

A and Others

Appellants

-and-

Secretary of State for the Home Department

Respondent

SUBMISSIONS BY

UNHCR

1. This is the first occasion that the United Nations High Commissioner for Refugees (“UNHCR”) has intervened in an Upper Tribunal case (or in an Immigration Appeals Tribunal case). UNHCR has previously intervened in cases in the English Court of Appeal, House of Lords and Supreme Court (e.g. *Fornah/K* [2006] UKHL 46, *Asfaw* [2008] UKHL 31 and *HJ (Iran) & HT (Cameron)* (SC) (pending)) and regularly intervenes in courts and tribunals in other jurisdictions. UNHCR welcomes the opportunity to contribute to the present appeals as well as the opportunity to participate constructively in future Upper Tribunal cases (pursuant to rule 9(5) of the Procedural Rules of the Upper Tribunal) given the Upper Tribunal’s special importance in protecting refugees and those in need of humanitarian protection in the United Kingdom. In the present case, unless otherwise invited by the Tribunal, UNHCR intends to limit its participation to short written submissions.

UNHCR's remit (including in relation to humanitarian protection)

2. UNHCR is the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and, together with governments, for seeking permanent solutions for the problem of refugees.¹ According to its Statute, UNHCR fulfils its mandate *inter alia* by, “[p]romoting the

¹ Statute of the Office of UNHCR, GA Res. 428(V), Annex, UN Doc A/1775, at [1] (1950) (*QD (Iraq)* submissions, Tab 1).

conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".² UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Convention relating to the Status of Refugees ("1951 Convention") and Article II of the 1967 Protocol relating to the Status of Refugees ("1967 Protocol"), obliging States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention and/or 1967 Protocol.³

3. In the years following the adoption of UNHCR's Statute, the UN General Assembly and Economic and Social Committee extended UNHCR's competence *ratione personae*.⁴ This was done not by amending the statutory definition of "refugee" but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.⁵ In practical terms, this has extended UNHCR's mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or disorder even in relation to persons who are not refugees within the meaning of the 1951 Convention. In the light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order are valid reasons for international protection under its mandate.⁶

4. UNHCR's supervisory responsibility has been reflected in European Union law. Article 78(1) of the Treaty on the Functioning of the European Union⁷ stipulates

² Ibid., at [8(a)].

³ UNTS No. 2545, Vol. 189, p.137 and UNTS No. 8791, Vol. 606, p.267.

⁴ See *UNHCR Note on International Protection*, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/830, 7. Sept. 1994 (***QD (Iraq) submissions, Tab 3***).

⁵ In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: "*The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.*"

⁶ UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner's Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, at [26] (***QD (Iraq) submissions, Tab 8***).

⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Treaty of Amsterdam, provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”.⁸ In addition, Article 18 of the Charter of Fundamental Rights of the European Union⁹ states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol. EC secondary legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive (2004/83/EC, 29 April 2004) 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.” (see also Article 21 of the Asylum Procedures Directive (2005/85/EC)).

UNHCR’s approach to interventions

5. When intervening in legal proceedings it is UNHCR’s practice to address its submissions to issues of international refugee law and doctrine and, to a more limited extent, to address general country conditions. It does not generally advance submissions on the facts of particular cases. UNHCR also understands the importance of not duplicating submissions advanced by the parties and only participates when and to the extent that it considers that its participation could be of value to the Tribunal.

Submissions on Article 15(c) and Iraq

6. At issue in the present case is the application of Article 15(c) of the Qualification Directive to certain Iraqi cases. UNHCR’s position on the application of this article was set out in the submissions made to the Court of Appeal in *QD (Iraq)* [2009] EWCA Civ 620. That remains its position. Those submissions were formally annexed to the judgment of the Court of Appeal by that court. Those

⁸ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340, 10.11.1997, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁹ European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

submissions are submitted herewith to this Tribunal, together with the associated bundle of materials to which those submissions refer, for the assistance of the Tribunal in this case.

7. Having reviewed the decisions under appeal in the present case and the issues that appear to be the subject of dispute, UNHCR does not consider it necessary to add to those submissions save to draw attention to the following four matters of relevance to the present appeals. However as anticipated by the Tribunal at the case management hearing on 10 May 2010, UNHCR does wish to reserve the right to submit further submissions if, having considered the skeleton arguments submitted by the parties, it considers that an issue is raised on which it is in a position to contribute further.

8. Firstly, UNHCR draws attention to the decision of the Conseil d'Etat in *Office Français de Protection des Réfugiés et Apatrides v Baskarathas*, 3 July 2009, No. 320295 (French version and UNHCR translation attached) in which the Conseil d'Etat upheld a decision by the French National Court of Asylum that had held that a Sri Lankan national was entitled to subsidiary protection under Article 15(c) of the Qualification Directive on the basis that there was a situation of generalised violence existing in the Eastern Part of Sri Lanka, notwithstanding that the Sri Lankan Army had taken control of that area. In addition to illustrating the effect of Article 15(c) in relation to regional levels of indiscriminate violence, the judgment makes clear that the threat to an individual's life or person need not arise from actions of a combatant to the armed conflict. Moreover as the Rapporteur Public emphasised, it would ignore the reality of contemporary armed conflicts to argue that the violence from which protection is granted must necessarily be limited to areas where the armed conflict itself is concentrated. Therefore despite the fact that the region in Eastern Sri Lanka was under the control of government forces, it was still affected by a state of generalised violence which the government forces could not effectively protect people against, given the general situation of internal armed conflict.

9. This is consistent with the submission made by UNHCR in *QD (Iraq)* at paragraph 45, where it was emphasised that in order for persons to qualify for protection under Article 15(c) it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question. Thus, where armed conflict leads to a breakdown in law and order individuals may be entitled to protection under Article 15(c) because the threat to their life or person arises by reason of indiscriminate violence which is the product of a situation of internal armed conflict. That is irrespective of whether there is in fact active military or armed combat taking place in that precise area at that precise time.

10. Secondly, UNHCR draws attention to the decision of the Supreme Administrative Court of the Republic of Bulgaria, First College (Bulgarian and UNHCR translation attached), dated 5 March 2009 (Administrative Case No 300/2009 in the matter of *Hassan Fayed*), upholding a claim for humanitarian protection under Article 15(c) of the Qualification Directive in respect of an individual sought to be returned to Iraq. In so holding the Supreme Administrative Court stated:

“In this case there is irrefutable evidence, including but not limited to the opinion of the International Law Directorate of the Ministry of Foreign Affairs, that the situation in Iraq can be qualified in accordance with the provisions of international law as internal armed conflict. The appellant of cassation is from Diwaniq of Kadisia Province in southern Iraq, and the situation there is defined as unstable with acts of indiscriminate violence and severe human rights violations; and in general, as an absence of legal order; therefore, there is a real threat for a basic attack(s) against Ahmed Hassan Fayed. Taking into consideration the presence of an armed conflict in Iraq, and in accordance with the above stated interpretation of Article 15(1)(c) ...there are no sufficient grounds for refusal to grant humanitarian status to the appellant ...”

11. Thirdly, as to the question of country conditions in Iraq, UNHCR draws attention to its guidelines on the security situation in Iraq which is set out in its document, “*Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*” April 2009 (*QD (Iraq)* submissions, tab 12; see also *QD (Iraq)* submissions paragraph 59). That document continues to reflect UNHCR’s present position.

12. Fourthly, one further issue of potential relevance to these appeals relates to the internal flight possibility within Iraq. As indicated in paragraph 89 of the *Eligibility Guidelines* (p.51), when assessing whether an individual fleeing violence can be expected to re-locate, key considerations include whether the individual can practically, safely and legally access the area of internal flight alternative (the “relevance analysis”), and whether the individual could live a relatively normal life in that area without facing undue hardship (the “reasonableness analysis”). UNHCR’s position is that generally no internal flight alternative will be available in Iraq because of, (i) the ability of non-State agents to perpetrate acts of violence with impunity, (ii) the ongoing levels of violence in mainly the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din, (iii) access and residency restrictions, and (iv) the hardship faced in ensuring even the basic survival in areas of relocation. Moreover, the national authorities in Iraq have a limited capacity to enforce law and order, the ISF may be infiltrated by radical elements and the judiciary is prone to intimidation and corruption (*Eligibility Guidelines*, paragraphs 88-110, pp.42-51).
13. Although some different considerations can arise in cases where a risk of harm does not relate to persecution or individual-targeting (most obviously, in such a case a tribunal would need to consider the risk of pursuit by the persecuting group, which is unlikely to be a consideration in relation to indiscriminate violence), UNHCR considers that the considerations set out above, reflected in the *Eligibility Guidelines*, are applicable in the case of persons fleeing situations of generalised non-targeted violence.

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