Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 1 October 2020 [1]

Case C-507/19

Bundesrepublik Deutschland
v
XT

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, (Germany)))

(Request for a preliminary ruling — Area of freedom, security and justice — Asylum policy — Stateless Palestinian — Cessation of UNRWA protection or assistance — Conditions for granting *ipso facto* refugee status)

1. By this reference for a preliminary ruling, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) asks the Court to clarify certain aspects of Article 12(1)(a) of Directive 2011/95/EU. [2] The case concerns whether a Palestine refugee should be qualified as either 'excluded from being a refugee' or '*ipso facto*' having that status under Article 12(1)(a) of Directive 2011/95 and more specifically what importance the applicant's change of residence between two different UNRWA 'fields of operation' prior to his travel to a European Union Member State may have for that qualification. Specifically, the applicant initially resided in Syria, subsequently moved to Lebanon for an extended period of time, and then returned to Syria for a very brief period before travelling to Germany by land. The referring court seeks guidance concerning the geographic area that it should take into account when evaluating the applicant's status under Article 12(1)(a) of that directive.

I. Legal context

A. International law

1. The Geneva Convention

2. The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 (the 'Geneva Convention').

1 Original language: English.

2 Directive 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).

3. Article 1(A) of the Geneva Convention defines, inter alia, the term 'refugee' for the purposes of that act, and Article 1(D) states:

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

2. UNRWA

4. United Nations General Assembly resolution No 302 (IV) of 8 December 1949, concerning assistance to Palestine refugees, established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the 'UNRWA'). The agency's mandate has been regularly renewed and its current mandate expires on 30 June 2023.[3] Its task is to serve the well-being and human development of Palestine refugees.

3. UNHCR

5. The Office of the United Nations High Commissioner for Refugees (the 'UNHCR') was created on 14 December 1950 by Resolution No 428 (V) of the United Nations General Assembly. The UNHCR is a subsidiary organ of the United Nations under Article 22 of the UN Charter.

B. EU law

6. 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, recast and repealed Directive 2004/83/EC[4] in the interest of clarity as a number of substantive changes were made to that directive. Article 12(1)(a), however, remained unchanged.

7. Recital (4) of Directive 2011/95 states that the Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees. The wording of recital (4) of that directive is identical to the wording of recital (3) of Directive 2004/83.

8. Recital (12) of Directive 2011/95 states that the main objective of that directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States. Recital (6) of Directive 2004/83 was worded identically.

3 See resolution adopted by the General Assembly on 13 December 2019, A/RES/74/83.

4 Council 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).

9. Recitals (22) to (24) of Directive 2011/95 state as follows:

‘(22) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

(23) Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(24) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.’

10. Article 1 of Directive 2011/95, headed ‘Purpose’, provides:

‘The purpose of this Directive is to lay down 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.’

11. Article 2 of Directive 2011/95, entitled ‘Definitions’, is worded as follows:

‘For the purposes of this Directive the following definitions shall apply:

(a) “international protection” means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) “beneficiary of international protection” means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

(c) “Geneva Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(d) “refugee” means 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;

(e) “refugee status” means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) “subsidiary protection status” means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) "application for international protection" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(i) "applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(n) "country of origin" means the country or countries of nationality or, for stateless persons, of former habitual residence.'

12. Article 5 of Directive 2011/95, headed International protection needs arising sur place', provides in paragraph 3 thereof:

'Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.'

13. Article 11, entitled 'Cessation', provides as follows:

'1. A … a stateless person shall cease to be a refugee if …:

…

(f) … he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering [point (f)] of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

3. [Point (f)] of paragraph 1 shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection …, being a stateless person, of the country of former habitual residence.'

14. Article 12, headed 'Exclusion' provides:

'1. 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 definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;

…'

15. Article 14 entitled ‘Revocation of, ending of or refusal to renew refugee status’ is worded as follows:

‘1. … Member States shall revoke, end or refuse to renew the refugee status of … a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with Article 11.

…

3. Member States shall revoke, end or refuse to renew the refugee status of a … a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

…’

II. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

16. According to the order for reference, XT (also, the ‘applicant’) is a stateless person of Palestinian origin, who was born in 1991 in Damascus, Syria. He is registered with UNRWA as a Palestine refugee at the camp of Yarmouk, south of Damascus.

17. From an unspecified point in time in October 2013 until 20 November 2015, he was present in Lebanon, where he took up temporary employment or performed odd jobs. It is not clear from the order for reference if he requested and/or received any tangible assistance from UNRWA during this period.

18. XT then left Lebanon and went to Qudsaya, Syria, where he stayed briefly with members of his family. Some days later, he left Syria and travelled to Germany by land. The exact extent of his stay in Syria is not clear from the file, but according to the submissions of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany), he left Lebanon at the ‘end of November’. Thus, at the most, he would have stayed in Syria for 10 days before travelling to Germany. According to the order for reference, at the time XT left Syria, Jordan and Lebanon had already closed their border to Palestinian refugees coming from Syria.

19. Due to the circumstances of the war and conflict in Syria, UNRWA appears to have been severely limited in its ability to provide protection and assistance in the Syria field of operation [5] at the time XT left that country. [6] However, according to its own statements, the agency continued to provide assistance in the Syria field of operation and 'maintained its programme-budget-supported health care, education, vocational training, microfinance, youth support and social services' despite the complex challenges, adapting them to the constrained circumstances of armed conflict. [7]

20. XT arrived in Germany in December 2015 and applied for asylum in February 2016. He was granted subsidiary protection by the Federal Office for Migration and Refugees by a decision of 29 August 2016, but was denied refugee status. By judgment of 24 November 2016, the Verwaltungsgericht (Administrative Court, Germany) upheld his appeal and ordered that he should be granted the status of refugee.

21. Upon appeal, the Oberverwaltungsgericht (Higher Administrative Court, Germany) dismissed the appeal brought by the Bundesrepublik Deutschland (Federal Republic of Germany) against the decision of the Verwaltungsgericht (Administrative Court), finding, in substance, that XT as a stateless Palestinian was a refugee within the meaning of the legal provisions transposing Article 12(1)(a) of Directive 2011/95 into German law. According to the Oberverwaltungsgericht (Higher Administrative Court), XT had received protection from UNRWA and that protection had ceased for reasons that were independent of his volition. The Oberverwaltungsgericht (Higher Administrative Court) found that his personal safety was at serious risk when he left Syria and that he had no access to protection from UNRWA in other parts of the agency's area of operations, Jordan and Lebanon having already closed their borders to Palestinian refugees from Syria. It found that his departure was forced by circumstances independent of his volition and that it could not be considered voluntary. This, it found, was confirmed by the fact that he was granted subsidiary protection. [8]

22. The Federal Republic of Germany brought an appeal on a point of law (*Revision*) before the Bundesverwaltungsgericht (Federal Administrative Court, Germany).

23. That court has stayed the proceedings and referred the following questions to the Court:

'(1) When assessing the question of whether, within the meaning of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, a stateless Palestinian is no longer granted protection or assistance of the UNRWA, is account to be taken from a geographical perspective solely of the respective field of operation (Gaza Strip, Jordan, Lebanon, Syria, West Bank) in which the stateless person had his actual residence upon leaving the area of operations of the UNRWA (in this case: Syria), or also of further fields of operation belonging to the area of operations of the UNRWA?

5 UNRWA routinely refers to each of the West Bank, Gaza, Syria, Lebanon and Jordan as a 'field of operation' and to all five fields together as its 'area of operations'. This terminology has also been used in the Court's case-law; see judgments of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraph 7); of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 7); and of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 7); see also Opinion of Advocate General Sharpston in *Bolbol* (C-31/09, EU:C:2010:119, point 11, and footnote 10) referring to the UNRWA Consolidated Eligibility and Registration Instructions ('CERI'), point VII.E.

6 The UNRWA annual operational report 2015, p. 1, 'executive summary', states that only 44 UNRWA schools out of 118 continued to operate (though complemented by 55 afternoon-shift schools), that 15 of the agency's 23 health centres remained open, and that only three out of six rounds of cash assistance had been delivered due to funding shortfalls.

7 Currently, the UNRWA website under the heading 'What we do – Emergency Response' states that 'the ongoing conflict in Syria has become one of the most serious challenges UNRWA has faced in its six decades of working with Palestine refugees. As violence continues, its impact on Palestine refugees has increased, displacing over 50% of the registered refugee population, including over 270 000 within Syria itself. Despite the considerable challenges, the Agency continues to provide Palestine refugees in Syria and those who have fled to neighbouring countries within the UNRWA areas of operations, including Lebanon and Jordan, with emergency relief, health, protection and education services, along with continued microfinance to support the coping strategies of micro-entrepreneurs.' See, https://www.unrwa.org/what-we-do/emergency-response, (last accessed on 28 September 2020).

8 Point four of the order for reference.

(2) If account is not solely to be taken of the field of operation upon leaving: Is account always to be taken, regardless of further conditions, of all the fields of operation of the area of operations? If not: Are further fields of operation only to be taken into consideration if the stateless person had a substantial (territorial) connection to that field of operation? Is a habitual residence — at the time of or prior to leaving — required for such a connection? Are further circumstances to be taken into consideration when examining a substantial (territorial) connection? If so: Which ones? Does it matter whether it is possible and reasonable for the stateless person to enter the relevant field of operation when leaving the UNRWA area of operations?

(3) Is a stateless person who leaves the area of operations of the UNRWA because his personal safety is at serious risk in the field of operation of his actual residence, and it is impossible for the UNRWA to grant him protection or assistance there, entitled, within the meaning of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, *ipso facto* to the benefits of the Directive even if he previously went to that field of operation without his personal safety having been at serious risk in the field of operation of his former residence and without being able to expect, according to the circumstances at the time of the move, to experience protection or assistance by the UNRWA in the field of operation into which he moves and to return to the field of operation of his previous residence in the foreseeable future?

(4) When assessing the question of whether a stateless person is not to be granted *ipso facto* refugee status because the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU ceased to apply once he left the area of operations of the UNRWA, is account to be taken solely of the field of operation of the last habitual residence? If not: Is consideration also, by analogy, to be given to the areas of which account is to be taken under No 2 for the time of leaving? If not: Which criteria are to be used to determine the areas which are to be taken into consideration at the time of the ruling on the application? Does the cessation of application of the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU require the (state or quasi-state) bodies in the relevant field of operation to be prepared to (re)admit the stateless person?

(5) In the event that, in connection with the satisfaction or cessation of application of the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, the field of operation of the (last) habitual residence is of significance: Which criteria are decisive for establishing habitual residence? Is lawful residence authorised by the country of residence required? If not: Is there at least a need for the conscious acceptance of the residence of the stateless person concerned by the responsible bodies of the field of operation? If so in this respect: Does the presence of the individual stateless person have to be specifically known to the responsible bodies or is the conscious acceptance of residence as a member of a larger group of people sufficient? If not: Is actual residence for a relatively long period of time sufficient in itself?'

24. Written observations have been submitted by the Belgian and German Governments as well as by the Federal Office for Migration and Refugees and by the European Commission. At the hearing, held on 10 June 2020, the German and French Governments and the Commission presented oral argument.

III. Analysis

A. Preliminary remarks

25. Before examining the questions referred, I consider it useful to make a few preliminary remarks regarding Directive 2011/95 and the geographic scope of UNRWA's operations, respectively.

1. Directive 2011/95

26. Directive 2011/95 was adopted on 13 December 2011. It recast and repealed Directive 2004/83. Although changes were made to other parts of the directive, Article 12(1)(a) of those two directives is in substance identical; only orthographic changes were made. The case law concerning Article 12(1)(a) of Directive 2004/83 should therefore equally apply to Article 12(1)(a) of Directive 2011/95.

27. Article 12(1)(a) contains two parts. The first part excludes a person that falls within the scope of Article 1(D) of the Geneva Convention from 'being a refugee' within the meaning of the directive. The first subparagraph of Article 1(D) excludes persons who are 'at present receiving' protection or assistance from UNRWA [9] from the Geneva Convention's scope of application (the exclusion clause). The second subparagraph of Article 1(D) provides that 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 UN General Assembly, they shall *ipso facto* be entitled to the benefits of the Geneva Convention (the inclusion clause). It is clear that the position of the Palestine refugees registered with UNRWA has not yet been so settled. [10] The English language version of Article 12(1)(a), second sentence, of Directive 2011/95 repeats Article 1(D), second subparagraph, *ad verbatim*, only replacing the word 'Convention' with 'Directive'. [11] It follows logically, and it is also settled case-law, that the inclusion clause of Article 12(1)(a), second sentence, only comes into play if the exclusion clause of Article 12(1)(a), first sentence, applies. [12]

28. Whereas the Geneva Convention only covers 'refugees', Directive 2011/95 and Directive 2004/83 also cover 'subsidiary protection'. For that reason, while the exclusion clause under Article 1(D) of the Geneva Convention covers the entire convention, the exclusion under Article 12(1)(a) of the two directives only concerns the status as a 'refugee'. Thus, a person can be excluded from being a refugee under that provision of Directive 2011/95, and yet still be entitled to subsidiary protection.

29. The Court has with respect to Directive 2011/95 reiteratively stated that it is apparent from recitals 4, 23 and 24 of that directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of that directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria, [13] and that the provisions of that directive, like those of Directive 2004/83, consequently must be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. [14] The Court has further held that those provisions also, as is apparent from recital 10 of Directive 2004/83, must be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter. [15]

9 Article 1(D) of the Geneva Convention and Article 12(1)(a) of Directive 2011/95 refer to 'protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees'. In practice, only UNRWA is covered by this expression.

10 See, e.g., resolution adopted by the UN General Assembly on 13 December 2019, A/RES/74/85.

11 The French language version of Article 12(1)(a) differs from the French version of the corresponding provision of the Geneva Convention; however, it only does so in its wording, not its content, and the differences would appear to more closely align the French and the English versions of the directive.

12 Judgment of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraphs 55 and 56).

13 See judgments of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713, paragraph 40 and the case-law cited), and of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 81) and, to the same effect regarding the corresponding recitals 3, 16 and 17 of Directive 2004/83, judgments of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraph 37); of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 42); and of 31 January 2017, *Lounani* (C-573/14, EU:C:2017:71, paragraph 41).

14 Judgments of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 43), and of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713, paragraphs 40 and 41).

15 Judgments of 2 March 2010, *Salahadin Abdulla and Others* (C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraphs 52 to 54); of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 43); and of 2 December 2014, *A and Others* (C-148/13 to C-150/13, EU:C:2014:2406, paragraphs 45 and 46).

2. The geographic scope of UNRWA's operations

30. UNRWA operates within an *area of operations* that is comprised of five *fields of operation*, namely the West Bank, Gaza, Jordan, Lebanon and Syria,[16] where it provides protection and/or assistance[17] to Palestine refugees and certain other categories of beneficiaries such as 'Jerusalem Poor and Gaza Poor' and non-registered persons displaced as a consequence of the 1967 and subsequent hostilities.[18] It would appear from the order for reference's description of the facts of the case that XT is a 'Palestine refugee'. The two fields of operation in which XT has resided are located in two different sovereign states, Syria and Lebanon. They are, however, both part of the UNRWA 'area of operations'.

31. UNRWA does not control the territories of its fields of operation and is not in a position to grant or deny a registered Palestine refugee access to the territory where a given field of operation is located. Thus, actual access may (and often will) be dependent on the changing policies of the governmental or quasi-governmental powers in control of the relevant territory at a given time.

B. The first and second questions

32. By its first and second questions, which I will address together, the referring court in substance seeks guidance on the geographic area that should be taken into account when evaluating whether UNRWA assistance or protection has 'ceased' in respect of a particular person who had previously availed him or herself of such assistance or protection. The questions specifically relate to the 'inclusion clause' of Article 12(1)(a), second sentence, of Directive 2011/95 and Article 1(D), second subparagraph, of the Geneva Convention.[19] The order for reference is based on the premiss that the exclusion clause of Article 12(1)(a), first sentence, and Article 1(D), first subparagraph, is applicable in the facts of the case in the main proceedings. For the purposes of my analysis, I have assumed this to be the case.

16 This terminology is found in UN General Assembly resolutions concerning UNRWA as well as in UNRWA materials describing the agency and its activities. See, as an example, 9th recital to General Assembly resolution A/RES/69/88 of 5 December 2014 and 25th recital to General Assembly resolution A/RES/72/82 of 7 December 2017, referring to 'all fields of operation, namely Jordan, the Syrian Arab Republic and the Occupied Palestinian territory'. See also 15th recital to the Resolution adopted by the General Assembly on 9 December 2015 – Operation of [UNRWA] for Palestine Refugees in the Near East, A/RES/70/85. It has also explicitly been used by the Court in its judgments of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraph 7); of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 7); and of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 7).

17 I am aware that the issues of whether UNRWA actually provides 'protection' and whether the agency has a 'protection mandate' are subject to dispute. Advocate General Sharpston in her Opinion in *El Kott* expressed the view that UNRWA 'was not set up to provide, nor has it ever provided, "protection", to Palestinian refugees', thereby taking a strict view on the meaning of the word 'protection' in this context (see, point 66 and footnotes 6 and 30 of that Opinion) and focusing on the absence of a police force or other security forces under the agency's control. UNRWA itself has taken a different view, as expressed in, inter alia, its publication 'protecting Palestine refugees'. In this publication the agency asserts that its 'protection mandate' has been acknowledged by the UN General Assembly by its recognition of 'the valuable work done by the Agency in providing *protection* to the Palestinian people, in particular Palestine refugees', as found in General Assembly resolution A/RES/69/88 of 5 December 2014. (The same language is found in General Assembly resolution A/RES/72/82 of 7 December 2017.) Those resolutions also commend the Agency for its extraordinary efforts 'to provide shelter … *protection* and other humanitarian assistance' during the 'military operations of July and August 2014', and contain expressions of 'special commendation' to the Agency for the 'essential role it has played for over [60/65] years in providing vital services for the … *protection* of the Palestine refugees …'. The resolution of these issues is not seminal for the purposes of providing an answer to the questions referred in the present case.

18 See CERI, points I. and III. 'Palestine refugees' are defined in CERI as 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict' as well as the descendants of such Palestine refugee males. Registration as a refugee with UNRWA is still open to members of this category (see CERI, point III.A.1). In this Opinion, the expression 'Palestinian refugees' – when not part of a quotation – is used to denote the broader category of refugees of Palestinian descent.

19 For ease of reference, I will refer to Article 12(1)(a) of Directive 2011/95 as 'Article 12(1)(a)' and Article 1(D) of the Geneva Convention as 'Article 1(D)'.

1. Summary of the arguments of the parties

33. The parties that have submitted written observations – the Commission, Belgium, Germany and the Federal Office for Migration and Refugees – all agree that when evaluating whether, for the purposes of Article 12(1)(a), UNRWA protection or assistance has ceased in respect of a person, it is not only the field of operation of last residence of the person concerned that should be taken into account. The Commission has expressed the view – with which I generally agree – that the fields of operation of UNRWA, which the person concerned actually could have accessed [20] when leaving the UNRWA area of operations, should be taken into account, as well as the fields of operation to which the person concerned would have access at the time of taking a decision (including a judicial decision) on the application for refugee status.

34. The Federal Republic of Germany has expressed the view that other fields of operation with which the person concerned has substantial connections should be taken into account in addition to the field of operation of his or her last actual residence. Those other fields of operation could be the fields of operation where the applicant had his or her last habitual residence, or where he or she had close family members. Belgium has expressed the view that all UNRWA fields of operation should be taken into account when determining whether a stateless Palestinian was still enjoying assistance from UNRWA at the time he or she left the UNRWA area of operations, and that it falls upon the applicant to show that it was impossible for him or her to travel to another UNRWA field of operation and receive protection or assistance there.

35. France did not submit written observations, but requested a hearing during which it expressed the view that only the field of operation where the applicant had his or her 'habitual residence' before submitting his or her application for refugee status is relevant for the determination of whether UNRWA protection or assistance has or had ceased.

2. Assessment of the first and the second questions

36. It should first be noted that neither Article 12(1)(a) nor Article 1(D) refer to the 'residence' of the person concerned. What matters for the purposes of the first sentence of Article 12(1)(a) and the first subparagraph of Article 1(D) is whether the person is receiving assistance or protection from the relevant agency, and for the second subparagraph or sentence of those two provisions whether this protection or assistance 'has ceased'. [21]

37. Secondly, it is settled case law that the assessment as to whether a person is covered by Article 12(1)(a), first or second sentence or both, is to be carried out on an individual basis, and not by judging the Palestine refugees or Palestinian refugees in general as a group. [22] Therefore, I do not share the concern voiced by some of the parties that taking the entire UNRWA area of operations into account when assessing whether the protection or assistance of that agency has ceased would

20 In the French version of the Commission's written submissions the expression 'aurait effectivement pu avoir accès' is used for the fields of operation to be taken into account at the time the applicant left the UNRWA area of operations; in the German version 'tatsächlich Zugang hätte haben können' is used.

21 Other provisions of Directive 2011/95 as well as the Geneva Convention contain references to the residence or 'habitual residence' of a stateless person – for example, Article 1(A)(2), first paragraph, *in fine*, of the Geneva Convention, concerning the qualification of a stateless person as a 'refugee' for purposes of the convention, or Article 2(d), *in fine*, of Directive 2011/95, which mirrors that provision of the Geneva Convention. However, Article 1(D), first subparagraph, of the Geneva Convention specifically excludes the persons covered from the application of the Geneva Convention and thereby from the application of those provisions.

22 See, to that effect, judgment of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraphs 41, 46 to 49, 53 and operative part); see also the discussion in Advocate General Sharpston's Opinion in that case, point 44.

unduly restrict the scope of the inclusion clause of Article 12(1)(a), second sentence.[23] Such an assessment should be carried out on an individual basis, meaning that only such protection or assistance in the other fields of operation that was or is actually accessible to the applicant should count.

38. The various elements of attachment that some of the parties have raised would generally appear to make it more likely that a given applicant would actually have access to the relevant field of operation and thereby to the protection or assistance that UNRWA is delivering there. That is most clearly the case with one of the examples given by the Federal Office for Migration and Refugees. If an applicant has formal rights to stay in another field of operation where UNRWA is providing its assistance, and it is possible for him or her to travel there, then obviously he or she has effective access to that assistance and the inclusion clause of Article 12(1)(a), second sentence, must, in my view, be inapplicable.

39. Whether family relations, prior habitual residence or other substantial links or attachments to a given field of operation would actually make it possible for a particular individual applicant to access UNRWA assistance in that field of operation is a factual question that should, in my view, be determined on a case-by-case basis taking all the relevant facts, including the personal circumstances of the applicant, into account.[24] If the applicant in question, judged on an individual basis, at the time of leaving the UNRWA area of operations, had actual access to UNRWA protection or assistance, or has such actual access at the time a decision is adopted (including a judicial decision) concerning his or her application, he or she cannot be considered to be covered by the inclusion clause of Article 12(1)(a), second sentence, regardless of the character of the links to the field of operation, if any, that made the access possible. In that case, where UNRWA continues to deliver protection or assistance in one or more fields of operation that are accessible to the applicant, protection or assistance from UNRWA cannot be said to have 'ceased'. Rather, the applicant may be said to have rescinded such protection or assistance upon leaving the field of operation where he or she previously had access to it.

40. This reading of Article 12(1)(a) is supported by the Court's judgments in *Bolbol*, *El Kott* and *Alheto*. In each of those judgments, the Court explicitly referred to UNRWA's area of operations as covering the Gaza Strip, the West Bank, Jordan, Lebanon and Syria and, to the extent relevant, treated this area as one unit.[25] In *Alheto*, the Court further stated, in the context of a question pertaining to Article 35 of Directive 2013/32/EU[26], that a person benefitting from 'effective protection or assistance from UNRWA' in another field of operation than the one where he or she had his or her habitual residence prior to leaving the UNRWA area of operations, and who could thus stay there in safety under dignified living conditions without the risk of being refouled to the territory of habitual residence, 'must … be excluded from refugee status in the European Union in accordance with Article 12(1)(a) of Directive 2011/95'.[27]

41. The UNHCR has over the years issued several guidelines, notes and other statements concerning the interpretation of Article 1(D) and, occasionally, Article 12(1)(a). Those statements are soft law and so have a certain persuasive force but are not binding.[28]

23 See submissions by the Federal Office for Migration and Refugees, point 25; the Federal Republic of Germany, point 27.

24 Those personal circumstances could, among other factors, include health-related restrictions or rights arising under the Charter.

25 See judgments of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826: paragraph 36, referring to the persons concerned being 'forced to leave UNRWA's area of operations'; paragraph 44, referring to *Bolbol*, 'the person concerned had not availed herself of assistance from UNRWA before leaving that agency's area of operations'; paragraph 45, 'situation of a person who has left that organ's or agency's area of operations'), and, in particular, of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraphs 131 to 143, referring in paragraph 133 to Jordan as 'part of UNRWA's area of operations').

26 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60). Article 35 of this directive concerns the concept of first country of asylum.

27 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 134).

28 Recital (22) of Directive 2011/95 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'.

42. Although Article 1(D) has remained unchanged, the views expressed by the UNHCR on the matter have varied substantially over time. Thus, the UNHCR in one such statement [29] expressed the view that a Palestine refugee who left the UNRWA area of operations for whatever reason, *ipso facto* would be entitled to the benefits of the Geneva Convention and to recognition as a refugee under Directive 2004/83 until he or she returned to that area (see points 2.2. and 2.3. of that statement – I note that under that reading, all five preliminary questions would have been moot), whereas it took the position in one of its guidelines [30] that the inclusion clause of Article 1(D), second subparagraph, applies where one or more 'objective reasons' for leaving the UNRWA area of operations or preventing a person from (re)availing him or herself of UNRWA protection or assistance has caused that protection or assistance to cease for the person in question (points 19 and 22 of those guidelines).

43. In the abovementioned guidelines, UNHCR further expresses the view that the assessment as to whether a Palestinian refugee will be able to access the protection or assistance of UNRWA should be made against 'a single UNRWA area of operations' and not against 'each of UNRWA's areas of operations'. [31] The UNHCR states that this recommendation is supported by the language of the Court's decision in *El Kott* and the Court's use of the singular form 'area of operation' in that judgment. [32]

44. I do not find the UNHCR's recommendation persuasive, and I believe the Court's decision in *El Kott* [33] does not support it. In that respect, I should point out first of all that the UNHCR in that part of the guidelines departs not only from the terminology used uniformly by the UN General Assembly in its resolutions concerning UNRWA, UNRWA itself in its descriptions of its work and the Court of Justice in its judgments, including *El Kott* [34], but also from the terminology used previously by the UNHCR itself in its Revised Statement on Article 1D of the 1951 Convention [35] and its Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees [36], where the term 'UNRWA area of operations' was used to designate the entire area in which UNRWA was providing protection or assistance.

45. In its most recent statement on the matter, issued in the context of the present case for the Court, [37] the UNHCR does not refer to the Court's judgment in *El Kott* as support for its views. The UNHCR in that statement reverts to the commonly used terminology, applying the expression 'UNRWA area of operations' to encompass all the five UNRWA fields of operation. [38] It expresses the view that the assessment of whether protection or assistance has ceased 'is … to be made against the field of operation in which the person was previously residing'. [39] If the person in question 'was previously resident in more than one UNRWA field of operation', the UNHCR now takes the view that 'the assessment of whether "protection or assistance has ceased for any reason" can be made against

29 See UNHCR Revised Statement on Article 1D of the 1951 Convention, dated October 2009.

30 See Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', December 2017, HCR/GIP/17/13.

31 Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017, HCR/GIP/17/13, point 22(k).

32 Idem, footnote 52.

33 Judgment of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826).

34 See judgments of 17 June 2010, *Bolbol* (C-31/09, EU:C:2010:351, paragraph 7); of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraph 7); and of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 7).

35 UN High Commissioner for Refugees (UNHCR), *UNHCR Revised Statement on Article 1D of the 1951 Convention in relation to Bolbol v. Bevándorlási és Állampolgársági Hivatal pending before the Court of Justice of the European Union*, October 2009, available at: https://www.refworld.org/docid/4add79a82.html.

36 UNHCR *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, dated October 2009. See in particular footnote 14.

37 UN High Commissioner for Refugees (UNHCR), *Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1)(a) of the EU Qualification Directive Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019 – Federal Republic of Germany v XT (C-507/19)*, 18 August 2020, available at: https://www.refworld.org/docid/5f3bdd234.html.

38 Idem, footnote 3.

39 Idem, point 23.

more than one area where the person had previously resided.' As support for its views, the UNHCR cites its own Guidelines on International Protection No. 13[40], mentioned above in points 43 and 44, without clarifying the discrepancies between the statement and those guidelines, which do not appear to have been withdrawn. I do not find the statement any more persuasive than the guidelines.

46. I therefore propose that the Court should give the following reply to the first and second questions referred:

When evaluating, for the purposes of Article 12(1)(a) of Directive 2011/95, whether UNRWA protection or assistance has 'ceased' in respect of a particular person who has previously availed him or herself of such protection or assistance, the national courts or competent administrative authorities should take into account all those UNRWA fields of operation in which the applicant in fact would have access to UNRWA protection or assistance.

When making this determination, the national court or administrative authority should take into account all the relevant facts, including the personal circumstances of the applicant and his or her ability to actually access those fields of operation.

C. The fourth question

47. By its fourth question, which I will address next, the referring court essentially seeks guidance concerning the geographic area that should be taken into account when judging whether the conditions for granting *ipso facto* refugee status have fallen away since the point in time when the applicant left the UNRWA area of operations, and more specifically whether the area to be taken into account mirrors the answer given to questions 1 and 2. The question is based on the premiss that the inclusion clause of Article 12(1)(a), second sentence, applied to the applicant at the time he or she left the UNRWA area of operations, but that it no longer applies at the time the competent national administrative or judicial authorities are deciding on the application, that is to say that UNRWA protection or assistance had ceased in respect of the applicant at the time of his or her departure from the UNRWA area of operations, but that it has been reinstated there before a final decision is made in respect of his or her claim for recognition, *ipso facto*, as a refugee.

1. Summary of the arguments of the parties

48. The parties which submitted written observations all effectively agree that the answer to the fourth question should mirror the answer given to the second question, that is to say, that the same geographic area should be taken into account for purposes of determining whether UNRWA protection or assistance had ceased at the time of the applicant's departure from the UNRWA area of operations, and for purposes of determining whether UNRWA protection or assistance had been reinstated at the time of the competent national administrative or judicial authorities' decision on the application for refugee status.[41]

49. The French government in its submissions at the hearing, as support for its position concerning questions 1, 2 and 4 that the relevant geographic area should be the field of operation in which the applicant had his or her habitual residence, argued that Article 2(d) and (n) of Directive 2011/95 uses this notion to define the conditions under which a stateless person should be qualified as a refugee, and Article 11(1)(f) of the directive uses the same notion for purposes of defining the circumstances in which a stateless person ceases to be a refugee.

40 Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017, HCR/GIP/17/13.

41 Submissions by Belgium, points 21 to 32 and 38 to 41; submissions by the Federal Republic of Germany, point 35; submissions by the Federal Office for Migration and Refugees, points 31 and 39, and submissions by the European Commission, point 29.

2. Assessment of the fourth question

50. I should first point out that Article 12(1)(a) excludes a person from 'being a refugee' and that the triggers for the application of that provision are unrelated to residence, as discussed in point 36 et seq. of this Opinion. The fact that Article 2(d) and (n) refer to 'habitual residence' is therefore not determinative for the answers to the questions referred. Secondly, the fourth (and the second) question relates to a situation different from that covered under Article 11(1)(f) of Directive 2011/95. That provision addresses the situation where a stateless person has already been granted refugee status and where the circumstances in connection with which that person was recognised as a refugee have ceased to exist, and it operates in conjunction with Article 14(1) of Directive 2011/95. That latter provision requires the Member States to 'revoke, end or refuse to renew the refugee status' of a stateless person if 'he or she has ceased to be a refugee in accordance with *Article 11* (emphasis added)'.

51. The fourth question, by contrast, is concerned with whether the relevant person should be recognised as a refugee in the first place, in accordance with Article 12(1)(a), second sentence. That provision would – if the circumstances so required, and a later determination concerning revocation had to be taken – operate in conjunction with Article 14(3), which requires the Member States to 'revoke, end or refuse to renew the refugee status' of a stateless person 'if he or she should have been or is excluded from being a refugee in accordance with *Article 12*' (emphasis added). Article 14(3) makes no mention of residence, habitual or otherwise.

52. I therefore propose that the Court should answer the fourth question referred as follows:

The area that should be taken into account for the purpose of determining whether, at the time of taking a decision on an application for *ipso facto* refugee status pursuant to Article 12(1)(a), second sentence, the conditions for the application of that provision no longer apply, mirrors the area taken into account for the purposes of evaluating whether UNRWA protection or assistance has 'ceased' in respect of a particular person who has previously availed him or herself of such protection or assistance, as described in the answer to the first and second questions.

D. The third question

53. By its third question, the referring court essentially asks for clarification regarding whether a stateless person can invoke risks to his or her personal safety to which he or she has voluntarily exposed him or herself by moving from a safe (or relatively safe) UNRWA field of operation to one where his or her personal safety is at serious risk, and whether he or she, on the basis of this voluntarily incurred risk, can claim *ipso facto* to be entitled to the benefits of refugee status according to Directive 2011/95.

54. The Court has already made clear in *El Kott* that a voluntary departure from UNRWA's area of operations is not sufficient to end the exclusion from refugee status laid down in Article 1(D).[42] However, the Court considered that if a person who has actually availed him or herself of UNRWA protection or assistance ceases to receive it for a reason beyond his or her control and independent of his or her volition, then the inclusion clause of Article 12(1)(a) applies and the person is *ipso facto* entitled to the benefits of the directive on the condition that none of the other exclusion clauses contained in Article 12(1)(b), Article 12(2) or Article 12(3) of Directive 2011/95 apply.[43]

42 See judgment of 19 December 2012, *Abed El Karem El Kott and Others* (C-364/11, EU:C:2012:826, paragraphs 49 to 51 and 59).

43 Idem, paragraphs 61, 64 and 65 and operative part, paragraph 1.

55. In that context, a person should be considered to have been forced to leave the UNRWA area of operations if that person's personal safety was at serious risk and it was impossible for UNRWA to guarantee that his or her living conditions in that area would be commensurate with the mission entrusted to it.[44]

56. In line with that reasoning, it is my view that a voluntary departure from a safe (or relatively safe) UNRWA field of operation to one where the personal safety of the individual concerned is at serious risk likewise cannot be invoked to claim that UNRWA protection or assistance has 'ceased' in respect of that person.

57. In particular, where the risks to his or her personal safety in the field of operation to which he or she travelled were known or reasonably foreseeable to the person concerned, and where he or she could have no reasonable expectation of safely returning to the safe (or relatively safe) field of operation from which he or she departed, or to another safe UNRWA field of operation, the UNRWA protection or assistance cannot be said to have ceased in respect of him or her.

58. I would add that that conclusion does not leave the person concerned without protection. He or she may still be able to qualify for subsidiary protection, and the principle of *non-refoulement* still applies in accordance with Article 21 of Directive 2011/95, but he or she should not be able to claim *ipso facto* refugee status on the basis of knowingly and voluntarily incurred risks.

59. I therefore propose that the Court should give the following reply to the third question referred:

An applicant for refugee status cannot invoke risks to his or her personal safety to which he or she has voluntarily exposed him or herself by moving from a safe (or relatively safe) UNRWA field of operation to one where his or her personal safety is at serious risk for the purpose of claiming *ipso facto* to be entitled to the benefits of refugee status according to Directive 2011/95.

E. The fifth question

60. The referring court has referred the fifth question only in the event that the habitual residence of the applicant should be considered relevant for the answer to the second and fourth questions. In view of the answer proposed to the first four questions, it is not necessary for the Court to answer the fifth question.

61. The Commission argued that the place of habitual residence is not determinative for the second and fourth questions, but that the fifth question nevertheless warrants a reply. The Commission in that respect points out that the term 'habitual residence' is used in Article 11(1)(f) of Directive 2011/95, which where appropriate is also applicable to stateless Palestinians.

62. According to the order for reference, the decision concerning XT's application for refugee status is not yet final, as the case is still under appeal. The issue of a subsequent revocation of refugee status for XT would not appear to be a part of the appeal on a point of law (*Revision*) pending before the referring court, and that court has not asked the Court to interpret Article 11(1)(f) of that directive. As described in point 50 of the present Opinion, a hypothetical future revocation of refugee status for XT on the basis of the exclusion clause in Article 12(1)(a), first sentence, would be governed by Article 14(3) of Directive 2011/95, which does not operate in conjunction with Article 11(1)(f). It is therefore my opinion that the fifth question is of a hypothetical nature, unless the notion of the 'habitual residence' of the applicant is relevant to the answer to the second or fourth question or both. I consider (as does the Commission) that this is not the case.

44 Idem, paragraph 63.

IV. Conclusion

63. In the light of the foregoing considerations, I propose that the Court should give the following reply to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany):

1. When evaluating, for purposes of Article 12(1)(a) of 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, whether United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) protection or assistance has 'ceased' in respect of a particular person who has previously availed him or herself of such protection or assistance, the national courts or competent administrative authorities should take into account all those UNRWA fields of operation in which the applicant in fact would have access to UNRWA protection or assistance.

   When making this determination, the national court or administrative authority should take into account all the relevant facts, including the personal circumstances of the applicant and his or her ability to actually access those fields of operation.

2. The area that should be taken into account for the purpose of determining whether, at the time of taking a decision on an application for *ipso facto* refugee status pursuant to Article 12(1)(a), second sentence, of Directive 2011/95, the conditions for the application of that provision no longer apply, mirrors the area taken into account for purposes of evaluating whether UNRWA protection or assistance has 'ceased' in respect of a particular person who has previously availed him or herself of such protection or assistance, as described in the answer to the first and second questions.

3. An applicant for refugee status cannot invoke risks to his or her personal safety to which he or she has voluntarily exposed him or herself by moving from a safe (or relatively safe) UNRWA field of operation to one where his or her personal safety is at serious risk for the purpose of claiming *ipso facto* to be entitled to the benefits of refugee status according to Directive 2011/95.

4. In view of the answer proposed to the first four of the questions referred, it is unnecessary for the Court to answer the fifth question.