled to refugee status in a Member State provided that they can establish that the condition relating to cessation of protection or assistance is satisfied in relation to them;
- (2) the words ‘such protection or assistance has ceased for any reason’ mean that, for the persons in question, the protection or assistance of which they had actually availed themselves is no longer provided to them for any reason beyond their control or independent of their volition.