Case No: C/2002/0751

Neutral Citation No [2002] EWCA Civ 1103
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 26th July 2002

Before :

LORD PHILLIPS OF WORTH MATRAVERS THE MASTER OF THE ROLLS
LORD JUSTICE MAY
and
LORD JUSTICE LAWS

- -

Between :

Amer Mohammed El-Ali	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

C/2002/1284

Daraz	
- and -	**Appellant**
The Secretary of State for the Home Department	
	Respondent
The United Nations High Commissioner for Refugees	**Intervener**

- -

Mr Nicholas Blake QC and Mr Raza Husain (instructed by Salfiti & Co) for El Ali
Mr Rambert de Mello and Mr Chris Williams (instructed by Nijher & Co) for Daraz
Mr Tim Eicke (instructed by the Treasury Solicitors) for the Secretary of State for the Home Department
Professor Guy Goodwin-Gill (instructed by the UNHCR) Intervener

- -

Judgment
As Approved by the Court

Lord Justice Laws:

INTRODUCTORY

1. There are two matters before the court. First there is in the case of *El-Ali* an appeal brought with permission granted by the Tribunal itself, against a starred determination of the Immigration Appeal Tribunal ("IAT") notified on 29 January 2002, dismissing the appellant's appeal from the decision of the Adjudicator who in his turn had in June 2001 dismissed the appellant's appeal against the Secretary of State's refusal of his asylum claim. The appeal requires the court to decide what is the correct interpretation of Article 1D of the 1951 United Nations Convention relating to the Status of Refugees ("the Convention"). The second matter before the court, *Daraz*, is an application for permission to appeal which was adjourned by myself, on consideration of the papers, to be listed with the appeal in *El-Ali*. The applicant Daraz seeks to raise essentially the same issues on Article 1D as does El-Ali. The IAT in *Daraz* gave the applicant's representative a period of 14 days within which to make written submissions on the Tribunal's then recent decision in *El-Ali*; however he failed to do so. Accordingly the IAT without further reasoning followed its own decision in *El-Ali*, and refused permission to appeal to this court to the applicant. At an early stage of the hearing we indicated that we would give permission to appeal, so that the two cases might be dealt with as substantive appeals on the same procedural footing.

THE MATERIAL PROVISIONS OF THE CONVENTION

2. Article 1D cannot be understood outside its context. It will be necessary in due course to refer to other legal materials, and some of the *travaux préparatoires* of the Convention, but it is convenient at this stage to set out the following provisions of the Convention itself. I have included (in light of the argument in the case) some but not all of the measures conferring the rights which refugees are to enjoy.

> "The High Contracting Parties
>
> *Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.
>
> ...
>
> *Considering* that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,
>
> *Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

...

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operating of State with the High Commissioner,

Have agreed as follows:

Chapter 1 – General Provisions

Article 1

Definition of 'Refugee'

A For the purpose of the present Convention, the term 'refugee' shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) [As a result of events occurring before 1 January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is national.

B.(1) For the purposes of this Convention, the words 'events occurring before 1 January 1951' in Article 1, Section A, shall be understood to mean either

(a) ‘events occurring in Europe before 1 January 1951’; or

(b) ‘events occurring in Europe or elsewhere before 1 January 1951’; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C This Convention shall cease to apply to any person falling under the terms of Section if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it, or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D 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.

E The Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principle of the United Nations.

Article 2

General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3

Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4

Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

…

Article 13

Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

....

Article 15

Rights of Association

As regards non-political and non-profit making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16

Access to courts

1 A refugee shall have free access to the courts of law on the territory of all Contracting States.

2 A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi.*

3 A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 17

Wage-earning employment

1 The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment.

...

Article 21

Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws on regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than the accorded to aliens generally in the same circumstances.

Article 22

Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

…

Article 24

Labour legislation and social security

1 The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum ago of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations...

…

Article 26

Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27

Identity Papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28

Travel documents

1 The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence...

…

Article 31

Refugees unlawfully in the country of refuge

1 The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2 The Contracting States shall not apply to the movement of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission

into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32

Expulsion

1 The Contracting states shall not expel a refugee lawfully in their territory save on ground of national security or public order.

2 The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3 The Contracting States shall allow such a refugee a reasonable period within which to seek admission into another country. The Contacting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return ("refoulement")

1 No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2 The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

As is well known the words in Article 1A(2) which I have enclosed in square brackets were taken out of the definition of "refugee" by Article 1(2) of the 1967 Protocol relating to the Status of Refugees. The second and third preambles to the 1967 Protocol recited:

"Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

> Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951".

Article 1(3) of the Protocol preserved existing declarations made by States Parties under Article 1B(1)(a) of the Convention unless the declaration was extended under Article 1B(2).

THE OUTLINE FACTS IN EL-ALI

3. El-Ali was born on 22 July 1977 in Kuwait but lived nearly all his life in the Lebanon. His parents originally came from a village near Tiberius in Israel. He arrived in the United Kingdom on 21 September 1998 having apparently been travelling on a false Jordanian passport which he destroyed en route. He claimed asylum and produced documents showing that he was registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") in the Lebanon field. The political and historical genesis of UNRWA is very important for the task of interpreting Article 1D and I shall explain it in due course. El-Ali's documents described him as a "Palestinian Refugee" and showed his residence to have been Ein El Hilweh Camp I. There are three decision letters from the Secretary of State, rejecting El-Ali's substantive asylum claim, and also his claims put forward in the context of the Secretary of State's Mandate Refugee policy and of Article 1D of the Convention.

4. It is convenient at this stage to give a summary explanation of the Mandate Refugee policy. On its face (the relevant documents are in the papers) the policy is directed at persons who have been recognised as refugees by, and received the protection of, the United Nations High Commissioner for Refugees ("UNHCR"); where an application is made on such a person's behalf from overseas for an entry clearance to come to the United Kingdom as a refugee, the policy indicates that it should not be necessary to assess the applicant's refugee status, and consideration of the claim should usually be limited to "the applicant's circumstances in the present country of refuge, and whether the UK is the most appropriate country for resettlement". A further Home Office instruction (since superceded, as I shall show: paragraph 5) stated: "An application from a Palestinian who receives protection from UNRWA should be considered in accordance with the instruction on *Mandate Refugees*". This decision-making procedure was followed in El-Ali's case. In November 2000, however, the Secretary of State concluded that he could have remained safely in the Lebanon and so should not be admitted under the policy.

5. The IAT decided that the Mandate Refugee policy had "no relevance" to El-Ali's case, essentially because he was asserting that he had ceased to receive protection from UNRWA, and had presented himself as a substantive asylum claimant. It is submitted in the skeleton argument prepared on El-Ali's behalf by junior counsel (paragraph 2) that the IAT was wrong and that the case should be remitted for re-determination on the footing that El-Ali had a strong *prima facie* case under the policy. However, there is no effective challenge to the Secretary of State's conclusion that El-Ali could have remained safely in the Lebanon. The Home

Office's procedures were revised in early 2001. As appears from the Minister of State's letter of 7 March 2001 the upshot, so far as material, is that a Palestinian who was "UNRWA assisted" before he came to the United Kingdom will have his claim to enter considered against the standard criteria for asylum contained in Article 1A(2) of the Convention. I may state at once that there is in my judgment no scope for allowing the appeal in *El-Ali* on any free-standing ground based on the Mandate Refugee policy.

6. The Adjudicator for his part rejected El-Ali's various claims. In particular, although he accepted that El-Ali had on one occasion been detained and investigated by the Lebanese authorities, he did not accept that the treatment then meted out to him amounted to persecution for a Convention reason; nor therefore, were the Secretary of State to return him to the Lebanon and he there suffered like treatment again, did the Adjudicator accept that that would amount to persecution for a Convention reason. He also rejected El-Ali's claim that the Lebanese government systematically discriminates against Palestinians to an extent which amounts to persecution, and with it the argument that his return to Lebanon would for that reason amount to a violation of the Convention.

7. El-Ali's essential case before the IAT, which (though it has been somewhat refined, as I shall show) gives rise to the issue of the true interpretation of Article 1D of the Convention, was, if I may say so, succinctly summarised by the IAT itself as follows:

> "10. The Appellant submits that Article 1D is to be given its full literal meaning and that, as a result, he is entitled to enter and remain in the United Kingdom as a refugee. While he was in Lebanon he was able to claim protection or assistance from UNRWA, and so the Refugee Convention did not apply to him. Now that he has left Lebanon that protection or assistance has ceased, and so '*ipso facto*' he has become, he says, entitled to the benefits of the Refugee Convention."

In rejecting this submission the IAT adopted an interpretation of Article 1D which I shall have to examine: it is not accepted by Mr Eicke for the Secretary of State, nor by Professor Goodwin-Gill who appeared for UNHCR. (UNHCR intervened with the court's permission, and for my part I found the intervention of considerable assistance.) The Secretary of State put in a respondent's notice urging a different interpretation, which has been supported by Mr Eicke in the course of argument.

THE OUTLINE FACTS IN DARAZ

8. Daraz is also a Palestinian who lived in the Lebanon. He was born at the Tyre Albass refugee camp on 26 June 1973. He arrived in the United Kingdom on 7 June 1998 and sought asylum, claiming to have left the Lebanon because he was wanted by members of the Hezbollah. The Secretary of State refused his claim and he appealed to the Adjudicator, before whom however he did not appear and was not represented. The Adjudicator rejected his substantive assertions of a well-founded fear of

persecution were he to be returned to the Lebanon. There is no reference in his determination to Article 1D; however at paragraph 36 he stated:

> "It was suggested that the Appellant is entitled to remain in the United Kingdom in any event. This is because the Secretary of State has published a policy to be followed in the case of people who are protected by [UNRWA]."

This was of course a reference to the Mandate Refugee policy. However the Adjudicator held that it was not for him, on the asylum appeal, to rule whether Daraz might be so entitled. Daraz then sought to rely on Article 1D in his Grounds of Appeal to the IAT, and was given leave to appeal to the Tribunal on 29 November 2001. That was two months before the IAT's decision in *El-Ali*. I have already described (paragraph 1) Daraz' representatives' failure to make submissions on *El-Ali* in the time allowed by the IAT, and the consequent refusal by the IAT of permission to appeal to this court. Having been granted permission by us, Daraz now relies on the same arguments based on Article 1D as does El-Ali, together with some additional points. I should say that in my judgment, as in the case of *El-Ali*, there is no room for any distinct case to be made in reliance on the Mandate Refugee policy. Both of these appeals turn entirely on the interpretation of Article 1D of the Convention.

HISTORICAL SUMMARY

9. The background is unusually important. For much of what follows in this short account I am indebted to the submissions of Professor Goodwin-Gill.

10. On 29 November 1947 the General Assembly of the United Nations voted in favour of the partition of Palestine into two separate States, Arab and Jewish. The British mandate over the territory ended on 14 May 1948. The next day the Jewish community proclaimed the State of Israel. At once the first Arab-Israeli war broke out. Many thousands of Palestinian Arabs fled into neighbouring countries. On 19 November 1948 the General Assembly established the Special Fund for Relief of Palestinian Refugees. On 11 December it resolved to establish the United Nations Conciliation Commission for Palestine ("UNCCP") which was instructed (Article 6 of Resolution 194(III)) "to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them". By paragraph 11 of 194(III) the General Assembly resolved

> "that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date… [and UNCCP was instructed to]
>
> facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation…"

11. A year later, on 8 December 1949, UNRWA was established by Resolution 302(IV) as a subsidiary organ of the General Assembly. Certain specific obligations were imposed on UNRWA (or rather its Director) but its overall brief was to provide assistance to those who had left Palestine as a result of the conflict. By paragraph 20 of 302(IV) UNRWA was directed to consult with UNCCP "in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194(III) of 11 December 1948".

12. UNRWA adopted a working definition of "refugee" for the purposes of this task: "a person whose normal residence was Palestine for a minimum of two years immediately preceding the outbreak of conflict in 1948, and who, as a result of that conflict, lost both home and means of livelihood, and who is in need". This definition has since been extended to the children of such persons. By Resolution 2252 (ES-V) of 4 July 1967 (re-affirmed by Resolution 2341 B (XXII) of 19 December 1967) the General Assembly authorised UNRWA to give temporary assistance as a matter of urgency to others in the area who had been displaced by the hostilities of June that year; and much more recently, by Resolution 56/54 of 10 December 2001, such assistance was extended so as to cover "persons in the area who are currently displaced and in serious need of continued assistance as a result of the June 1967 and subsequent hostilities". The reference in that Resolution to "the area" is to the territorial scope of UNRWA's activities, which is restricted to Lebanon, Syria, Jordan, the West Bank, the Gaza Strip and (since the 1967 displacements) Egypt. The recipients of its assistance are also restricted, being limited to refugees registered in these countries and residing there. By Resolution 56/56, also of 10 December 2001, the General Assembly (amongst other things) requested the Commissioner-General of UNRWA "to proceed with the issuance of identification cards for Palestine refugees and their descendants in the Occupied Palestinian Territory".

13. These later measures, from 1967 onwards, show that the scope of UNRWA assistance has been widened at times long since the original displacement of Palestinian Arabs following the war of 1948. In due course I shall have to consider what light, if any, this circumstance throws on the interpretation of Article 1D.

14. There are some further aspects of the earlier historical events to which I must refer before coming to the *travaux préparatoires* of the Convention. First, whereas the role of UNRWA was primarily to give aid and assistance, UNCCP was distinctly charged with a measure of protection: see for example Resolution 194(III) paragraphs 2(a) and 6, cross-referring to Resolution 186 (S-2) of 14 May 1948 and Resolution 394(V) of 14 December 1950. I need not set out these materials. Secondly, it was plainly envisaged in the period leading up to the adoption of the Convention that the plight of the displaced Palestinians would be resolved within a short time-scale. This is implicit in much of the contemporary documentation, including paragraph 6 of Resolution 302(IV), by which it was anticipated that direct relief to the Palestinian refugees should cease not later than 31 December 1950. But the high hopes of the time were not fulfilled; indeed, as the world knows, they have still not been fulfilled. More particularly for our purposes, expectations of what might have been achieved by UNCCP were not met. In her article *Reinterpreting Palestinian Refugee Rights under International Law, and a Framework for Durable Solutions* Professor Susan Akram of the Boston University Law School states:

> "The UNCCP struggled to fulfil its mandate. Its efforts were stymied by a complete stalemate: the Arab states and the Palestinians demanded full repatriation, while Israel refused to accept any repatriation of the refugees. Thus, within four years of its formation, the UNCCP devolved from an agency charged with the 'protection of the rights, property and interests of the refugees' to little more than a symbol of UN concern for the unresolved aspects of the Arab-Israeli conflict".

Whether or not this is a just description of the events which happened – as to which we need form no view – it is clear that UNCCP's aims were unachieved. And it is I think no less plain that in the years from 1948 to 1951, when the Convention was adopted, it was entirely beyond the contemplation of the General Assembly, or of the nations and peoples involved, that fifty years and more later there would still be no political solution to cure the displacement of the Palestinian Arabs.

15. The next aspect of the historical background to which I should refer forms a convenient bridge towards the *travaux préparatoires* of the Convention. It is that Palestinian refugees – and there is no doubt but that the displaced Palestinians were considered at all relevant stages to be *refugees* – were regarded, in and out of the United Nations, as belonging to a special category. To anticipate the question of Article 1D's proper interpretation, I note that Professor Hathaway of the Osgoode Hall Law School (*The Law of Refugee Status*, Butterworths, p.204) states that Article 1D

> "resulted from the strongly held view of Arab states that because the plight of Palestinian refugees was the consequence of the establishment of Israel by the United Nations itself, the UN should bear a more direct and obvious responsibility for their well-being".

Professor Hathaway then cites these observations of the Lebanese representative at the Fifth Session of the Third Committee of the General Assembly (5 UNGAOR) on 27 November 1950 (pp.358-359):

> "… the Palestinian refugees… differed from all other refugees. In all other cases, persons had become refugees as a result of action taken contrary to the principles of the United Nations, and the obligation of the Organization toward them was a moral one only. The existence of the Palestine refugees, on the other hand, was the direct result of a decision taken by the United Nations itself, with full knowledge of the consequences. The Palestine refugees were therefore a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility."

After setting out further citations (including material showing the desire of the Arab States that the Palestinian refugees should be aided pending their repatriation,

"repatriation being the only real solution of their problem") Professor Hathaway observes (p.207):

> "The concerns of the Arab community ironically coincided with a determination by some Western delegates to avert the prospect of claims to refugee status by Palestinians. The French representative, for example [statement, UN Doc. A/CONF.2/SR.19, 26 November 1951],
>
> > '… considered that the problems in their case were completely different from those of the refugees in Europe, and could not see how Contracting States could bind themselves to a text under the terms of which their obligations would be extended to include a new, large group of refugees…'
>
> Indeed, the American representative warned that the inclusion of Palestinian refugees 'would present Contracting States with an undefined problem, and so reduce the number of States in Europe that would find it possible to sign the Convention.'"

16. It is not hard to see that this uneasy and ironic conformity between the stance of the Arab States and the anxieties of the Europeans drove towards a disposition in the Convention, in 1951, of the plight and the claims of the Palestinian refugees which would be quite different from the notion of protection in any of the Signatory States obliged to harbour a refugee who fled to its borders. This notion is the paradigm of the Convention's aims; applied to the Palestinians in 1951, however, it might have been the engine of a *diaspora* which would be condemned by the Arabs and feared or resented or at least not welcomed by the Europeans, or by some of them.

17. Last before coming to the *travaux* of the Convention I should note the adoption by the General Assembly on 14 December 1950, by Resolution 428(V), of the Statute of the Office of the UNHCR. By Chapter I Article 1 he was to "assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute…" Chapter II Article 6 opens with the words "The competence of the High Commissioner shall extend to…", and then A(i) and (ii), which immediately follow, correspond to Article 1A(1) and (2) of the Convention in its original form; save that Article 6A(ii) (equivalent to Article 1A(2) of the Convention) has the words "or for reasons other than personal convenience" between "owing to such fear" and "is unwilling to avail himself".

THE TRAVAUX PREPARATOIRES OF THE CONVENTION

18. The relevance of the *travaux préparatoires* to the interpretation of the Convention, and thus of Article 1D, is not in doubt. The *travaux* of an international treaty are recognised as a "supplementary means of interpretation" by Article 32 of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"). (The Vienna Convention strictly applies only to the construction of treaties concluded after its

entry into force on 27 January 1980; however, as Gummow J explained in *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 277, the rules of interpretation which it sets out reflect customary international law.)

19. On 14 December 1950 the General Assembly considered (Resolution 429(V)) a draft Refugee Convention which had been submitted by the Economic and Social Council, and resolved to hold a conference at Geneva at which the draft would be considered by governments, including the governments of States which were not members of the United Nations. Article 1C of the draft, which was annexed to Resolution 429(V) and was in part the forerunner of Article 1D in the Convention as it was adopted, merely provided:

> "The present Convention shall not apply to persons who are at present receiving from other organs or agencies of the United Nations protection or assistance."

The Geneva conference duly met and deliberated. The record of the nineteenth meeting held on 13 July 1951, whose purpose as I understand it was in terms to consider what should be the definition of "refugee" in the forthcoming Convention, contains a number of important passages. The Egyptian representative proposed an amendment to Article 1C by the addition of a second sentence as follows:

> "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 United Nations General Assembly, they shall *ipso facto* be entitled to the benefit of this Convention."

This, of course, became the second sentence of Article 1D. The Egyptian representative's observations are reported thus in the text of the nineteenth meeting (A/CONF.2/SR.19, pp.16-17):

> "… it should be noted… that the present situation of those refugees was a temporary one, and that the relevant resolutions of the General Assembly provided that they should return to their homes…
>
> The limiting clause contained in paragraph C of article 1 of the Convention [sc. as I have set it out above in its original form] at present covered Arab refugees from Palestine. From the Egyptian Government's point of view it was clear that so long as United Nations institutions and organs cared for such refugees their protection would be a matter for the United Nations alone. However, when that aid came to an end the question would arise of how their continued protection was to be ensured. It would only be natural to extend the benefits of the Convention to them; hence the introduction of the Egyptian amendment."

The Iraqi representative pointed out that (p.17):

> "… paragraph C of article 1 had been inserted in the definition at the express request of the Arab countries which had not wished to impose on Contracting States the burden of the Arab refugees from Palestine so long as the United Nations was caring for them. When the assistance at present being given by the United Nations came to an end, and the Convention accordingly became applicable to those refugees, it would not by any means follow that they would emigrate to France or other western European countries, if only for purely material reasons."

The Egyptian representative had more to say (p.19):

> "The provisions of paragraph C would cease to be applicable the moment the aid at present being given by the United Nations to Arab refugees ceased; the latter would then be eligible for the benefits of the Convention."

The United Kingdom representative (p.20)

> "… wished to make it quite clear that he understood paragraph C to exclude persons who were defined as those who at the time when the Convention came into force were receiving protection or assistance from United Nations organs or agencies, and that the cessation of the operations of such organs or agencies would not bring such persons within the scope of the Convention."

So there was a debate as to the effect of the unamended paragraph C when the agencies of the United Nations ceased their operations: would the Convention then apply to the Palestinian Arabs or not?

20. Being of the view that the Convention would not apply in those circumstances, the Egyptian representative was at pains to press his amendment. At the twentieth meeting (which followed on the afternoon of the same day, 13 July 1951), he said:

> "It was only right and proper that, as soon as the Palestine problem had been settled and the refugees no longer enjoyed United Nations assistance and protection, they should be entitled to the benefits of the Convention on the Status of Refugees, and it was for that reason that the Egyptian delegation had submitted its amendment… to article 1 of the draft Convention."

At the twenty-ninth meeting, on 19 July, the Egyptian representative returned to his theme:

> "The object of the Egyptian amendment was to make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function, would automatically come within the scope of the Convention."

The Egyptian amendment was adopted at the twenty-ninth meeting. The Convention itself was adopted on 28 July 1951.

21. That is a sufficient citation of the *travaux* for the purpose of interpreting Article 1D.

RIVAL INTERPRETATIONS

22. The starting-point for the interpretation of Article 1D is, of course, the language which the drafters used: see Article 31(1) of the Vienna Convention, and *Adan v SSHD* [1999] 1 AC 293 *per* Lord Lloyd of Berwick at 305. However there is first a point to be made which does not depend on the language. Though there is some suggestion in the literature to the contrary I think it is entirely plain, from the *travaux* and the Convention's historical setting, that Article 1D is only concerned with Palestinian Arabs. As will in due course appear there is a real question *which* Palestinian Arabs; I merely say at this stage that the Article's scope does not in my judgment extend to any other groups.

23. I turn then to the language of the Article. It contains three particular phrases upon which the debate has focussed. Plainly the Article must be read as a whole (and, of course, in the context of the surrounding provisions of the Convention), but the combined effect, correctly understood, of these three elements will drive its overall meaning. For convenience I will set out the text of the Article again with the three phrases emphasised:

> "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***."

24. Subject to certain refinements, each of the expressions which I have emphasised might bear either of two senses. "At present" might mean (A) that the "persons" to whom the first sentence (and by cross-reference – "such persons" – the second sentence) refers are and are *only* those Palestinians who as at 28 July 1951, when the Convention was adopted, were registered to receive protection or assistance from

non-UNHCR United Nations bodies and were resident in the territories where such bodies operated (in this case we are concerned only with UNRWA assistance). The other possible meaning of "at present" – (B) – has been described with spectacular inelegance as "continuative", that is, it connotes a wider reference for the "persons" mentioned in the Article, so as to include any Palestinian who is receiving UNRWA assistance at the time when the application of Article 1D falls to be considered in any individual case; in particular (and perhaps *only*) when the authorities of any State Party are called on to decide whether or not a particular Palestinian should be given entry to its territory as a refugee. The effect of adopting (A) rather than (B) or *vice versa* will be at once apparent. If (A) is right, the identity of those persons excluded from the Convention by the first sentence of 1D was fixed on 28 July 1951, and in the nature of things their numbers must have been dwindled ever since. Any other person, including any other Palestinian Arab, is entirely untouched by 1D and, unless excluded by some other provision, is free to claim refuge in any State Party to the Convention by showing that he falls within Article 1A(2). If (A) is the correct sense of "at present" these appeals must fail; manifestly neither El-Ali nor Daraz were receiving UNRWA assistance (or registered with UNRWA) on 28 July 1951 and both acknowledge that they have no case in this court to the effect that they should be treated as refugees within Article 1A(2) of the Convention; each accepts that the appellate authorities have lawfully concluded that he does not harbour a well-founded fear of persecution for a Convention reason in the event of his return to the Lebanon.

25. The first meaning – (A) – of "such protection or assistance has ceased for any reason" in the second sentence of the Article contemplates the happening of a single overall event, namely the cesser or withdrawal of its agencies' support by the United Nations; as for example might have happened if it had become clear that the Palestinians could return in peace and security to their homelands, and in consequence the operations of (in this case) UNRWA were wound up; or perhaps if that were done for some other reason of international politics. The second meaning – (B) – contemplates the happening of individual or particular events: thus if an individual Palestinian leaves the territory where he is registered with UNRWA and/or receiving assistance from UNRWA, the relevant protection or assistance ceases in his case; he is accordingly and without more taken out of the scope of the first sentence of 1D and finds himself within the second. Again the application of meaning (A) over (B) or *vice versa* at once profoundly affects the Article's operation in practice. If (A) is right, application of the first sentence of the Article shuts down altogether upon a single happening, and *all* those subject to exclusion under the first sentence are then and there the beneficiaries of the second sentence (whatever its benefits are: that depends on the meaning to be attributed to the third of the three phrases). But if (B) is right, then subject to certain qualifications in the appellants' arguments to which I will come, an individual may seemingly move at will between the first and the second sentence.

26. The first meaning – (A) – of "these persons shall *ipso facto* be entitled to the benefits of this Convention" in the second sentence is that any such person merely becomes entitled to *apply* to a State Party for refugee status under Article 1A(2), and must demonstrate that Article 1A(2) applies to him. The second meaning – (B) – is that any such person shall be accepted as a refugee (by any State Party where he claims asylum) without having to demonstrate that he falls within Article 1A(2). Subject to a separate point about the effect of the non-*refoulement* clause (Article 33) he is then entitled to all the material benefits of the Convention including and in particular those

flowing from the provisions in Articles 3 ff which I have set out above at paragraph 2. The difference between the respective effects of (A) and (B) needs no elaboration.

27. It will be evident that the possible combinations that might be made of the (A) and (B) meanings for each of the three phrases will yield quite different interpretations of Article 1D taken as a whole. If I may express it schematically, there is a range of interpretations from A-A-A to B-B-B. With certain important reservations as regards the precise meanings to be attributed to the first and second phrases, the appellants urge B-B-B, and that position was essentially supported by Professor Goodwin-Gill. The Secretary of State urged A-A-A. The IAT adopted A-B-B. For reasons I shall give, I consider that the correct interpretation is A-A-B.

"AT PRESENT"

28. I find it convenient first to consider the meaning of this phrase in the first sentence of the Article, because it will in my judgment determine that sentence's scope and therefore, potentially, the scope of the whole Article. At once there is as I see it a formidable difficulty in the way of meaning (B), favoured by the appellants and UNHCR, namely that the phrase has a "continuative" effect. If in practice this means that the first sentence falls to be applied in any given case *at the time when* a State Party is called on to consider an asylum claim put forward by a Palestinian Arab, Article 1D is rendered entirely unworkable. Suppose first that the authorities of the State Party conclude that the applicant before them is at that time to be regarded as a person who is receiving UNRWA assistance. They are bound to refuse the claim, since *ex hypothesi* by force of the first sentence of the Article the Convention does not apply to him; but in that case the second sentence has nowhere to bite. Suppose next that the authorities of the relevant State Party conclude that the applicant is not receiving UNRWA assistance at the time of his application. In that case Article 1D has no application at all, the applicant is to be treated as seeking asylum under Article 1A(2), and his claim falls to be dealt with accordingly. Thus the two sentences of 1D can in substance only operate if the application of the first sentence is seen as *historic*, as referring to a past state of affairs. Then the task of the State Party to whom a Palestinian applies for refuge gives a coherent place to Article 1D. It must enquire whether the claimant is a person to whom that past state of affairs applied. If he is, then by force of the first sentence the Convention does not apply to him, unless the second sentence has effect in his case. The ambit of the second sentence, of course, depends on the meanings to be respectively attached to the two critical phrases there appearing.

29. The difficulties inherent in according a "continuative" effect to "at present" influenced the IAT, as appears from paragraph 39 of the determination which with respect I need not set out. Moreover the proposition that the words "at present" refer to 28 July 1951 is supported by a formidable body of expert academic opinion: see Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998), p.96, citing Grahl-Madsen (*The Status of Refugees in International Law*, Sijthoff-Leyden 1966) and Hathaway with both of whom he agrees on the point. But this is *not* an acceptance of meaning (A) as I have described it – viz. that the "persons" to whom the first sentence refers are and are *only* those Palestinians who as

at 28 July 1951 were receiving UNRWA assistance. Takkenberg (who has experience as an UNRWA officer in the field) says (p.98):

> "The interpretation that the words 'at present'… refer to [28 July 1951] raises the question whether that provision is *only* applicable to those Palestinian refugees who were at that time being assisted by UNRWA, excluding those registered at a later date. An affirmative answer would lead to an interpretation which is definitely not in line with the intention of the drafters of the Convention, which was to exclude *all* Palestinian refugees under UNRWA's care from its application. According to Grahl-Madsen:
>
> > 'There is reason to believe that Article 1D applies not only to those individuals who were actually receiving protection or assistance from UNRWA on 28 July 1951, but also to those individuals who became the concern of UNRWA at any later date, including those born after the signing of the Convention; or, in other words, that Article 1D applies to *persons within the mandate of UNRWA as a class or category*, and not to individual persons. If this were not so, we would get a rather artificial distinction between those who became UNRWA refugees before or on 28 July 1951, and those who became UNRWA refugees after that date.' [Takkenberg's emphasis]

30. In this context Takkenberg refers also to one of the relatively few judicial decisions in which Article 1D has been addressed, namely the judgment of the German Federal Administrative Court (the *Bundesverwaltungsgericht*) of 4 June 1991 ((Bverg I C 42.88) (1992) 4(3) IJRL 387 Case 1200. The court said (Takkenberg's translation):

> "With the words 'at present', article 1D, first sentence, ties in with the specific category of persons who at the time the 1951 Convention was adopted were already in receipt of protection or assistance from organs or agencies of the United Nations other than UNHCR, *without excluding from its application persons who only at a later point in time were able to enjoy such protection or assistance*. A different interpretation would lead to the inappropriate, apparently unintended result that persons enjoying protection or assistance after the set date, for example descendants born later, would be treated differently under the 1951 Convention, although they share the same refugee experience…" [my emphasis]

31. So this approach (which is adopted also by Hathaway) accepts that the reference of "at present" is to 28 July 1951, but does not accept that this defines the membership of the class of "persons who are at present receiving [assistance]" by reference to that date.

32. This is, in effect, the position taken on "at present" by Mr Blake QC for El-Ali, whose argument was adopted by Mr de Mello for Daraz. Mr Blake submitted (as I understood him) that while the class of persons which is the subject of the first sentence of Article 1D was originally identified by reference to 28 July 1951 – and thus as at that date was constituted by those Palestinian Arabs receiving assistance from UNRWA in the territories where UNRWA's operations were conducted – nevertheless Palestinians who later qualified for such assistance in those territories would thereby join the class. Accordingly his client was included.

33. I consider this approach to the scope of Article 1D to be erroneous. First, because of the language: the phrase "persons who are at present receiving [assistance]" no longer means what it says; it includes also persons who *later* receive such assistance. Under the suggested interpretation, "at present" does not refer to a specific date (28 July 1951 or otherwise) as setting the time when the membership of the class described in the first sentence is fixed (which is surely the ordinary sense of the words used) but merely to a start-date, a *terminus a quo*, for the identification of the class whose membership may, however, be swelled by new entrants thereafter. I think this is a very considerable distortion of the Article's language. I notice that Professor Goodwin-Gill, at paragraph 15 of his helpful supplemental submissions, acknowledges that if a "continuative" approach (including therefore the approach I am presently considering) is to be accepted the words "persons at present receiving" have to be taken as if they read "persons who were and/or are now receiving". I cannot think that is a legitimate exercise. It is to substitute what is really an entirely different provision.

34. My second reason for rejecting this approach arises from the definition of "refugee" in Article 1A(2): until 1967 a refugee within the meaning of Article 1A(2) was so only by reference to "events occurring before 1 January 1951"; thus until 1967 the Palestinians intended to be excluded from the Convention by the first sentence of Article 1D can only have been persons whose putative claims to refugee status rested on such events. Article 1D was not amended by the 1967 Protocol, and I do not think it can have been amended by implication. This is a point which was addressed by Professor Goodwin-Gill in his skeleton argument at paragraphs 69-73. There he submits (paragraph 72) that the "equal status" to be enjoyed by all refugees irrespective of the 1 January 1951 dateline, aspired to in the third preamble to the 1967 Protocol, "could not be achieved if the category of refugees falling within Article 1D were subject to the 1 January 1951 or any other dateline". But if those intended to be covered by the first sentence of 1D include Palestinians not within the original July 1951 group, then the class of "refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951" (the words of the third preamble to the 1967 Protocol) is made smaller, not bigger; to express the same point differently, the more tightly defined the group of persons to which the first sentence of 1D applies, the larger will be the numbers of those entitled to apply to States Parties under Article 1A(2).

35. Professor Goodwin-Gill also submits (paragraph 73) that "Article 1D is not based as such on 'a well-founded fear of persecution' in the sense of Article 1A(2) [but] on the events of 1948-1949 [and] the mandates of UNRWA and UNCCP…" This is true; but the effect of the first sentence of 1D is to disqualify the persons to whom it refers

from applying for refugee status under 1A(2). The persons in question must, before as well as after 1967, have been at least potential candidates for refuge under 1A(2) for Article 1D to have effect.

36. The next reason why I would reject this approach to the first sentence of 1D engages the third critical phrase in the Article, appearing in the second sentence: "these persons shall *ipso facto* be entitled to the benefits of this Convention". I am clear, as was the IAT, that by these words the second sentence confers rights upon any person to whom it applies to be accepted as a refugee without having to demonstrate that he or she falls within the Article 1A(2) definition: meaning (B). On this footing, I think it unsurprising that the class of persons caught by the first sentence should be identified and fixed by reference to a particular date. They were entitled to receive highly preferential and special treatment once the second sentence of 1D came into effect. This, it seems to me, was itself a recognition of the particular responsibility borne by the United Nations towards the Palestinian Arabs who had been displaced (see paragraph 15 above). It appears to me on the whole to be unlikely that arrangements of that kind were intended to apply to others, including others not yet born, who had not suffered that experience and had not, accordingly, been taken under the *aegis* of UNRWA at the time the Convention was signed; although of course I recognise (as I have already stated: paragraph 14) that the Convention's drafters did not envisage just how long the difficulties of the displaced Palestinians would remain unresolved.

37. Next, I should say that with respect to Takkenberg, and Professor Goodwin-Gill (see paragraph 18 of his supplemental submissions), I do not consider that the interpretation of "at present" which fixes the membership of the class being referred to as at 28 July 1951 runs counter to the *travaux*. On the contrary, I think the drafters were specifically concerned with that generation of Arabs who had been displaced from Palestine. I agree with this observation of the IAT, at paragraph 42 of the determination in *El-Ali*:

> "So far from producing a bizarre result, as has sometimes been argued, this interpretation would appear to operate fairly and efficiently. The crucial consideration is that those who were within UNRWA's mandate on 28 July 1951 were actually displaced persons. They had been compelled to leave their homes – or to remain away from them – by the Israel-Arab war of 1948-9. To that extent it was right to treat them as a group, with a common, shared experience. Hence the plural 'persons' is used in Article 1D, in contrast to Article 1A, C, E and F, each of which regulates the circumstances of an individual person."

38. Amongst alleged "bizarre results" is the suggestion, canvassed by Professor Goodwin-Gill, that this interpretation of "at present" which was adopted by the IAT and which I consider to be correct sits ill with the application of other, near-contemporaneous international instruments, in particular the UNHCR Statute and the 1954 Convention relating to the Status of Stateless Persons. The latter was adopted on 28 September 1954 and entered into force on 6 June 1960. It obliges the States Parties to confer certain rights (comparable with many of the rights provided for in

the Refugee Convention) upon stateless persons within their territory. Article 1(2)(i) is in the same terms as the first sentence of 1D, with the addition at the end of the words "so long as they are receiving such protection or assistance". Professor Goodwin-Gill's point is that applying the same approach to the interpretation of the two measures gives the 28 July 1951 defining date for 1D of the Refugee Convention and the 28 September 1954 defining date for 1(2)(i) of the Stateless Persons Convention. But I do not think that is necessarily bizarre. Let it be accepted for the purposes of this argument that, at least after the end of the British mandate, the displaced Palestinian Arabs are generally to be regarded as stateless (a condition whose meaning is itself not without some sophistication: see *Desai* 88 FTR 161 in the Federal Court of Canada): the position is succinctly described at paragraph 27 of the decision of the Federal Court of Australia in *Quiader* [2001] FCA 1458. Still the classes of persons to whom these two Conventions apply, though overlapping, are not the same. There is thus no necessary want of reason in the difference of dates.

39. The UNHCR Statute is rather different. The Office of the High Commissioner came into being on 1 January 1951; the Statute had been adopted by the General Assembly on 14 December 1950, as I have indicated in paragraph 17, where I have set out an abbreviated account of some of the effects of Chapter I and Chapter II. Article 6(7)(c) reads as follows:

> "Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:…
>
> (c) who continues to receive from other organs or agencies of the United Nations protection or assistance…"

Professor Goodwin-Gill suggests that this wording bears a "continuative" meaning. Thus, he submits, on the interpretation of 1D of the Convention which I favour, the category of persons receiving protection or assistance from UN organs other than UNHCR has to be accorded yet another meaning – the third – in the UNHCR Statute. Even if this is right, the functions of the Commissioner under the Statute, though plainly closely related, are not identical to the functions of the Convention itself. However it seems to me that the words used do not suggest that the class itself changes over time.

40. I have briefly described (paragraph 12) the enlargement since 1967 of the class or classes of persons eligible to receive, or in fact receiving, assistance from UNRWA. But I do not consider that this affects the interpretation of Article 1D. First, as I think is accepted on all hands, resolutions of the General Assembly such as brought about the expansion of UNRWA's mandate are not legally capable of effecting an amendment to the Convention. But Professor Goodwin-Gill argues (supplementary submissions, paragraphs 7–9) that these resolutions constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within Article 31(3) of the Vienna Convention, by force of which, therefore, they may be taken into account in the Refugee Convention's interpretation. However these resolutions are not in my judgment any evidence of "practice in the application of the treaty". The enlargement of UNRWA's mandate in 1967 and

thereafter is not on its face an "application" of the first sentence of 1D; and there is no reason why the two things should march together.

41. I recognise that it is a premise of the reasoning of French J in the Federal Court of Australia in *Quiader*, to which I have referred in passing, that the ambit of the first sentence of 1D is potentially wider than I would have it, since otherwise there could have been no question but that the respondent in that case, who was born in Damascus in 1963, would have enjoyed the right to apply to the Australian authorities under Article 1A(2). In fact the court arrived at that result by a somewhat longer route, holding that (paragraph 33):

> "… Art 1(D) does not apply, to exclude from the protection of the Convention, a Palestinian, entitled to protection and assistance from UNRWA, who is nevertheless at risk of persecution if returned to his home region notwithstanding that it is within the territorial competence of UNRWA."

42. With great respect I do not think that as a general proposition this is right. But if it is not, the seeming harshness of the result is all but extinguished by my overall conclusion on this part of the case: the IAT in my view correctly interpreted the first sentence of Article 1D of the Convention, whose application is thus limited to those receiving assistance from UNRWA as at 28 July 1951. I should say that something was sought to be made in the course of argument of the difference between "protection" and "assistance"; but it seems to me beyond argument that those persons registered with or receiving assistance from UNRWA in the territories of its operation on 28 July 1951, even if they were not the beneficiaries of any other distinct protection, must have fallen within the first sentence of 1D. I do not consider that my conclusions produce bizarre results. When read with the generous interpretation of "these persons shall *ipso facto* be entitled to the benefits of this Convention" in the second sentence, which I also favour, in my judgment this construction yields a proper balance between the special claims of those Palestinians who were actually displaced in 1948-49 and the rights of other persons, including Palestinians not members of the original group, to claim protection under Article 1A(2) of the Convention. I consider this interpretation to be promoted by the language of the Article, the Article's context, and the historical setting and the *travaux préparatoires* of the Convention. I acknowledge that it is at odds with the views of Carr J in the Federal Court of Australia in *Al-Khateeb* [2002] FCA 7, paragraph 49, but with great respect I cannot find in the learned judge's reasoning in that case anything to surmount the considerations which have led me to the view I have expressed.

43. If my Lords were to agree with this view, that would conclude these appeals in favour of the Secretary of State, since neither appellant was on this footing within the class of persons referred to in the first sentence of 1D and is not therefore a candidate to claim the benefit of the second sentence, whatever the latter's scope; and as I have made clear there is now no challenge to the dismissal of their substantive claims under Article 1A(2). However I should deal, albeit more briefly, with the meaning to be attributed to the second and third critical phrases in Article 1D, both appearing in the second sentence. I have already indicated my acceptance that the more generous

sense – meaning (B) – should be accorded to the third phrase, "these persons shall *ipso facto*…"

"SUCH PROTECTION OR ASSISTANCE HAS CEASED FOR ANY REASON"

44. Judging from the summary given at paragraph 10 of the determination (which I have set out above at paragraph 7), El-Ali's position before the IAT may have gone so far as to suggest that a Palestinian registered with UNRWA who left the territory of his residence and registration for any reason whatever thereby moved, as it were, from the first to the second sentence of 1D. But, subject only to any practical constraints upon his ability to travel from place to place, this would put the applicability of the 1D regime entirely at the choice of the individual Palestinian. I am clear that must be wrong, and in formulating his case for this court counsel for El-Ali eschewed so extreme a stance. Paragraph 14 of the skeleton argument prepared by junior counsel asserts:

> "The appellant submits that Article 1D is a contingent inclusion clause. It defines refugees on the contingency that protection or assistance *in fact or in the particular case* ceases to be provided from... UNRWA, or cannot be accessed. When that contingency occurs, claimants are without more entitled to be treated as refugees. However, *the Appellant no longer submits that the act of leaving for reasons of personal convenience itself* means that protection or assistance has ceased. The Appellant submits that for the second sentence in Article 1D to be engaged, it is enough that there is either:
>
> 1) an inability to access UNRWA protection, or
>
> 2) a protection related reason rather than personal convenience for the individual's departure."

Then in paragraph 44 of the skeleton it is asserted (I summarise) that El-Ali's treatment in Lebanon was sufficient to justify a finding that there was a "protection related reason" for his departure from that country.

45. While this qualification introduces some constraint upon the circumstances in which a Palestinian may at his own choice move, as I have put it, from the first to the second sentence of 1D, it does so at the price of introducing a test or criterion which is nowhere to be found in the Article. It is true that the phrase "for reasons other than personal convenience" appears in Article 6A(ii) of the UNHCR Statute as a qualification of the definition there set out of the class of persons to which the competence of the High Commissioner is made to extend. But there is no warrant for reading an equivalent qualification into Article 1D.

46. Mr Blake sought to pray in aid the learning on what is called, in the argot of refugee law, the "internal flight alternative" which arises in some cases in the assessment of

an Article 1A(2) claim: where it is accepted that the applicant may be persecuted for a Convention reason in some parts of his home State, but it is said that it is reasonable for him to take refuge in another part where on the evidence he would be safe. He cited *Robinson* [1998] QB 929, *Karanakaran* [2000] INLR 122 and *Gardi* [2002] EWCA Civ 750. However in my judgment it is wholly unreal to suppose that the question – sometimes a difficult factual question – engaged in consideration of the internal flight alternative, namely whether in the particular circumstances it would be "unduly harsh" (see eg the headnote in *Karanakaran*) to expect an asylum claimant to settle in this or that part of his home State, has anything whatever to do with the operation of the second sentence of Article 1D.

47. Here the language of the provision, and the *travaux*, point in my judgment conclusively to a clear and particular result. It was the drafters' intention, effected in the words used, that the second sentence would bite on the happening of a particular overall event: the cessation of UNRWA assistance. They did not contemplate that Article 1D would apply piecemeal and haphazardly, its scope marked off by reference to the persons who at any given moment were or were not within the UNRWA territories receiving assistance – whether or not in any given case an individual might have a good reason (a "protection related reason") for leaving the territory where he is registered.

48. I have considered the possible plight of a Palestinian within the first sentence of 1D who leaves the territory where he is registered with UNRWA but then finds himself barred from returning to it. Is he still excluded from the Convention's scope by force of the first sentence? Such a potential state of affairs to my mind demonstrates the need, elementary enough, to construe 1D as a whole. If as I would hold the class of persons referred to in the first sentence is limited to those receiving UNRWA assistance on 28 July 1951, this possible scenario is far more apparent than real, and would not, in my judgment, constitute sufficient justification for an interpretation of "such protection or assistance has ceased for any reason" – based on the movements of individuals and not the overall cessation of UNRWA activity – which for reasons I have given cannot be accepted. That said, I would recognise the force of a limited alternative view, though I would not myself adopt it, to the effect that a person who could demonstrate that he was actually *prevented*, by the relevant authorities, from returning to the State where he is UNRWA assisted has in truth passed from the first to the second sentence of Article 1D. That would be an exceptional circumstance. On my approach to "at present" and on the facts of these cases, it is not necessary to decide whether it may be right.

"THESE PERSONS SHALL* IPSO FACTO *BE ENTITLED TO THE BENEFITS OF THE CONVENTION"

49. I have already given my view that these words mean that any person to whom they apply is to be treated as a refugee within Article 1A(2), and therefore entitled to the benefits which the Convention requires to be accorded to refugees, without having to demonstrate a good Article 1A(2) case on his individual facts. The IAT took the same view. In my judgment this result is inescapable, given the language which the drafters chose to use. The phrase "*ipso facto*" in the English text is mirrored in the

French by "*de plein droit*", and it is suggested that this points even more strongly than does the Latinism to an intention, once the second sentence bites, to confer on all its beneficiaries the substantive rights which the Convention guarantees automatically, with nothing else to be established.

50. So great a parcel of rights would not likely be conferred, I think, unless the class of its recipients were clear and certain, and this is given by the interpretations I favour both of "at present" and "such protection or assistance has ceased for any reason". At the end, each of these interpretations is in constellation with the others; each is, of course, merely a dimension of the true interpretation of the whole provision contained in Article 1D. I consider that the approach I have put forward best reflects the Convention's original and historic purposes and if, like the European Convention on Human Rights, it should be regarded as a living instrument, then this approach also represents a rational and humane response to today's Palestinian asylum-seekers.

POSTSCRIPT

51. I have not so far referred to a distinct issue canvassed before us, namely whether, even if the appellants were right as to the construction of Article 1D, nevertheless it would be open to the Secretary of State lawfully to remove them to the Lebanon because on the appellate authorities' findings neither appellant entertains a well-founded fear of persecution for a Convention reason in the event of his being returned. The Secretary of State through Mr Eicke would wish to contend that in those circumstances, even if on the true construction of 1D these appellants have the benefit of the second sentence of the Article so that they have to be accepted a refugees and admitted to the Convention's benefits, still it would be open to him to remove them because (since they entertain no well-founded fear) to do so would not violate the non-*refoulement* provision contained in Article 33 of the Convention. Since in my view Article 1D has never touched either appellant, I do not find it necessary to deal with this question.

52. I would dismiss these appeals.

Lord Justice May:

53. I agree.

Lord Phillips MR :

54. I agree that these appeals should be dismissed for the reasons given by Laws LJ. I propose to set out shortly, in my own words, my reasons for sharing his conclusions, without repeating his detailed and elegant exposition of the relevant facts, background material and jurisprudence.

55. The issue that arises on these appeals is whether Article 1D of the 1951 Convention has any application to two men born of Palestinian parents over 20 years after the Convention was agreed, one in Kuwait and the other in the Lebanon. Each was registered with and enjoyed the assistance of UNRWA in the Lebanon, but each has come to this country contending, to put it at its lowest, that he could not reasonably be expected to continue to live in the Lebanon. Each claims that he is entitled to be treated as a refugee by virtue of the provisions of Article 1D.

56. Article 1D provides:

> "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention"

'**persons who are at present receiving…protection or assistance'**

57. Article 1D can only apply to the appellants if they fall within the category of persons described by these words. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties requires us to interpret these words in accordance with their ordinary meaning, in their context and having regard to the object and purpose of the Convention.

Ordinary meaning

58. The ordinary meaning of the words 'at present', when used in an agreement, whether concluded by individuals or by High Contracting Parties, is 'at the time of the conclusion of this agreement'. Not only is that the ordinary meaning of those words, but, having regard to their immediate context, I find it impossible to give them any other meaning. This is because, by Article 1D, the Member States were making an agreement both about the present, in the first sentence and about the future in the second sentence. The first sentence is plainly designed to be dealing with the state of affairs persisting at the time that the Convention was concluded.

Context and purpose

59. When the broader context in which the Convention was concluded and the object of the Convention are considered they provide compelling support for the conclusion that the words in the phrase under consideration are to be given their ordinary meaning.

60. The Convention was concluded at a time when the Second World War and the circumstances leading up to it had resulted in the displacement of many refugees from their homelands. The Convention was concerned with securing humanitarian treatment for those who had already become refugees at the time that the Convention was concluded. Thus the general definition of 'refugee' in Article 1(2) was a person who '*as a result of events occurring before 1 January 1951*… is outside the country of his nationality'. Inasmuch as Article 1D was making an exception from the application of the Convention, that exception was only relevant to persons who were outside the country of their nationality as a result of events that had occurred before 1 January 1951.

61. Although the definition of the 'persons' subject to the application of Article 1D is non-specific, the background facts, as illuminated by the travaux préparatoires make it quite clear that there was, in existence in 1951, a category of persons for whom Article 1D was tailor made. These were the Palestinian Arabs who had been displaced from their homeland as a result of the events which immediately followed the termination of the British mandate on 14 May 1948. That group of persons was receiving protection or assistance from 'organisations or agencies of the United Nations other than the UNHCR', namely UNRWA and UNCCP and it has never been suggested that there were any other persons who, at the time, satisfied those criteria.

62. Equally, the reference in the second sentence of Article 1D to the 'position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly' can only sensibly refer to a series of resolutions that had, by the time that the Convention was concluded, been passed in relation to the resettlement of the displaced Palestinian Arabs.

63. How is it suggested that an alternative meaning can be given to the phrase under consideration, and what reasons are advanced for according it such a meaning? Laws LJ deals with this at paragraphs 29 to 32 of his judgment. The suggestion is that 'persons who are at present receiving… protection or assistance' should be interpreted as ' persons who are now or in the future become members of that category of persons who are at present receiving protection or assistance'. Plainly, as Laws LJ observes, this involves a considerable distortion of the ordinary meaning of the words used. I do not, however, think that this is beyond the bounds of what can be achieved by the type of purposive interpretation that is applied to international conventions. What reason is advanced for distorting the ordinary meaning of the words?

64. It is said by Grahl-Madsen that the distorted meaning is required because otherwise there will be 'a rather artificial distinction between those who became refugees before or on 28 July 1951 and those who became refugees after that date' and the Bundesverwaltungsgericht has described this as an 'inappropriate, apparently unintended result' - see Laws LJ at paragraphs 29 and 30.

65. I have no difficulty in accepting that this result was unintended by the States who were party to the Convention. The reason is that they believed that they were dealing with a short-term situation that would reasonably soon be resolved. They did not

anticipate that, half a century later, there would be second or third generations of Palestinian Arabs, living outside the territories from which their parents or grandparents had been displaced, and enjoying the assistance of UNRWA. Nor did they anticipate that there would be further Palestinian Arabs displaced as a result of the war in June 1967 and subsequent hostilities.

66. What I do not accept is that, had the parties to the Convention envisaged what was to come, they would have agreed that the regime provided for by Article 1D would apply indefinitely to all displaced or stateless Palestinian Arabs who might find themselves receiving assistance from UNRWA. It is possible that they might have made such an agreement, but it is equally possible that they would not have been prepared to enter into so uncertain a commitment. At the end of the day, however, I do not believe that these considerations are relevant. What matters is what the parties to the Convention in fact agreed in 1951, not what they might have agreed had they envisaged a state of affairs which they did not foresee at the time.

67. I agree with Laws L.J. that the 1967 Protocol had no impact on Article 1D, for the reasons that he gives.

68. For these reasons I conclude that Article 1D has no application to either of the appellants. If I am correct, this renders academic the other issues that arise on the interpretation of the Article. I shall, however, deal with them briefly.

'When such protection or assistance has ceased for any reason'

69. Do these words apply where an individual, of his own initiative, leaves the territory where UNRWA is providing the assistance, or are they only applicable if and when UNRWA withdraws the assistance that it is providing? Here, I believe, there is ambiguity, but it is resolved when the objects of Article 1D and the travaux préparatoires are considered.

70. One of the objects of Article 1D was to prevent a 'diaspora' of displaced Palestinian Arabs, so that resettlement in the lands from which they had been displaced would more readily be achieved. Another motive was to provide some protection for the High Contracting Parties against a potential flood of asylum applications from displaced Palestinian Arabs. Both these objects would be liable to be defeated if the second sentence of Article 1D were so construed as to enable individuals to avoid the effect of the first sentence of the Article by not availing themselves of the assistance on offer by UNRWA.

71. In addition to the above considerations, when the travaux préparatoires to which Laws LJ has referred in paragraphs 19 and 20 of his judgment are considered, it is clear that the second sentence of the Article was intended to cater for the situation should the organs of the United Nations cease to provide protection and assistance.

72. For these reasons I share the conclusion of Laws LJ that the second sentence of Article 1D does not apply to individuals who, of their own initiative, cease to avail themselves of assistance provided by UNRWA, notwithstanding that UNRWA continues to offer such assistance.

'shall ipso facto be entitled to the benefits of the Convention'

73. Does this mean 'shall be entitled to be treated as refugees' or 'shall be entitled to the benefits of the Convention *provided that* they can show that they are refugees within its terms'? The ordinary meaning of the words is undoubtedly the former. The Convention provides for benefits only for those who are refugees, as therein defined. If one is not a refugee, the Convention provides one with no benefits. Anyone entitled to the benefits of the Convention is, ex hypothesi, entitled to be treated as a refugee. The addition of the words 'ipso facto' or, in French '*de plein droit',* put the matter beyond doubt.

74. There is nothing in the context or the surrounding circumstances that makes it necessary to give the phrase under consideration other than its normal meaning. Article 1D was designed to deal with those who might otherwise be entitled to the benefits of the Convention. Under the first sentence these persons were to be deprived of those benefits for so long as the United Nations was providing protection or assistance. I can see nothing irrational, or contrary to the object of the Convention in general and Article 1D in particular, in the parties agreeing that the defined category of the displaced Palestinian Arabs who were, at the time, receiving assistance from UNRWA should be treated as refugees should that assistance be withdrawn before they were resettled.

75. For these reasons I concur in Laws LJ's interpretation of this part of Article 1D.

76. It follows that these appeals must be dismissed.

Order: Appeals dismissed. Leave to appeal to the House of Lords refused. Public funding order of both appellants costs. No order as to costs.

(Order does not form part of the approved judgment).