



UNHCR Revised Statement on Article 1D of the 1951 Convention ¹

*Issued in the context of the preliminary ruling reference
to the Court of Justice of the European Communities
from the Budapest Municipal Court regarding
the interpretation of Article 12(1)(a) of the Qualification Directive*

Introduction

On 26 January 2009, the Fővárosi Bíróság (Budapest Municipal Court)² lodged a request to the Court of Justice of the European Communities³ for a preliminary ruling concerning the interpretation 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.⁴ That provision governs the application of the Qualification Directive to persons who fall “within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the Office of the United Nations High Commissioner for Refugees” (“UNHCR”). Article 12(1)(a) of the Qualification Directive therefore has a decisive impact on Member States’ interpretation and implementation of Article 1D of the 1951 Convention relating to the Status of Refugees.⁵

¹ This revision replaces the Statement on Article 1D of the 1951 Convention issued by UNHCR in May 2009 in order to take into account UNHCR’s revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees (October 2009) and following discussions with UNRWA.

² Hereafter the “referring court”.

³ The referring court decided on a preliminary reference to the Court of Justice of the European Communities on 15 December 2008 in the case C-31/09 *Bolbol Nawras v. Bevándorlási és Állampolgársági Hivatal*, [OJ C 82/15, 04.04.2009], at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:082:0015:0015:en:pdf>.

⁴ Council of the European Union, *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* [OJ L 304/12, 30.09.2004], at: <http://www.unhcr.org/refworld/docid/4157e75e4.html> (hereafter: “Qualification Directive”).

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter: “1951 Convention”).

The questions posed by the referring court⁶ concern the criteria for exclusion from refugee status under Article 12(1)(a) of the Qualification Directive, as well as the conditions under which protection or assistance of a UN organ other than UNHCR are considered to have ceased, and the consequences for the entitlements of the concerned person under the Qualification Directive.

This is the third preliminary ruling reference regarding the interpretation of the Qualification Directive⁷ and the second case in which the ECJ is asked to clarify the application of a specific provision of the 1951 Convention in the framework of the EU asylum *acquis*. UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.⁸ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.⁹ This supervisory responsibility is confirmed by Article 35 of the 1951 Convention¹⁰ and Article II of the 1967 Protocol relating to the Status of Refugees¹¹ and extends to all EU Member States, as they are all States Parties to both instruments.

UNHCR’s supervisory responsibility has been reflected in European Community law, including by means of a general reference to the 1951 Convention in Article 63(1) of the Treaty establishing the European Community,¹² as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy”.¹³ EC secondary legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive states that consultations with the UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”. The supervisory responsibility of UNHCR is also

⁶ The English translation of the questions is reproduced in Part 2 below.

⁷ Case-465/07 *Elgafaji*, Judgment of 17 February 2009, Official Journal of the European Union [OJ C 90/3, 18.04.2009] and joined cases: Case C-179/08 *Dier Jamal*; Case C-178/08 *Ahmed Adem and Hamrin Mosa Rashi*; Case C-177/08 *Khoshnaw Abdullah*; Case C-176/08 *Kamil Hasan*; Case C-175/08 *Aydin Salahadin Abdulla*, [OJ C 197/3, 02.08.2008], at: http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=197&Submit=Search&ihm_lang=en.

⁸ UN General Assembly, UNHCR, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428 (V), Annex, UN Doc. A/1775, para. 1 (14 December 1950); at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁹ *Ibid.*, para. 8(a).

¹⁰ See above footnote 5. According to Article 35(1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of this Convention”.

¹¹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

¹² *Consolidated version of the Treaty on European Union and of the Treaty establishing the European Community* [OJ C 321 E/65, 29.12.2006], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:en.pdf>.

¹³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

specifically articulated in Article 21 of Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.¹⁴ It is also reflected in the recent proposal of the European Commission for a Regulation establishing a European Asylum Support Office,¹⁵ which recognizes UNHCR's expertise in the field of asylum¹⁶ and foresees a non-voting seat for UNHCR on EASO's Management Board.¹⁷

Against this background, UNHCR in this Statement expresses its view on the issues arising in the preliminary ruling reference of 26 January 2009. Part 1 of this Statement addresses the need to interpret the Qualification Directive in accordance with the 1951 Convention and in the light of UNHCR's authoritative guidance. Part 2 sets out UNHCR's views on the specific questions submitted to the ECJ. The Annex to this Statement attaches UNHCR's Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, which sets out UNHCR's overall position on the subject.

1. The Qualification Directive and the 1951 Convention

The Treaty establishing the European Community clearly sets an obligation for EC secondary legislation on asylum to conform to the 1951 Convention and its 1967 Protocol.¹⁸ The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the "full and inclusive application" of the 1951 Convention.¹⁹ It follows that the transposition of the Qualification Directive into

¹⁴ Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [OJ L 326/13, 13.12.2005], at: <http://www.unhcr.org/refworld/docid/4394203c4.html>. Article 21(c) in particular obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure".

¹⁵ European Commission, *Proposal For a Regulation of the European Parliament and of the Council Establishing A European Asylum Support Office*, COM(2009) 66 final, 18.02.2009, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0066:FIN:EN:PDF> (hereafter: "EASO").

¹⁶ Recital 9 of the EASO Proposal indicates that "the Office should act in close cooperation with the Office of the UN High Commissioner for Refugees (UNHCR) in order to benefit from its expertise and support".

¹⁷ Recital 14 of the EASO Proposal underlines that "given its expertise in the field of asylum, UNHCR should be a non-voting member of the Board so that it is fully involved in the work of the Office". UNHCR's membership on the EASO Management Boards is governed by Article 23(4).

¹⁸ See above footnote 12. Article 63(1) provides that measures on asylum shall be "in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees and other relevant treaties". The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community provides in its Article 63 that the common policy on asylum, subsidiary protection and temporary protection must be "in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

¹⁹ See para. 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16.10.1999, at: <http://www.unhcr.org/refworld/docid/3ef2d2264.html>; para. 6 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13.12.2004, at: <http://www.unhcr.org/refworld/docid/41e6a854c.html>; para. 1 of the Green Paper of the Commission on the Future Common European

national legislation of EU Member States, all of which are States Parties to the 1951 Convention, must also be in line with the 1951 Convention.

The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”²⁰ and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for [...] the right to asylum”²¹ as well as guiding Member States in the application of the 1951 Convention.²² Certain provisions of the Directive replicate the wording of the 1951 Convention almost exactly.²³ One of the purposes of the Directive is thus not only to ensure compliance with the 1951 Convention, but to contribute to its full implementation.

The above considerations and the requirement to interpret and apply the Qualification Directive in accordance with the 1951 Convention are particularly significant in the context of Article 12(1)(a) since this provision explicitly refers to Article 1D of the 1951 Convention to define its own scope of application *ratione personae* and *materiae*.²⁴

In general, the Conclusions of UNHCR’s Executive Committee, as well as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status²⁵ and subsequent Guidelines on International Protection²⁶ issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*. These provide guidance for the interpretation and application of the 1951 Convention, and influenced significantly the drafting of the Qualification Directive. The Explanatory Memorandum

Asylum System COM(2007) 301 final, 06.06.2006, at: <http://www.unhcr.org/refworld/docid/466e5a972.html>; part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17.06. 2008, at: <http://www.unhcr.org/refworld/docid/4860eee72.html>. The Policy Plan recognizes the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also p. 11 of the European Pact on Immigration and Asylum adopted on 16 October 2008, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”, *European Pact on Immigration and Asylum*, 13440/08, 16.10.2008, p. 11, at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

²⁰ Recital 3 of the Qualification Directive.

²¹ Recital 10 of the Qualification Directive.

²² Recital 16 of the Qualification Directive.

²³ For instance, Article 2(c) of the Qualification Directive replicates almost exactly Article 1A of the 1951 Convention.

²⁴ This is one of the few provisions of the Qualification Directive which explicitly relies on a specific provision of the 1951 Convention to determine its scope of application. Other instances include Article 14(6) referring to certain rights provided to refugees by the 1951 Convention and Article 25 referring to the Travel Document Schedule contained in the 1951 Convention.

²⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter: “UNHCR Handbook”).

²⁶ UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines, including UNHCR’s revised Note on Article 1D of October 2009 (annexed herewith), complement the UNHCR Handbook (see above footnote 25) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

of the Commission's proposal²⁷ quotes the UNHCR Handbook and Executive Committee Conclusions as sources, along with the 1951 Convention itself.²⁸

2. UNHCR's comments on the questions referred to the ECJ

The following questions have been referred to the ECJ:

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

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or it is also necessary for him actually to avail himself of that protection or assistance?
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 objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?
3. Do the benefits of this 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 in the scope *ratione personae* of the directive?”

Article 12(1)(a) of the Qualification Directive reads as follows:

“1. 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 1 D of the Geneva 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.”

Article 1D of the 1951 Convention itself provides:

“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 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

²⁷ European Commission, *Proposal for a Council Directive on minimum standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, COM(2001) 510 final, 12.09.2001, at: <http://www.unhcr.org/refworld/docid/47fdfb1ad.html>.

²⁸ *Ibid*, part 3, p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term “refugee”, which constituted the “starting point” of the Qualification Directive, recognized that the Handbook is a “valuable aid to Member States in determining refugee status”; see *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees* [OJ L 63/2, 13.3.1996], at: <http://www.unhcr.org/refworld/docid/3ae6b37f44.html>.

Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.”

UNHCR’s overall position on the applicability of Article 1D of the 1951 Convention to Palestinian refugees is set out in the Note annexed to this Statement. In the light of that position, the three specific questions referred to the ECJ are answered below.

2.1. Receiving protection or assistance (Question 1)

Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

UNHCR’s interpretation of Article 1D of the 1951 Convention is not based on that Article’s literal meaning, but takes into account the general principle of international law that a treaty should be interpreted in accordance with the rules of interpretation codified in the 1969 Vienna Convention on the Law of the Treaties, as acknowledged by the ECJ.²⁹ Thus, in addition to the text and the ordinary meaning of the terms included in Article 1D, the object and the purpose of the 1951 Convention, as well as its overall historical objective and context in which it was drafted and developments subsequent to its conclusion will be relevant in establishing the personal and material scope of Article 1D.³⁰

In UNHCR’s view, persons currently falling within the scope of Article 1D of the 1951 Convention, and hence of Article 12(a) of the Qualification Directive, are the following two groups of Palestinian refugees:³¹

- a) Palestinians who are “Palestine refugees” within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948 and subsequent UN General Assembly Resolutions, and who, as a result of the 1948 Arab-Israeli conflict, were displaced from that part of Mandate Palestine which became Israel, and who have been unable to return there;

²⁹ The ECJ has indicated that “in interpreting a provision of the Community law, it is appropriate to consider its wording as well as the context in which it occurs and the objectives of the rules of which it forms part” (see Case C-223/98, *Adidas*, para. 23; Case-191/99, *Kvaerner*, para. 30; Case C-315/00, *Maierhofer*, para. 27). See also Case C-344/04, *IATA*, 10 January 2006, para. 40.

³⁰ Article 31(1) of the Vienna Convention provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose”. The elucidation of the ordinary meaning of terms should therefore take into account those other interpretative elements and not be understood in abstract. Art. 32 of the Vienna Convention allows resort to “supplementary means of interpretation”, including the *travaux préparatoires*, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”.

³¹ See paragraph 4 of the Note annexed to this Statement (hereafter “the Note”).

b) Palestinians not falling within paragraph (a) above who are “displaced persons” within the sense of UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent UN General Assembly resolutions, and who, as a result of the 1967 Arab-Israeli conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there.

Included within the above groups are not only persons displaced at the time of the 1948 and 1967 hostilities, but also the descendants of such persons. On the other hand, persons falling within Articles 1C, 1E or 1F of the 1951 Convention do not fall within the scope of Article 1D, even if they remain “Palestine refugees” or “displaced persons” whose position is yet to be definitively settled in accordance with the relevant UN General Assembly resolutions.³²

UNHCR considers that the above persons falling within the scope of Article 1D who are inside the area of operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) are “at present receiving from organs or agencies of the United Nations other than [UNHCR] protection or assistance” within the sense of paragraph 1 of Article 1D.³³

2.2. Cessation of protection or assistance (Question 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 objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

The phrase “for any reason” in paragraph 2 of Article 1D should be interpreted in its context and in line with the object and purpose of that Article, which is to ensure continuity of protection and assistance to Palestinian refugees, be this geographical and/or temporal continuity.

At present, UNRWA continues to provide protection and assistance to Palestinian refugees within its area of operations. Such protection or assistance cannot therefore be

³² *Ibid.*

³³ See paragraph 8 of the Note. As mentioned in the endnote to that paragraph, persons who are “Palestine refugees” are eligible to “be registered in UNRWA’s Registration System and to receive UNRWA services”, whereas UNRWA “makes its services available to non-registered persons displaced as a result of the 1967 and subsequent hostilities” (UNRWA, “Consolidated Eligibility and Registration Instructions”, 2009). However, it should be noted that while having been registered and/or recorded by UNRWA may help an individual prove that he or she falls within the scope of Article 1D of the 1951 Convention, it is not conclusive as to whether he or she falls within that Article’s scope. This is for two reasons. First, as stated above, persons falling within Articles 1C, 1E or 1F of the 1951 Convention do not fall within the scope of Article 1D, even if they remain “Palestine refugees” or “displaced persons” whose position is yet to be definitively settled in accordance with the relevant UN General Assembly resolutions. Second, UNRWA has not registered and does not provide services to all persons who are “Palestine refugees”, nor does it provide services to all persons who have been “displaced as a result of the 1967 and subsequent hostilities”.

regarded as having ceased within the meaning of paragraph 2 of Article 1D for Palestinian refugees who are inside that area. However, if a Palestinian refugee leaves that area, such protection or assistance ceases, meaning that he or she is *ipso facto* entitled to the benefits of the 1951 Convention.³⁴

If such a refugee returns to UNRWA's area of operations, he or she remains entitled to the benefits of the 1951 Convention until such return takes place. Upon return, he or she no longer falls within paragraph 2 of Article 1D but falls instead within paragraph 1 of that Article, meaning that he or she loses his or her entitlement to the benefits of the 1951 Convention even though he or she continues to retain his or her refugee character. However, this is not the case if a "displaced person" who is not a "Palestine refugee"³⁵ returns to the Palestinian territory occupied by Israel since 1967, since in that eventuality he or she would lose his or her refugee character and not fall within the scope of Article 1D at all.³⁶

Thus, in moving from inside to outside the UNRWA area of operations and then back again, the person concerned moves back and forth between paragraphs 1 and 2 of Article 1D, irrespective of the reasons for leaving or returning to the UNRWA area.

2.3. *Benefits of the Directive (Question 3)*

Do the benefits of this 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 in the scope ratione personae of the directive?

Persons falling within paragraph 2 of Article 1D are *ipso facto* entitled to the benefits of the 1951 Convention, provided that Articles 1C, 1E and 1F of that Convention do not apply; no separate determination of well-founded fear under Article 1A(2) of the 1951 Convention is required. The term "benefits of the 1951 Convention" refers to the standard of treatment that States Parties to the 1951 Convention are required to accord to refugees under Articles 2 to 34 of that Convention.³⁷

UNHCR therefore submits that a person falling within paragraph 2 of Article 1D of the 1951 Convention is *ipso facto* entitled to recognition as a refugee under the Qualification Directive, and to the treatment to which refugees are entitled under the Directive.

**UNHCR
October 2009**

³⁴ See paragraph 8 of the Note, including its point about Palestinian refugees who have never resided inside UNRWA's area of operations.

³⁵ This refers to the category of persons defined in point (b) of section 2.1 above.

³⁶ See paragraph 10 of the Note.

³⁷ See paragraphs 8 and 9 of the Note.