

Bolbol v. Bevándorlási és Állampolgársági Hivatal

JUDGMENT OF THE COURT (Grand Chamber)
17 June 2010 (*)

(Directive 2004/83/EC – Minimum standards for the qualification and status of third country nationals or stateless persons as refugees – Stateless person of Palestinian origin who has not sought protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – Application for refugee status – Refusal based on a failure to meet the conditions laid down in Article 1A of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 – Right of that stateless person to be recognised as a refugee on the basis of the second sentence of Article 12(1)(a) of Directive 2004/83)

In Case C-31/09,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Fovárosi Bíróság (Hungary), made by decision of 15 December 2008, received at the Court on 26 January 2009, in the proceedings

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, Presidents of Chambers, A. Rosas, P. Kuris, J.J. Kasel and M. Safjan, Judges, Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2009,

after considering the observations submitted on behalf of:

- Ms Bolbol, by G. Gyozo, ügyvéd,
- the Hungarian Government, by R. Somssich, M. Fehér and K. Borvölgyi, acting as Agents,
- the Belgian Government, by C. Pochet and T. Materne, acting as Agents,
- the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,
- the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the United Kingdom Government, by I. Rao, acting as Agent,
- the Commission of the European Communities, by B. Simon and M. Condou-Durande, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need

international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Ms Bolbol, a stateless person of Palestinian origin, and Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship; 'BAH') concerning the refusal of BAH to grant Ms Bolbol's application for refugee status.

Legal context

International law

Convention relating to the Status of Refugees

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

4 The first subparagraph of Article 1A(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who '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'.

5 Article 1D of the Geneva Convention 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.'

United Nations Conciliation Commission for Palestine

6 The United Nations Conciliation Commission for Palestine (UNCCP) was established by United Nations General Assembly Resolution No 194 (III) of 11 December 1948. Under paragraph 11 of that resolution, the United Nations General Assembly:

'*Resolves* that the refugees wishing to return to their homes in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the [UNCCP] to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.'

United Nations Relief and Works Agency for Palestine Refugees in the Near East

7 United Nations General Assembly Resolution No 302 (IV) of 8 December 1949 established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Its mandate has been regularly renewed, and its current mandate expires on 30 June 2011. UNRWA's area of operation covers the Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.

8 Under paragraph 20 of Resolution No 302 (IV), the United Nations General Assembly:

'Directs [UNRWA] to consult with [the 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.'

9 In accordance with paragraph 6 of United Nations General Assembly Resolution No 2252 (ES'V) of 4 July 1967, the General Assembly:

'Endorses ... the efforts of the Commissioner-General of [UNRWA] to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities.'

10 Under paragraphs 1 to 3 of United Nations General Assembly Resolution No 63/91 of 5 December 2008, the General Assembly:

'1. *Notes with regret* that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern and the Palestine refugees continue to require assistance to meet basic health, education and living needs;

2. *Also notes with regret* that the [UNCCP] has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III), and reiterates its request to the [UNCCP] to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly as appropriate, but no later than 1 September 2009;

3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services for the well-being and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees'.

The United Nations High Commissioner for Refugees

11 Under paragraph 7(c) of the annex to United Nations General Assembly Resolution No 428 (V), of 14 December 1950, on the Statute of the Office of the High Commissioner for Refugees (UNHRC), the mandate of the High Commissioner for Refugees, as defined in that statute, '... shall not extend to a person ... who continues to receive from other organs or agencies of the United Nations protection or assistance'.

European Union legislation

12 Recitals 2 and 3 in the preamble to the Directive state:

'(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention ..., thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention ... provide[s] the cornerstone of the international legal regime for the protection of refugees.'

13 Recital 6 in the preamble to the Directive states:

The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

14 Under Recital 10 in the preamble to the Directive:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

15 Recitals 16 and 17 of the preamble to the Directive state:

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

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

16 Pursuant to Article 2(c) to (e) of the Directive, for the purposes of that directive:

(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

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

17 Articles 13 and 18 of the Directive provide that the Member States are to grant refugee status or subsidiary protection status to third country nationals who qualify as refugees in accordance with Chapters II and III or Chapters II and V of that directive respectively.

18 Chapter III of the Directive on qualification for being a refugee includes, under the heading 'Exclusion', Article 12(1)(a) which provides:

'A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

19 Article 13 of the Directive provides:

'Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.'

20 Chapter VII of the Directive, entitled 'Content of International Protection', includes Article 21(1) which provides:

'Member States shall respect the principle of non-refoulement in accordance with their international obligations.'

21 In accordance with Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

22 Article 3(1) of Law No CXXXIX of 1997 on asylum (*Magyar Közlöny* 1997/112 (XII.15.); 'the Law on Asylum'), provides:

'Subject to the exception provided for in Article 4, the refugee authority shall, upon application, recognise as a refugee a foreigner who proves or provides prima facie evidence that the provisions of the Geneva Convention apply to him under Article 1A and B(1)(b) of the Geneva Convention, and Article 1(2) and (3) of the Protocol.'

23 Pursuant to Article 38(2) of the Law on Asylum, in a decision refusing an application for asylum, the competent authority is to confirm whether there is a prohibition against refoulement and/or expulsion.

24 Article 51(1) of Law No II of 2007 on the Entry and Stay of third country nationals (a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény, *Magyar Közlöny* 2007/1 (I.5.)) provides:

'Third country nationals may not be returned or expelled to the territory of a country that fails to satisfy the criterion of safe country of origin or safe third country in respect of the person in question, in particular where the third country national is likely to be persecuted for reasons of race, religion, nationality or membership of a particular social group, nor to the territory or border of a country where there is good reason to believe that the expelled third country national is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 It is clear from the order for reference that Ms Bolbol, after having left the Gaza Strip in the company of her husband, arrived in Hungary with a visa on 10 January 2007. There, she subsequently obtained a residence permit from the immigration authority.

26 On 21 June 2007, in case her residence permit was not extended, she submitted an application for asylum to BAH, citing the unsafe situation in the Gaza Strip caused by the daily clashes between Fatah and Hamas. Ms Bolbol based her application on the second subparagraph of Article 1D of the Geneva Convention, pointing out that she was a Palestinian residing outside UNRWA's area of operations. Of her family members, only her father remained in the Gaza Strip.

27 According to the order for reference, Ms Bolbol has not availed herself of the protection or assistance of UNRWA. She claims however to be entitled to such protection and assistance, relying in support of that claim on a UNRWA registration card issued to the family of her father's cousins. In the absence of any documentary evidence, the defendant in the main proceedings disputes the family connection on which Ms Bolbol relies. In addition, despite the steps taken by Ms Bolbol at UNRWA, it has been unable to confirm her right to be registered on the basis of her family connections.

28 In its decision of 14 September 2007, the defendant in the main proceedings refused Ms Bolbol's application for asylum, but at the same time found that she could not be expelled.

29 The refusal of Ms Bolbol's application for asylum is based on Article 3(1) of the Law on Asylum. According to the grounds for refusal of the application, the second subparagraph of Article 1D of the Geneva Convention does not require unconditional recognition as a refugee but defines the category of persons to whom the provisions of the Geneva Convention apply. It follows that Palestinians must also be given access to the asylum procedure and that it is necessary to examine whether they meet the definition of 'refugee' for the purposes of Article 1A of that convention. According to that decision, it is not possible to grant Ms Bolbol refugee status because Article 1A of the Geneva Convention does not apply to her, since she did not leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution.

30 It is apparent from the order for reference that Ms Bolbol benefits from a prohibition on expulsion on the basis of Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay, on the grounds that the readmission of Palestinians was at the discretion of the Israeli authorities and Ms Bolbol would be exposed to torture or inhuman and degrading treatment in the Gaza Strip on account of the critical conditions there.

31 Ms Bolbol has requested the referring court to vary BAH's decision and grant her refugee status pursuant to the second subparagraph of Article 1D of the Geneva Convention which, in her view, is a separate basis for recognition as a refugee. Since she meets the conditions laid down in that provision, she is entitled to recognition as a refugee irrespective of whether she qualifies as a refugee under Article 1A. According to Ms Bolbol, the purpose of Article 1D is to make clear that where a person registered or entitled to be registered with UNRWA resides, for any reason, outside UNRWA's area of operations and, for good reason, cannot be expected to return there, the States party to the Geneva Convention must automatically grant him refugee status. In view of the fact that, through her father, she is entitled to be registered with UNRWA, but resides in Hungary and therefore outside its area of operations, she should be recognised as a refugee without further examination.

32 The defendant in the main proceedings contends that the action should be dismissed, maintaining that Ms Bolbol's application for refugee status is unfounded since she did not leave her country for any of the reasons set out in Article 1A of the Geneva Convention, and that Article 1D does not automatically grant a basis for refugee status but is merely a provision concerning the Convention's scope *ratione personae*. Therefore, Palestinians are entitled to refugee status only where they meet the definition of 'refugee' within the meaning of Article 1A of the Geneva Convention, which must be determined on a case-by-case basis.

33 The referring court observes that the point of law raised in the main proceedings must be resolved in the light of Article 12(1)(a) of the Directive. As the originating application in the main proceedings was lodged on 21 June 2007, a date by which that provision had not yet been transposed into Hungarian domestic law, the provisions of European Union law should, in this instance, be applied directly.

34 According to the referring court, Article 1D of the Geneva Convention is open to a number of interpretations. In October 2002, the United Nations High Commissioner for Refugees issued a 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees'. However, that note fails to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision with regard to Palestinians. As the Directive includes a reference to Article 1D of the Geneva Convention, the Court has jurisdiction to interpret the meaning of that article of the Convention.

35 In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?
2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?
3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive?

The questions referred for a preliminary ruling

Preliminary observations

36 The Directive was adopted on the basis of, inter alia, point (1)(c) of the first subparagraph of Article 63 EC which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

37 It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 52).

38 The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54).

The first question

39 By its first question, the referring court asks whether, for the purposes of the first sentence of Article 12(1)(a) of the Directive, a person receives protection and assistance from an agency of the United Nations other than UNHCR by virtue of the mere fact that that person is entitled to that protection or assistance, or must that person have availed himself of that protection or assistance.

40 At the outset, it should be borne in mind that, in the context of a reference for a preliminary ruling, it is for the national court to establish the facts.

41 As was stated in paragraph 27 above, Ms Bolbol has not availed herself of the protection or assistance of UNRWA.

42 Chapter III of the Directive, on qualification for being a refugee, includes Article 12(1)(a) which states that a third country national or a stateless person is excluded from being a refugee, if '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 [UNHCR]'.

43 Article 1D of the Geneva Convention provides that it does not apply 'to persons who are at present receiving ... protection or assistance' from such an organ or agency of the United Nations.

44 It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention, since it was created in the light of the specific situation of Palestinian refugees receiving protection or assistance from UNRWA, as is apparent in particular from the proposal for a Council Directive presented by the Commission on 12 September 2001 (COM(2001) 510 final).

45 As the Advocate General observes at points 12 and 13 of her Opinion, it is clear from UNRWA's 'Consolidated Eligibility and Registration Instructions' ('CERI') – the currently applicable version of which was adopted during 2009 – that while the term 'Palestine Refugee' applies, for UNRWA's purposes, to 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' (Point III.A.1 of CERI), other persons are also eligible to receive protection or assistance from UNRWA. They include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (Point III.B of CERI; see also, *inter alia*, paragraph 6 of the United Nations General Assembly Resolution No 2252 (ESV) of 4 July 1967).

46 In those circumstances, it cannot be ruled out *a priori* that a person such as Ms Bolbol, who is not registered with UNRWA, could nevertheless be among those persons coming within Article 1D of the Geneva Convention and, therefore, within the first sentence of Article 12(1)(a) of the Directive.

47 Contrary to the line of argument developed by the United Kingdom Government, it cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive.

48 The Geneva Convention, in its original 1951 version, was amended by the Protocol on the Status of Refugees of 31 January 1967 specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of 'events occurring before 1 January 1951'.

49 Therefore, in order to determine whether a person such as Ms Bolbol comes within a situation envisaged by the first sentence of Article 12(1)(a) of the Directive, it must be ascertained, as the referring court asks, whether it suffices that such a person is eligible to receive the assistance provided by UNRWA or whether it must be established that he has availed himself of that assistance.

50 Article 1D of the Geneva Convention, to which Article 12(1)(a) of the Directive refers, merely excludes from the scope of that convention those persons who are 'at present receiving' protection or assistance from an organ or agency of the United Nations other than UNHCR.

51 It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.

52 While registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means.

53 In those circumstances, the answer to the first question referred is that, for the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

54 It should be added that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive.

The second and third questions

55 As has been pointed out in paragraph 41 above, Ms Bolbol has not availed herself of protection or assistance from UNRWA.

56 In those circumstances, and in the light of the reply to the first question, it is not necessary to reply to the other questions referred.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

For the purposes of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

[Signatures]

* Language of the case: Hungarian.