IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-349/20

NB

AB

Appellants

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

WRITTEN OBSERVATIONS OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

The United Nations High Commissioner for Refugees ("**UNHCR**") is represented by Marie Demetriou QC and Tim Johnston (Barristers).

Address for service: 10 Furnival Street, London, United Kingdom, EC4A 1AB.

Service of documents may also be effected by fax or by email at: bottinic@unhcr.org.

[30 November 2020]

INTRODUCTION

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees ("**UNHCR**") in relation to the order for reference made by the First-Tier Tribunal (Immigration and Asylum Chamber) of the United Kingdom ("**the FTT**") in the case of *NB and AB v The Secretary of State for the Home Department* (Appeal numbers PA/07865/2019 and PA/07864/2019) ("**NB and AB**").

2. UNHCR was joined as a party to the proceedings before the FTT with the agreement of the parties.[1] It is the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees. 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[.]*"[2]

3. UNHCR's supervisory responsibility is exercised in part by issuing interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 *Convention relating to the Status of Refugees* ("**the 1951 Convention**").[3] Those guidelines include the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ("**UNHCR Handbook**")[4] and various Guidelines on International Protection. The FTT cited and relied on the UNHCR *Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* ("**the Guidelines**")[5] in its judgment setting out the grounds for the reference.[6]

---

1 See the judgment of Dr HH Storey, sitting as a judge of the First-Tier Tribunal of 29 July 2020 in *NB and AB v Secretary of State for the Home Department*, ("**the FTT judgment**") [131].

2 General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), ("**UNHCR Statute**") [8(a)].

3 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 complement the UNHCR *Handbook* and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

4 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued February 2019, HCR/1P/4/ENG/REV.4.

5 UNHCR, *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.

6 FTT Judgment [27], [117] and elsewhere.

4. UNHCR's supervisory responsibility has been reflected in European Union law, including in Article 78 (1) of the Treaty on the Functioning of the European Union ("**TFEU**") which provides that the Union's asylum policy must be in accordance with the 1951 Convention.[7]

5. Secondary EU legislation expressly recognises the role and expertise of UNHCR. For instance, Recital 22 of Directive 2011/95/EU of 13 December 2011, ("**the Qualification Directive**"), states that consultations with UNHCR "*may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention*".[8] The supervisory responsibility of UNHCR is also reflected in Article 29 of Directive 2013/32/EU of 29 June 2013 ("**the Asylum Procedures Directive**"), which obliges Member States to allow UNHCR to present its views "*in the exercise of its supervisory responsibilities*" regarding individual applications for international protection "*at any stage of the procedure*."[9]

6. UNHCR has supervised the application of the 1951 Convention throughout the world for nearly 70 years. The 1951 Convention itself is widely recognised, *inter alia*, by this Court, as "*the cornerstone of the international legal regime for the protection of refugees*."[10] The Court has also recognised that "*documents from the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention*."[11] The UNHCR *Handbook* has been found by the Supreme Courts of Canada, the United Kingdom, and the United States to be a "highly relevant authority",[12] a "highly persuasive authority",[13] a source of

---

7 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008.

8 European Union: Council of the European Union, *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)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

9 European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 180/95; 29.6.2013, 2013/32/EU.

10 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Court of Justice, 2 March 2010, [52]; *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Court of Justice, 9 November 2010, [77].

11 *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl,* Case C-720/17, European Court of Justice, 23 May 2019 [57].

12 *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at paras. 46; *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689, pp. 713-714.

13 *R v. Secretary of State for the Home Department, Ex parte Adan,* [2001] 1 All ER 593, [2001] 2 AC 477, p.519.

"significant guidance",[14] and a document that "'should be accorded considerable weight', in the light of the obligation of Member States under Article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention".[15] UNHCR's *Handbook* has also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 *Vienna Convention on the Law of Treaties*, in reflecting "subsequent practice in the application of the treaty".[16] UNHCR's "unique and unrivalled expertise"[17] on particular legal issues has also been acknowledged by the European Court of Human Rights ("**ECtHR**"), which has expressly interpreted the provisions of the European Convention on Human Rights in a manner consistent with UNHCR's Guidelines.[18]

THE LEGISLATIVE FRAMEWORK

The 1951 Convention

7. Article 1D of the 1951 Convention acknowledges that certain categories of refugees may benefit from separate arrangements for their protection or assistance by organs or agencies of the United Nations other than UNHCR.[19] It provides that:

> "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 definitely settled in accordance with the relevant resolutions adopted by the General

---

14 *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987); 107 S. Ct. 1207.

15 *Al-Sirri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, at [36] citing *R v Asfaw* [2008] AC 1061, per Lord Bingham at para 13, and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, p. 678.

16 *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 as discussed in relation to the UNHCR Handbook in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, [53].

17 UK Supreme Court, *EM(Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, at [72].

18 For example, *Saadi v United Kingdom* (2008) 47 EHRR 17, [65]. On the authoritative nature of UNHCR's reports in relation to the conditions in a third country see *Ilias and Ahmed v Hungary* Application No. 47287/15; European Court of Human Rights; Judgment of 21 November 2019 [141] and [163]. On the need to "*give due weight*" to UNHCR conclusions on the risks faced by asylum seekers on return see *Abdolkhani and Karimnia v Turkey* Application no 30471/08; European Court of Human Rights; Judgment of 22 September 2009 [82]. The Court noted that its reasoning was in line with the UNHCR Guidelines in *F.G. v Sweden* Application no. 43611/11; European Court of Human Rights; Judgment of 23 March 2016; [123].

19 Guidelines [1].

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

8. At present, Article 1D applies to Palestinian refugees, for whom the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("**UNRWA**"), was established to respond to their situation.[20]

9. Article 1D thus applies to Palestinian refugees,[21] whom the international community has already recognized as refugees.[22] As noted by the Court, *"… the States signatories to the [1951] Geneva Convention deliberately decided in 1951 to afford [Palestinian refugees] the special treatment provided for in Article 1D of the convention, to which Article 12(1)(a) of Directive 2004/83 refers*".[23]

10. The primary purpose of Article 1D is thus to ensure that Palestinian refugees continue to be recognized as a specific category of refugees, and that they continue to receive protection and associated rights as persons "*whose refugee character has already been established"*[24] until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly.[25] The second purpose of

---

20 This was acknowledged by the Court *El-Kott v Bevándorlási és Állampolgársági Hivata* [2012] Case C-364/11; European Court of Justice; 19 December 2012; [48]. When the Convention was signed in 1951, there was another UN body providing protection to Palestinian refugees: the United Nations Conciliation Commission for Palestine ("**UNCCP**"), established by United Nations General Assembly resolution No 194 (III) of 11 December 1948. See Guidelines, footnote 3; *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Union: Court of Justice of the European Union, 17 June 2010; Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law,* 2d ed, (OUP: 2020).

21 The following groups of Palestinian refugees fall within the personal scope (*ratione personae*) of Article 1D:

(i) Persons 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.

(ii) Persons 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 conflict have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there. It also includes those persons displaced by "subsequent hostilities".

(iii) **Descendants** of "Palestine refugees" or "displaced persons".

For further explanations, please see Guidelines [8].

22 *Ibid.*, [3].

23 *El Kott*, [80]. Furthermore, in his Opinion in *Alheto*, Advocate General Mengozzi stated that "persons falling into that category are *already recognised as refugees* by the international community and, as such, benefit from a special programme of protection entrusted to the bodies of the UN", [36].

24 *AD (Palestine)*, [2015] NZIPT 800693-605 New Zealand: Immigration and Protection Tribunal, 23 December 2015, [159].

25 Guidelines [6]. See also, *El Kott*, where the Court affirmed that the objective of Article 1D was to "ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" [62].

Article 1D is to avoid duplicating and overlapping competencies between UNRWA and UNHCR for this group of refugees.[26]

The Qualification Directive

11. Article 12(1)(a) of the Qualification Directive provides:

> "A third country national or a stateless person is excluded from being a refugee, if:
>
> > (a) he or she falls within the scope of Article 1D of the 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, these persons shall ipso facto be entitled to the benefits of this Directive…"

12. Accordingly, Article 12(1)(a) establishes how the Qualification Directive should apply to persons who fall within the scope of Article 1D of the Convention.

UNHCR Guidance

13. The UNHCR Handbook, Executive Committee Conclusions, and Guidelines on International Protection issued by UNHCR, provide guidance on the interpretation and application of provisions of the 1951 Convention. They influenced the drafting of the Qualification Directive itself: the Explanatory Memorandum to the Commission's proposal quotes from the UNHCR *Handbook*, UNHCR Executive Committee Conclusions and the 1951 Convention itself. In his recent Opinion in Case C-507/19 *XT*, 1 October 2020, Advocate General Tanchev noted that there have been variations in the UNHCR's Guidelines over time as regards the proper interpretation of Article 1D of the 1951 Convention.[27] It is correct that UNHCR's interpretation of Article 1D has evolved since 2009. The very purpose of updating the Guidelines has been to reflect that evolved approach which itself reflects developments in the jurisprudence of courts in various signatory states on the interpretation of Article 1D and takes account of academic scholarship and State practice as part of wide ranging public consultations.[28]

---

26 Guidelines [7].

27 See [41] – [45] of the Advocate General's Opinion, C-507/19, *Bundesrepublik Deutschland v XT*, 1 October 2020.

28 Indeed, UNHCR's interpretation of Article 1D of the 1951 Convention is not static and continues to evolve, as evidenced by UNHCR's *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.

14. The Guidelines explain that:

(a) The phrase within paragraph 2 of Article 1D "*ceased for any reason*" should not be read restrictively. It is not limited to circumstances in which UNRWA itself ceases to exist.[29]

(b) That said, protection under the 1951 Convention does not extend to applicants who "*refuse to (re)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience*".[30]

(c) The critical question – for the purposes of the inclusion clause – is whether, at the time the individual claim is considered, the protection and assistance of UNRWA "*has ceased owing to one or more of the "objective reasons" for leaving or preventing them from (re)availing themselves of UNRWA's protection or assistance…*"[31]

(d) The reasons why an individual left UNRWA's area of operations "*is not in itself determinative*", and "*it is not relevant whether the applicant departed in the first place on a voluntary basis*".[32]

(e) When determining whether or not an individual should benefit from the protection of the Convention, the decision-maker should have regard to the circumstances of the individual and "*up-to-date country of origin information*."[33]

(f) The objective reasons that bring the applicant within the scope of the second paragraph of Article 1D include:

(1) The inability of UNRWA to fulfil its protection or assistance mandate.[34]

(2) Threats to the applicant's life, physical integrity, security or liberty or other serious protection-related reasons that may compel a Palestinian to leave

---

29 Guidelines [18]; El Kott, [56]; see also *AD (Palestine)* *supra* note 24 [166].
30 Guidelines [19].
31 Guidelines [19].
32 Guidelines [19] and [27].
33 Guidelines [20].
34 Guidelines [22(b) and (c)].

UNRWA's area of operation or prevent his or her (re)availment of UNRWA's protection or assistance, including "*sexual or gender-based violence, torture, inhuman or degrading treatment or punishment, human trafficking and exploitation, forced recruitment, severe discrimination, or arbitrary arrest or detention*."[35]

(3) Barriers relating to personal security which prevent re(availment) of UNRWA's protection or assistance include "*harassment, violence or exploitation.*"[36]

(4) Other practical, legal and/or safety barriers preventing an applicant from (re)availing him/herself of the protection or assistance of UNRWA, such as border closures, lack of documentation, dangers *en route*, or refusal by the relevant authorities to (re)admit the person.

(g) The personal circumstances of the applicant, including disability, family situation and relationships, social and other vulnerabilities are relevant when conducting the assessment.[37]

The Court's judgments and Advocate Generals' Opinions

15. The Court has considered the proper interpretation of Article 12(1)(a) of the Qualification Directive on several occasions and the following principles can be distilled from the case-law of the Court and Advocate Generals' opinions:

(a) Protection or assistance from UNRWA will have ceased when "*it is impossible for that organ or agency to carry out its mission*."[38]

(b) Cessation of protection or assistance may well result from events that have nothing to do with UNRWA itself but from circumstances "*which have forced the person*

35 Guidelines [22(e)].
36 Guidelines [22(i)].
37 Guidelines [24].
38 *El-Kott* [56].

concerned to leave the UNRWA area of operations as they are beyond that person's control."[39]

(c) Circumstances that force an individual to leave the UNRWA area of operations include situations "… *where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency*."[40]

(d) Objective reasons for cessation do not encompass a decision taken "*on grounds of personal convenience*."[41]

(e) An individual who leaves the UNRWA area of operations of their own volition on a temporary basis – but cannot return there because of a change in circumstances, is prevented from receiving UNRWA protection or assistance for a reason beyond their control: in those circumstances UNRWA protection and assistance has ceased.[42]

(f) A temporary cessation of assistance or protection is enough to bring the applicant within the inclusion clause; it is enough to show that there has been a "*hiatus in the protection or assistance*".[43]

THE FIRST QUESTION: TEMPORAL NATURE OF THE ASSESSMENT

16. The first question referred is as follows:

> "In assessing whether there has been a cessation of protection or assistance from UNRWA within the meaning of the second sentence of Article 12(1)(a) of the QD to an UNRWA-registered stateless Palestinian in respect of the assistance afforded to disabled persons:
>
> 1. Is the assessment purely an historic exercise of considering the circumstances which are said to have forced an applicant to leave the UNRWA area of operations when he did, or is it also an *ex nunc*, forward-looking assessment of whether the applicant can avail himself of such protection or assistance presently?"

---

39 *El-Kott* [58].
40 *El-Kott* [65]. *Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Case C-585/16; European Court of Justice; 25 July 2018 [86].
41 *El-Kott* Opinion Advocate General Sharpston [78].
42 Ibid. [82].
43 *Alheto* Opinion Advocate General Mengozzi [45].

17. UNHCR contends that the relevant question is whether, at the time the individual claim is considered, the protection or assistance of UNRWA has ceased such that the applicant is unable to (re)avail him/herself of that protection or assistance. Whether there has been a cessation of protection or assistance from UNRWA must be assessed in a holistic and objective manner taking into account all relevant information including the personal circumstances of the applicant. Whilst it may (depending on the facts of the case) be appropriate for this assessment to consider the circumstances in which an applicant left the UNRWA area of operations, the critical question in every case is whether – taking all relevant information into account - UNRWA's protection or assistance has now ceased for the applicant concerned.

18. This follows from the wording of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive.

19. In particular, according to the plain wording of those provisions, the decision-maker must assess whether protection or assistance of UNRWA "*has ceased*", in other words, whether the absence of protection or assistance is ongoing or persists. The inquiry is not directed to past events only. Further, the decision-maker must determine whether protection or assistance has ceased for "*any reason*". The inquiry is accordingly a broad one.

20. The interpretation set out above is also consistent with the purpose of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive. This Court has confirmed that the objective of those provisions is to "*ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations*" (emphasis added).[44]

21. It is not surprising that the Court reached that conclusion. If the decision-maker was only entitled to take account of the circumstances at the time an individual departed the region, (the so-called historic exercise), the result would be artificial. Decision-makers would be precluded from taking into account the actual situation that may prevent a Palestinian refugee from (re)availing him or herself of UNRWA's protection or

---

44 See *El-Kott* at [62] and [60].

assistance. This would be inconsistent with the purpose of Article 1D, which is to ensure that Palestinian refugees continue to receive protection as refugees already recognised by the international community. Both the CJEU[45] and ECtHR[46] recognise that the enjoyment and exercise of rights must be real and effective rather than theoretical or abstract.

22. This is evident from a simple example. If the individual in question left the UNRWA area of operations of their own volition, and on grounds of personal convenience, but the security situation in the region subsequently deteriorates and all parties now agree that the individual could not safely return, it would be artificial and wrong to conclude that protection or assistance has not ceased.

23. The provisions of the Qualification Directive and the Opinions of the Court's Advocate Generals support the submission that the assessment under Article 12(1)(a) must be holistic and take account of all relevant circumstances, including the circumstances that exist at the time of the decision with a view to determining whether protection or assistance of UNRWA has ceased.

24. The requirement under Article 4(3)(a) of the Qualification Directive, applicable by analogy in cases being assessed under Article 12(1)(a),[47] to take into account all relevant facts at the time of taking a decision, supports the submission that the question the authorities must determine, on the basis of all relevant factors, is whether cessation or protection or assistance has now ceased.

25. In interpreting the phrase "ceased for any reason", Advocate General Sharpston noted in *El Kott* that in some cases, circumstances arising after the person left the UNRWA's area of operations would bring the person within the scope of the second sentence of Article 12(1)(a) of the Qualification Directive because such a person must be considered as being prevented from receiving UNRWA protection or assistance:

> "… it is quite conceivable… that a person in receipt of UNRWA assistance may voluntarily leave the UNRWA area on a temporary basis… while fully intending to return… but finds that in fact his

---

45 *Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín*, C243/15; European Court of Justice; 8 November 2016; [65]; *Star Storage and Others*, C-439/14 and C-488/14, European Court of Justice; 15 September 2016; [46].

46 *Airey v Ireland* Application no 6289/73, European Court of Human Rights; 9 October 1979; [24]; *Mehmet Eren v Turkey* Application no 32347/02, European Court of Human Rights; 14 October 2008; [50].

47 *El Kott* [64].

> re-entry into the territory in which received assistance is blocked. Such a person should, in my view, be considered as prevented from receiving UNRWA assistance for a reason beyond his control or independent of his volition."[48]

26. Clearly, this requires the decision-maker to take account of the actual situation of the applicant at the time of decision-making in order to determine whether protection or assistance has ceased for any reason.

27. The Opinion of Advocate General Mengozzi in *Alheto* is to similar effect:[49]

> "The aim of the examination that is required under the second sentence of Article 12(1)(a) of Directive 2011/95 is to establish whether the assistance or protection provided by UNRWA to an asylum applicant has actually ceased, which may be the case where, as mentioned, for objective reasons or reasons relating to the applicant's individual position, that agency is no longer in a position to guarantee that his living conditions will be commensurate with the mandate entrusted to it, or where, because of obstacles of a practical or legal nature or relating to the security situation in the relevant UNRWA area of operations, the applicant is unable to return to that area." (emphasis added).

28. As stated above, the UNHCR Guidelines provide that:

(a) Objective reasons which bring an applicant within the second paragraph of Article 1D, include (but are not limited to) the inability of UNRWA to fulfil its protection or assistance mandate; threats to the applicant's physical integrity, security or liberty or other serious protection-related reasons, including inhuman or degrading treatment, or severe discrimination;[50] practical barriers which prevent access to the UNRWA area of operation;[51] and "*barriers relating to safety or personal security which prevent (re)availment… [and] prevent[…] the applicant from being able to return safely. Up-to-date information on the realistic prospect of being able to (re)avail oneself of the protection or assistance is required.*"[52]

In each case, the "*personal circumstances of the applicant are relevant to the determination of whether one of the objective reasons exists… Thus, each claim must be determined on its individual merits, enabling consideration of circumstances that are specific to the applicant. These personal circumstances may include age, sex, gender, sexual orientation and gender identity, health, disability, civil status, family situation and relationships, social or other vulnerabilities,*

---

48 *El-Kott* Advocate General Sharpston [78].
49 *Alheto* Advocate General Mengozzi [44].
50 Guidelines, [22(d)-(f)].
51 Ibid. [22(g)].
52 Ibid. [22(i)].

ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, and any past experiences of serious harm and its psychological effects".[53]

29. The Guidelines further provide that although the phrase "*ceased for any reason*" is "*not to be construed restrictively*":[54]

    (a) The application of the second paragraph of Article 1D is not unlimited[55] and accordingly does not apply to those who refuse to (re)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience,[56] "*the reasons why one has left an UNRWA area of operation (for example, for work or study purposes, or for protection reasons) is not of itself determinative. What is pivotal is whether the protection or assistance of UNRWA has ceased owing to one or more 'objective reasons' for leaving or preventing them from (re)availing themselves of UNRWA's protection or assistance*".[57]

    (b) Accordingly, the assessment must consider the circumstances of the individual and up-to-date country of original information.[58]

30. Thus, the answer to the first question is clear. Historic evidence concerning the cessation of protection or assistance, the present availability of protection or assistance and the personal circumstances of the individual refugee must *all* be taken into account. All these matters inform the single question that the decision-maker must decide: has protection or assistance ceased for any reason? Even if a Palestinian refugee was not forced to leave UNRWA's area of operations, they will come within the scope of the protection conferred by Article 12(1)(a) of the Qualification Directive if they are unable to (re)avail themselves of UNRWA's protection or assistance for objective reasons.

---

53 Ibid. [24].
54 Guidelines, [18].
55 Guidelines, footnote 35: "Mere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance.", El Kott, [59].
56 Guidelines, footnote 36: See, El Kott, paras 49-51 and 59-63. See also by way of analogy regarding personal convenience, Statute of the Office of the United Nations High Commissioner for Refugees, paragraphs 6(ii)(e) and (f).
57 Guidelines, [19].
58 Guidelines, [20].

THE SECOND QUESTION: BURDEN OF PROOF

31. The second question referred is as follows:

> "2. If the answer to Question 1 is that assessment includes a forward-looking assessment, is it legitimate to rely analogically on the cessation clause in Article 11, so that where historically the applicant can show a qualifying reason as to why he or she left the UNRWA area, the evidential burden falls upon the Member State to show that such reason no longer holds?"

32. UNHCR makes two submissions in relation to this question.

33. First, consistent with the answer given above to the first question, Article 1D does not distinguish between "forward-looking" or "backward-looking" assessments when determining whether protection or assistance has ceased. The premise of this question appears to be that the decision-maker must first determine whether the refugee had an objective historic reason for leaving the UNRWA area of operations and then, separately, consider whether there are objective reasons for not returning at the present time.

34. In UNHCR's view, this is not the proper approach. As set out above, the critical question is whether as of the date of the assessment, the protection or assistance of UNRWA has ceased such that the applicant is unable to (re)avail him/herself of that protection or assistance. The decision-maker should adopt a holistic approach, taking account of all material relevant to the cessation of protection or assistance, in the light of the individual circumstances of the applicant. While this may entail taking into account the circumstances that led to the applicant leaving the UNRWA area of operations, this will not on its own be determinative. It is possible that an applicant might have voluntarily left the area of UNRWA protection and still fall within the scope of the second paragraph of Article 1D if they are at the time of the determination unable to (re)avail themselves of protection or assistance.

35. Second, the question appears to assume that the entire burden of showing an objective reason for the application of the second paragraph of Article 1D falls on the applicant. This is incorrect. Whilst – as in any civil litigation – the applicant bears the basic burden to make out their case,[59] in light of the vulnerability of the applicant in asylum

---

[59] UNHCR Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998 [6].

procedures, the burden of adducing relevant evidence is borne by both the applicant and the decision-maker.[60]

36. Indeed, this principle is reflected in Article 4(1) of the Qualification Directive which establishes that the authorities of the Member States must cooperate with the applicant in order to determine the relevant elements of the application. The principle of cooperation is also reflected in the Court's case-law. Thus, in Case C-277/11 *MM*,[61] the Court held that:

> "This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents."

37. This principle is reflected in the UNHCR *Handbook*, which provides that:[62]

> "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. **Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.** Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

38. The principle is also reflected in the Guidelines, which explain that the "*burden generally rests on the applicant*" to produce evidence insofar as possible to support his or her statements and to substantiate the claim, and to furnish the decision-maker with information "*insofar as there is information that is available to him or her*." On the other hand, a decision-maker also "*shares the duty of ascertaining the facts relevant to the determination*."[63]

---

60 Advocate General's Opinion; *A, B and C*; C-148/13, C-149/13 and C-150/13; 17 July 2014; [73].

61 Case C-277/11, *M.M. v Minister for Justice, Equality and Law Reform*, EU:C:2012:744, [66]; see also *Fathi*, C-56/17; Court of Justice; 4 October 2018; [86] – [87]; *F*, C-473/16; Court of Justice, Judgment of 25 January 2018; [41]. See to the same effect the judgment the European Court of Human Rights in *J.K. v Sweden*, Application no. 59166/12, Judgment 23 August 2016, [52] – [54] adopting the approach set out in the *Handbook*; and F.K. v Sweden Application no 43611/11; Judgment of 23 March 2016; [109].

62 *Handbook* [196].

63 Guidelines [39] and [40].

39. Accordingly, in UNHCR's view, the second question asked by the FTT adopts the incorrect approach. It is not appropriate to speak – in cases of this kind – of the evidential burden being borne by the applicant and then shifting to the State. The burden to identify and adduce relevant evidence is shared between the parties in what is a non-adversarial decision-making process.

THE THIRD QUESTION: INTENTIONAL DEPRIVATION

40. By its third question referred, the FTT asks:

> "In order for there to be justifiable objective reasons for the departure of such a person related to UNRWA's provision of protection or assistance, is it necessary to establish intentional infliction of harm or deprivation of assistance (by act or omission) on the part of UNRWA or the state in which it operates?"

41. The answer is "no" for the following three reasons.

42. First, a requirement to establish intentional infliction of harm or deprivation of protection or assistance by UNRWA would conflict with the clear wording of Article 1D of the 1951 Convention/ Article 12(1)(a) of the Qualification Directive.

43. On their face, those provisions require an objective assessment of whether "*protection or assistance has ceased for any reason*". There is nothing in Article 1D that confines the inquiry by reference to the subjective intentions of UNRWA or the State in which it operates. To import an intent requirement into Article 12(1)(a) would be to read words into that provision that would unduly (i) narrow the broad scope of the assessment, and (ii) fundamentally restrict the scope of protection afforded to Palestinian refugees.

44. Narrowing and restricting the assessment by incorporating an element of intentional deprivation of assistance or infliction of harm would also be inconsistent with the purpose of the provision. As explained by Advocate General Mengozzi in *Alheto*:[64]

> "The aim of the examination that is required under the second sentence of Article 12(1)(a) of Directive 2011/95 is to establish whether the assistance or protection provided by UNRWA to an asylum applicant has actually ceased, which may be the case where, as mentioned, for objective reasons or reasons relating to the applicant's individual position, that agency is no longer in a position to guarantee that his living conditions will be commensurate with the mandate entrusted to it."

---

64 *Alheto* Advocate General Mengozzi [44].

45. Second, the FTT appears to have asked this question because it was attempting to draw an equivalence between the test in relation to the interpretation of Article 1D and the test for subsidiary protection under Article 15(b) of the Qualification Directive – where the question is whether the State of origin might intentionally deprive the individual of protection.[65] There is no proper basis for treating these two different types of cases in the same manner. They are not relevantly similar.[66] Different questions arise in the context of subsidiary protection: "Article 12(1)(a) does not concern subsidiary protection in any way."[67]

46. Third, the referring Court also asks whether it is necessary to show that the State in which UNRWA provides protection or assistance intends to cause harm to a Palestinian refugee before they may fall within the scope of the inclusion clause. Again, the answer is no. The test in Article 1D does not admit of any analysis of the intentions of that State; the only relevant question is whether UNRWA's protection or assistance has ceased.

47. The actions and inactions of the State in which UNRWA provides protection or assistance will, of course, be relevant to the assessment of that objective question. They form a part of the factual background and matrix against which a decision-maker must assess whether or not protection or assistance has ceased. As the Guidelines explain:

> "Although Article 1D focuses on the cessation of the protection or assistance of UNRWA, the situation in the State in whose jurisdiction UNRWA is operating will not only be relevant, but may be determinative of the need for 1951 Convention protection. For example, the host State or authorities – not UNRWA – will control whether a Palestinian refugee will be permitted to (re)enter their territory and (re)establish him/herself there, including whether he or she is able to obtain the necessary legal documentation establishing a right to stay in the State or territory. The risk facing the applicant may emanate, for example, from the authorities directly."[68]

48. Therefore, whether or not the actions (or inactions) of UNRWA or the State in which it operates were intentional plays no part in the Article 1D analysis.

---

65 FTT Judgment [112] – [115].

66 For this reason the FTT's analogy with the reasoning in *M'Bodj v Etat Belge* Case C-542/13; Court of Justice; 18 December 2014 and *MP v Secretary of State for the Home Department*; Case C-353/16; Court of Justice; 24 April 2018 does not assist.

67 AG Sharpston, El Kott, [58]. As noted at [9] above, Palestinian refugees are already recognised by the international community as refugees.

68 Guidelines [22(j)].

THE FOURTH QUESTION: ASSISTANCE PROVIDED BY NGOs

49. By its fourth question, the referring Court asks:

> "Is it relevant to take into account the assistance provided to such persons by civil society actors such as NGOs?"

50. UNHCR submits that it is not relevant to take into account assistance or protection provided by civil society actors, when conducting an evaluation under Article 1D.

51. This follows from the wording of Article 1D itself. Article 1D refers only to the protection or assistance of organs or agencies of the United Nations other than UNHCR; it makes no reference to any support or services provided by non-state or non-UN third parties. UNRWA is an agency of the United Nations, established by the General Assembly, with a mandate to provide protection and assistance to Palestinian refugees. An NGO is not in the same position. An NGO cannot provide "assistance" or "protection" for the purposes of the Convention.

52. UNHCR's position on this question is consistent with the wording and purpose of Article 1D. It demarcates the respective competence of UNRWA, UNHCR and the State parties to the 1951 Convention. It is not concerned with – nor does it take account of – assistance afforded by civil society actors and NGOs.

CONCLUSION

53. In conclusion, UNHCR submits that the CJEU should answer the questions of the FTT as follows:

Question 1: The Article 1D assessment should be a holistic exercise, which may take into account the circumstances when the applicant left the UNRWA area of operations but which must determine, on the basis of all relevant factors, whether, at the time of the determination, UNRWA protection or assistance has ceased for the applicant. Even if the applicant was not forced to leave the UNRWA's area of operations, he will come within the scope of the protection conferred by Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive if he is unable to (re)avail himself of UNRWA's protection or assistance for objective reasons.

Question 2: The decision-maker and the applicant share a common evidential burden in relation to that assessment.

Question 3: It is not necessary to demonstrate that either UNRWA, or the State in which UNRWA is operating, have intentionally inflicted harm or deprivation on the applicant or will do so, when conducting an Article 1D assessment.

Question 4: It is not relevant to take into account the assistance provided to Palestinian refugees by civil society actors such as NGOs.