



### **CJEU - El Kott and Others, case C-364/11**

The case concerns the interpretation and scope of Article 12(1)(a) of the 2004 Qualification Directive (equivalent to Article 1D of the Refugee Convention). The CJEU held that persons who have registered with UNRWA or received UNRWA's assistance will not be excluded from refugee status if that assistance has ceased for reasons beyond their control and independent of their volition. However, mere absence from UNRWA's area of operation or a voluntary decision to leave it cannot be regarded as cessation of assistance. A person will be considered to have been forced to leave UNRWA's area of operation where their personal safety was at serious risk and it was impossible for UNRWA to guarantee their living conditions. Where UNRWA's assistance has ceased for reasons beyond the control of the applicant, and other exclusion clauses are not applicable, the applicant is automatically entitled to refugee status, but they are required to have made an application for refugee status.

**Case name (in original language) :** Mostafa Abed El Karem El Kott and Others v Bevéndorlási és Állampolgársági Hivatal

**Case number:** C-364/11

**Citation:** CJEU, El Kott and Others (C-364/11), 19 December 2012

**Date of decision:** 19/12/2012

**State:** Hungary

**Court / UN Treaty Body:** Court of Justice of the European Union

**Language(s) the decision is available in:** Estonian, Finnish, Greek, Italian; Maltese, Latvian, Lithuanian, Maltese, Polish, Slovenian, Bulgarian, Croatian, Czech, Danish, Dutch, English, French, German, Hungarian, Italian, Portuguese, Romanian, Spanish, Swedish

**Applicant's country of birth:** Palestine

**Applicant's country of residence:** Hungary

**Legal instruments:** European Union law, Other international law

**Key aspects:** Exclusion grounds, Protection, Refugee status determination

**Relevant Legislative Provisions:**

## *International Law*

- Convention relating to the Status of Refugees
- Geneva Convention, Articles 1(A)(2) and 1(D)

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 [HCR] protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.”

- United Nations General Assembly resolution No 194 (III) (UN Conciliation Commission for Palestine)
- United Nations General Assembly resolution No 302 (IV) (UN Relief and Works Agency for Palestine Refugees in the Near East)
- United Nations General Assembly resolution No 2252 (ES-V), § 6
- United Nations General Assembly resolution No 66/72, §§ 1 – 3

## *EU Legislation*

- Directive 2004/83, recital 3, 10, 16 and 17, Articles 1, 2, 4, 11, 12, 13, and 21(1)

Article 12(a) provides: “A third-country national or a stateless person is excluded from being a refugee if: (a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees (HCR). When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive.”

- Directive 2005/85/EC, Article 2(c)

Article 2(c) provides: “applicant’ or ‘applicant for asylum’ means a third country national or stateless person who has made an application for asylum in respect of

which a final decision has not yet been taken.”

- Treaty on the Functioning of the European Union, Article 6(1)
- Charter of Fundamental Rights, Articles 1 and 18

### *Hungarian Law*

- Law No LXXX of 2007 on the right of asylum, Article 8(1)

### **Facts**

All of the applicants are stateless persons of Palestinian origin:

#### *Mr Abed El Karem El Kott*

Mr El Kott lived in difficult material circumstances at the Ein El-Hilweh United Nations Relief and Works Agency (“UNRWA”) refugee camp in Lebanon. While at the refugee camp his house burned down and he was threatened. Consequently, he left the camp and fled from Lebanon to Hungary. In Hungary the Office for Immigration and Citizenship (“BAH”) did not recognise him as a refugee, however they ordered that he should not be returned to Lebanon, respecting the principle of *non-refoulement*. Mr El Kott appealed this refusal to recognise him as a refugee.

#### *Mr A Radi*

Mr Radi lived in the the Nahr el Bared UNRWA refugee camp in Lebanon. His home was destroyed as a result of clashes between the Lebanese army and the Islamic Fatah in 2007. Since there was no space to accommodate Mr Radi and his family at a nearby camp the family stayed with an acquaintance in Tripoli. While there soldiers insulted and mistreated the family by arresting them arbitrarily, torturing and humiliating them.

Mr Radi left Lebanon and ended up in Hungary. The Hungarian BAH did not recognize Mr Radi as a refugee, however they ordered that he should not be returned to Lebanon, respecting the principle of *non-refoulement*. Mr Radi appealed this refusal to recognise him as a refugee.

#### *Mr Kamal Ismail*

Mr Ismail lived with his family at the Ein El-Hilweh UNRWA refugee camp in Lebanon. He stated that he was threatened with death and suspected as an 'enemy agent' because of his refusal to allow extremists to use his roof during armed clashes. Unable to protect himself, he left with his family to Beirut, where they also did not feel safe, and ended up in Hungary.

In Hungary Mr Ismail produced a certificate from the Palestinian People's Committee to the effect that he and his family had had to leave the Ein El-Hilweh camp for safety reasons, and also provided photographs of their house after it had been vandalised. Nevertheless, the BAH did not recognize Ismail or his family as refugees, instead they granted him and his family members subsidiary protection. Mr Ismail appealed this refusal to recognise him as a refugee.

### **Legal arguments by the applicant**

The applicants in the main proceedings sought recognition as refugees on the basis of the second subparagraph of Art. 1D of the Geneva Convention to which the second sentence of Art. 12(1)(a) Qualification Directive refers.

They argued that Article 1D of the Geneva Convention and Article 12(1)(a) of Directive 2004/83 automatically granted them refugee status when they were forced to leave UNRWA's area of operations. According to the applicants, as they are no longer receiving aid from the UNRWA they qualify as persons who "shall *ipso facto* be entitled to the benefits of this Convention," meaning that they should automatically be granted refugee status (Geneva Convention, Article 1D).

### **Legal arguments by the opposing party**

The respondents argue that the BAH treated the applications for asylum within the meaning of Article 2(c) of Directive 2005/85, and carried out its examination of refugee status in accordance with the procedure laid down in that directive. Under these procedures the BAH determined that the applicants did not satisfy the requirements for recognition as refugees.

Moreover, while acknowledging that the applicants may *ipso facto* be entitled to the benefits of Directive 2004/83, the respondents argue that an entitlement does not mean that such persons automatically qualify as refugees. Instead, they claim the words *ipso facto* mean that the individual concerned would fall within the scope of the directive giving rise to the possibility that they may be recognised as a refugee.

### **Decision & Reasoning**

The referring court asked two interpretive questions: First, in light of the second sentence of Article 12(1)(a) of Directive 2004/83 (“Qualification Directive”) the CJEU needs to explain whether the Qualification Directive “must be interpreted as meaning that the fact that a person may ‘be entitled to the benefits of [the] Directive’ means that the person concerned is automatically entitled to refugee status or simply that such a person falls within the scope *ratione personae* of the directive” (§69). And secondly, “whether the second sentence... is to be interpreted as meaning that the cessation of protection or assistance on the part of a United Nations organ or agency other than the HCR ‘for any reason’ concerns the situation of a person who has left that organ’s or agency’s area of operations in circumstances such as those characterising the departure of each of the applicants in the main proceedings” (§45). The referring court labelled the first issue Question 1 and the second issue Question 2. The CJEU addressed Question 2 first.

Before beginning its analysis, the CJEU noted that the Geneva Convention “constitutes the cornerstone of the international legal regime for the protection of refugees” (§42). For that reason, “Directive 2004/83 must... be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU” (§43).

### *Question 2: The Cessation of Assistance*

Accordingly, the CJEU began by stating that the fact that the Geneva Convention “simply excludes from the scope of the convention persons who ‘are at present receiving’ protection or assistance from such an organ or agency of the United Nations cannot be construed as meaning that mere absence or voluntary departure from UNRWA’s area of operations would be sufficient to end the exclusion from refugee status laid down in that provision” (§49). Otherwise, “an applicant for asylum... who submitted an application in the territory of a Member State and was therefore physically absent from UNRWA’s area of operations would never be caught by the ground for exclusion from refugee status ... depriving that ground for exclusion of any practical effect” (§50). Moreover, interpreting the Qualification Directive in this manner was held to run counter to Article 1D of the Geneva Convention, which attempts to exclude from the convention all persons already receiving UN assistance (§51).

As a result, the first sentence of the Qualification Directive should be interpreted to mean “that the ground for excluding a person from being a refugee laid down in that provision covers not only persons who are currently availing themselves of assistance provided by UNRWA but also those such as the applicants in the main proceedings who in fact availed themselves of such assistance shortly before submitting an application for asylum in a Member State” (§52). However, this exclusion from refugee status only applies if “assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) of the directive” (§52).

From the text of Article 12(1)(a) it is clear that it is “primarily the actual assistance provided by UNRWA and not the existence of that agency itself which must cease” (§57). Where “the person concerned has been forced to leave for reasons unconnected with that person’s will, such a situation may lead to a finding that the assistance from which that person benefited has ceased...” (§59).

The CJEU found that it is for “the competent national authorities and courts to ascertain whether the departure of the person concerned may be justified by reasons beyond his control and independent of his volition which force him to leave the area in question and thus prevent him from receiving UNRWA assistance” (§61). Offering guidance on this point, the CJEU reminds national courts of the objective of Article 1D of the Geneva Convention, “namely to ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled...” (§62).

In light of this guidance the CJEU determined that the departure from UNRWA by a Palestinian refugee should be regarded as forced when there are serious risks to their personal safety and where it is impossible for the UNRWA to actualize the guarantees promoted in their mission. Additionally, the CJEU states that the competent national authorities must undertake this determination on an individual basis, considering all the relevant factors (§64).

### *Question 1: The Ipso Facto Entitlement*

Having determined who should have access to the benefits of the Qualification Directive, the CJEU then defines what these benefits are. First, the CJEU distinguished the Qualification Directive from the Geneva Convention by the fact that the Qualification Directive deals with both refugee and subsidiary protection status, whereas the Geneva Convention only addresses refugee status. As a result,

“the words ‘entitled to the benefits of [the] Directive’ in the second sentence of Article 12(1)(a) of the directive must be understood as referring only to refugee status, since that provision was based on Article 1D of the Geneva Convention and the directive must be interpreted in the light of that provision” (§67).

Both the second sentence of Article 12(1)(a) and Article 1D of the Geneva Convention provide that applicable individuals ‘shall *ipso facto* be entitled to the benefits’ of the applicable directive or Convention. Accordingly, the CJEU determined that this statement must be referencing something more than just the right to apply for refugee status on the basis of Article 2(c) of the Qualification Directive, an option already available to a third-country national or stateless person in the territory of a Member State.

For one, the language would be “superfluous and ineffective if its only purpose was to point out that the persons who are no longer excluded from refugee status by virtue of the first sentence of that provision may rely on the directive to ensure that their application for refugee status will be considered in accordance with Article 2(c) of the directive” (§73). Furthermore, the CJEU draws a distinction between individuals who have been settled and those where, “as is the case in the main proceedings, the position of the persons concerned has not been settled... [the] directive’ necessarily has wider implications than those arising from the simple fact that such persons are not excluded from the possibility of qualifying as refugees if they satisfy the requirements laid down in Article 2(c)” (§74).

The CJEU held that the fact that while an individual may be *ipso facto* entitled to the benefits of the Qualification Directive, this does not entail an unconditional right to refugee status. Consequently, an application for refugee status still needs to be submitted, with the competent authorities carrying out an examination of the asylum application. The examination should determine whether “the applicant actually sought assistance from UNRWA..., that the assistance has ceased and... that the applicant is not caught by any of the grounds for exclusion.” ( 76). When these conditions are met, that is to say when Question 2 is satisfied, the applicant should automatically be granted refugee status (§81).

## **Decision documents**

[CJEU, El Kott and Others \(C-364.11\), 19 December 2012.pdf](#)

## **Outcome**

With respect to Question 2 the CJEU held that persons who cease to receive assistance from a non-HCR UN organisation for a reason beyond their control may be entitled to the benefits of Directive 2004/83. It is for the competent national authorities of Member States to determine whether an individual asylum application falls within this category. However, asylum seekers fleeing protection because of serious threats to their personal safety when the relevant UN agency could not live up to its mission always will.

Regarding Question 1, when the competent authorities of a Member State have determined that protection has ceased, the *ipso facto* entitlement requires Member State to recognise and grant the individual refugee status automatically, so long as they are not caught by the exceptions to Directive 2004/83.

### **Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)**

UNHCR written intervention regarding the interpretation of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive.

### **Caselaw cited**

- Case C-31/09 *Bolbol* [2010] ECR I-5539
- Joined Cases C-71/11 and C-99/11 *Y and Z* [2012] ECR
- Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493

### **Third party interventions**

UNHCR written intervention regarding the interpretation of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive.

### **Third party interventions (docs)**

[El Kott - UNHCR Observations.pdf](#)