



UNHCR's Oral Intervention at the Court of Justice of the European Union

Hearing of the case of *El Kott and Others v. Hungary* (C-364/11)

15 May 2012, Luxembourg

Mr. President, Members of the Court, Madam Advocate General,

Introduction

1. UNHCR has a long tradition of appearing as a third party intervener, or “amicus curiae”, in cases raising important points of asylum and refugee law before the European Court of Human Rights and before supreme courts of several EU Member States. UNHCR is very pleased in the present case to make submissions for the second time before this Court.
2. I wish to inform the Court of the presence of representatives of UNHCR, as well as the presence of a representative of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, or UNRWA. UNRWA supports both the written and oral submissions that UNHCR is making in this case.
3. UNHCR has a mandate to provide international protection to refugees, including by supervising the application of relevant international conventions. This supervisory responsibility is recognized in the 1951 Convention relating to the Status of Refugees (the Refugee Convention), and has been acknowledged by a number of international, regional and national courts. UNHCR's supervisory responsibility is also recognized in EU law, including by way of a general reference to the Refugee Convention in Article 78 of the Treaty on the Functioning of the EU and in Declaration 17 to the Treaty of Amsterdam, as well as in the

EU asylum acquis, notably through references to the role of UNHCR in the Qualification Directive and the Asylum Procedures Directive.

4. In addressing the two questions posed to the Court by the Metropolitan Court of Budapest in this case, I will divide UNHCR's oral submissions into the following parts:

- Firstly, I will address the primacy of the Refugee Convention when interpreting and applying EU secondary legislation on asylum, such as the Qualification Directive;
- Secondly, I will provide UNHCR's position on the interpretation of "benefits of this Directive / benefits of this Convention" (which corresponds to Question 1 referred by the national Court); and
- Finally, I will address the proper interpretation of the phrase "when such protection or assistance has ceased for any reason" (which corresponds to Question 2 referred to the Court).

1. Primacy of the Refugee Convention & the central role of the Refugee Convention when interpreting and applying the Qualification Directive

5. I will now turn to our first point, notably the central role of the Refugee Convention in the interpretation and application of the legislative instruments of the EU asylum acquis, such as the Qualification Directive.

6. Article 12(1)(a) of the Qualification Directive is based upon, and very largely replicates the wording of, Article 1D of the Refugee Convention. Article 12(1)(a) should therefore be interpreted in accordance with Article 1D of the Refugee Convention. The principle of the primacy of the Refugee Convention, as well as the obligation of EU secondary legislation to conform to the Refugee Convention may be found in a number of European Union legislative

instruments, notably Article 78 of the Treaty on the Functioning of the EU, related Commission policy documents, as well as Recitals of the Qualification Directive.

7. This Court has acknowledged this important principle in its judgments of *Salahadin Abdulla and Others*, *Bolbol*, and *Germany v. B and D*.
8. The principle of primacy is very relevant in the present case, since Article 12(1)(a) of the Qualification Directive largely replicates the wording of Article 1D of the Refugee Convention.

**2. Interpretation of “Benefits of this Directive/Benefits of this Convention”
(Question #1)**

9. I will now address the first question referred to the Court, namely the interpretation of the phrase “benefits of this Directive”.
10. As noted in our Written Submissions, the meaning of the phrase “benefits of this Convention” contained in Article 1D refers to the rights and standards of treatment contained in Articles 2 to 34 of the Refugee Convention, and which are attached to refugee status as defined in Article 1 of that Convention.
11. The same meaning must, in our submission, be attributed to Article 12(1)(a) which uses the same language, but with reference to the Qualification Directive. As such, the phrase “the benefits of this Directive” refers to the rights and standards of treatment accorded to refugees under Chapters IV “Refugee Status” and VII “Content of International Protection” of the Qualification Directive.

12. This follows, in our submission, from both the ordinary meaning, and the purpose of Article 1D.

13. With regard to its ordinary meaning, “benefits of the Convention” must mean the substantive benefits contained in Articles 2 to 34 of the Refugee Convention and Chapters IV and VII of the Qualification Directive. The contrary interpretation distorts the meaning of “benefits”. It cannot mean simply access to asylum procedures for determining refugee status under Article 1A(2) of the Refugee Convention. Article 1 does not itself contain any benefits – it simply defines who *is* and who *is not* entitled to have access to those benefits. This is supported by the use of the term “benefits” elsewhere in the Refugee Convention, for example in Articles 5 and 7, in a context that can only mean the substantive benefits conferred by the Refugee Convention. It would be very odd if the same word had a different meaning in Article 1D. Furthermore, Article 1D refers to an “*ipso facto*” entitlement, meaning that persons falling within the scope of Article 1D are automatically entitled to the benefits of the Convention. The term “*ipso facto*” would be entirely redundant, in our submission, if the provision merely meant that a Palestinian refugee could apply for international protection in accordance with the general rules and in the same way as all asylum-seekers.

14. As to the purpose of Article 1D, the provision aims to ensure continuity of protection of persons whose *refugee character has already been established*. This is an important point in our submission. This is not unlike Article 1A(1) (the provision of the Refugee Convention dealing with “statutory refugees”, which I will return to shortly). The purpose of ensuring continuity of protection for Palestinian refugees would not be achieved if Article 1D were

interpreted as meaning only access to asylum procedures under Article 1A(2) and the corresponding provisions of the Qualification Directive.

15. Contrary to some of the submissions made to this Court, this construction of Article 1D does not result in discrimination or preferential treatment of Palestinian refugees granted refugee status under Article 1D. It stems from the fact that the Refugee Convention recognizes three categories of refugees in Article 1. The first category is that of “statutory refugees” recognized under Article 1A(1), being those who had been recognized as refugees under pre-existing arrangements at the time of the entry into force of the Refugee Convention. The second category covers refugees with a well-founded fear of being persecuted on a Convention ground in Article 1A(2). And the third category of refugees identified by the Refugee Convention are those refugees under Article 1D, only a sub-set of whom are recognized as falling within the Refugee Convention protection scheme.

16. All three categories of refugees who fall within the Convention terms are entitled to the benefits of the Refugee Convention as refugees. Palestinian refugees recognized under Article 1D receive the same rights, benefits and standards of treatment as other refugees recognized under Articles 1A(1) or 1A(2), so there is no more favourable treatment provided to Article 1D refugees than other refugees. They each enjoy the benefits of the Refugee Convention set out in Articles 2 to 34.

3. Interpretation of “when such protection or assistance has ceased for any reason”

(Question #2)

17. I will now turn to provide UNHCR’s position on the second question referred to this Court, notably the phrase “when such protection or assistance has ceased for any reason” in the second sentence of Article 1D.

18. As way of background to our submissions on this point, I wish to draw the Court's attention to the two related purposes of Article 1D of the Refugee Convention, and these are:

- Firstly, to avoid overlapping competencies between UNHCR and other organs or agencies of the UN, in particular UNRWA – this is the justification for the “exclusion clause” found in the first sentence of Article 1D; and
- Secondly, to ensure the continuity of protection or assistance for Palestinian refugees, in circumstances where that protection or assistance has ceased – this is the justification for the “inclusion clause” found in the second sentence of Article 1D.

19. As we've stated in our Written Submissions, it is UNHCR's position the expression “for any reason”, on its plain reading, must not be construed restrictively. Consequently, reasons other than the cessation of UNRWA as an agency or the cessation of UNRWA's activities are valid, and may trigger the application of Article 1D. In particular, the expression “ceased for any reason” would also cover any objective reason outside the control of the person concerned such that they are unable to avail themselves of the protection or assistance of UNRWA.

20. In determining what would be an objective reason outside the control of the person concerned such that “protection or assistance has ceased for any reason”, States need to assess whether a Palestinian who falls within the personal scope of Article 1D *cannot* return to an UNRWA area of operation where he or she previously received protection or assistance. This may be the case, for example, where the authorities refuse his or her re-admission or the renewal of his or her travel documents, or, as in this case, because of threats to his or her physical safety or freedom. In such circumstances, the special regime established under Article 1D is

triggered so as to ensure the continuity of protection, and the individual Palestinian refugee should be granted refugee status in the EU Member State where he or she has sought asylum. And of course, in carrying out such an assessment, States need to ensure that access to protection is not unduly delayed.

21. This interpretation of Article 1D is consistent with the clear wording of the provision which talks about “any reason” (and its equivalent in Article 12(1)(a) of the Qualification Directive). At the same time, it achieves the objective of Article 1D, namely to ensure the continuity of protection or assistance of Palestinian refugees, until such time as their situation is definitively settled in accordance with relevant UN General Assembly Resolutions. Moreover, we would point out that where the drafters of the Refugee Convention (and the Qualification Directive) intended to limit the scope of other provisions, they did so expressly and set out the exceptions. In Article 1D there are no such limitations or exceptions.

22. In conclusion:

- UNHCR’s proposed response to Question #1 is that “benefits of the Convention” means the substantive benefits that are attached to refugee status in the Refugee Convention, and the corresponding benefits attached to refugee status in the Qualification Directive.
- UNHCR’s proposed response to Question #2 is that “ceased for any reason” should not be construed restrictively, and should be interpreted as meaning any objective reason outside the control of the person concerned such that the person is unable to avail themselves of the protection or assistance of UNRWA.

Thank you.