

Closing Protection Gaps:

***A Handbook on Protection of Palestinian Refugees in
States Signatories to the 1951 Refugee Convention.***

**Jurisprudence Regarding
Article 1D
2005-2010**

Revised Second Edition.



BADIL Resource Center
for Palestinian Residency and Refugee Rights
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BADIL Resource Center for Palestinian Residency and Refugee Rights

PO Box 728, Bethlehem, Palestine

Telefax: 00972-2-2747346

info@badil.org

<http://www.badil.org>

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NATIONAL JURISPRUDENCE

THE EUROPEAN UNION

BELGIUM

DENMARK

FRANCE

HUNGARY

IRELAND

ITALY

NETHERLANDS

NORWAY

POLAND

SPAIN

SWEDEN

SWITZERLAND

UNITED KINGDOM

NORTH AMERICA

CANADA

UNITED STATES

OCEANIA

AUSTRALIA

NEW ZEALAND

INTRODUCTION

This project seeks to document developments in the jurisprudence of relevance to Article 1D of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) in the five year period between 2005 and 2010. Certain relevant materials have been made available on BADIL's website (www.badil.org).

The research covers developments in the case law of 17 of the 23 non-Arab countries (all signatories to the 1951 Refugee Convention and/or the 1954 Convention relating to the Status of Stateless Persons) that were included in the Handbook: Australia, Belgium, Canada, Denmark, France, Hungary, Ireland, Italy, Netherlands, New Zealand, Norway, Poland, Spain, Sweden, Switzerland, United Kingdom and United States.¹

Many contributors replied specifically to the questionnaire and addressed the two key questions regarding national Article 1 D jurisprudence and protection under the 1954 Stateless Convention (Appendix 1) during the five-year period. Others decided to re-assess the entire country profile in the Handbook or to provide additional information on cases concerning Article 1A(2) of the 1951 Refugee Convention and the issue of return. As a result, the scope and details of the input differs slightly, but the key questions have been addressed by all 17 countries.

The research also briefly examines other relevant developments concerning the protection of Palestinian asylum seekers that have occurred over the last five years, including within the European Union as well as in jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.

It is BADIL's hope that this survey together with the Handbook will contribute to the implementation of more coherent and effective global standards for the international protection of Palestinian refugees.

¹ Five countries were not researched due to insignificant jurisprudence (Mexico, Nigeria and South Africa) or the lack of resources to conduct research (Austria and Finland). Updated research from one country (Germany) will be added later.

ACKNOWLEDGEMENTS

This survey is the product of a sustained collective effort by numerous individuals and organizations. I would like to thank those lawyers, UNHCR staff, practitioners of refugee law, and researchers who provided background material and conducted research in the completion of this report. I also appreciate the support of UNCHR staff in Brussels and Geneva who facilitated contact with national UNHCR offices and provided useful comments.

Finally, BADIL would like to affirm that, although UNHCR and numerous other experts have provided significant insight and feedback, the opinions expressed, and the conclusions drawn, are those of BADIL alone, and it is solely responsible for any errors.

NOTE REGARDING NATIONAL JURISPRUDENCE

Relevant jurisprudence from the last five years is documented in the following country profiles. Some decisions and judgments are not available for the public. However, where judgments are available online, links to them are included herein. BADIL aims to keep its website updated to reflect new developments in the relevant jurisprudence.

LIST OF CONTRIBUTORS

Australia

Steve Norman
PO Box 70
Strawberry Hills
NSW 2012
Australia
Email: norman.rsd@hotmail.com

Belgium

UNHCR Regional Representation for
Western Europe
Rue Van Eyck 11b,
B-1050 Brussels,
Belgium
Telephone. +32 2 627 59 99
Email: PAUWELS@unhcr.org

Canada

Edward C. Corrigan
383 Richmond Street
Suite 902
London, Ontario
N6A 3C4
Canada
Telephone: + 1 519 439 4015
Email: corriganlaw@edcorrigan.ca
Website www.edcorrigan.ca

Denmark

Danish Refugee Council
Stinne Ostergaard Poulsen
Borgergade 10, 3. Sal
P.O.Box 53
1002 Copenhagen K
Denmark
Telephone: + 45 33 32 84 48
Email: drc@drc.dk
Website : www.drc.dk

France

CIMADE
Antoine Decourcelle
64, rue Clisson,

75013 PARIS
France
Telephone : + 33144186050
E-mail: antoine.decourcelle@lacimade.org
Website : www.cimade.org

Hungary

Hungarian Helsinki Committee
Bajcsy-Zsilinszky ut 36-38
1054 Budapest
Hungary
Telephone: + 36 1 32 1 4141
Email: helsinki@helsinki.hu
Website: www.helsinki.hu

Ireland

Refugee Legal Service
Bernadette McGonigle
Pope's Quay
Cork
Ireland
Telephone: 00353 21 4554634
Email: berniemcgonigle@gmail.com
Website: www.legalaidboard.ie

Italy

Italian Refugee Council,
Maria de Donato
Via del Velabro 5/a,
Roma,
Italy
Telephone + 39 06 69 200114
Email: dedonato@cir-onlus.org
Website: www.cir-onlus.org

Netherlands

Dr. Jeff Handmaker²
Lecturer in Law, Development and Human Rights
International Institute of Social Studies (ISS)
Erasmus University
Postbus 29776
2502 LT Den Haag

² Dr Jeff Handmaker is no longer a practitioner and, hence, he does not represent asylum seekers in specific cases. For legal advice in such cases, please contact lawyers in the Netherlands, for example Mr. P.J. Schüller who also provided input to this research. His contact details are: Keizersgracht 560, 1017 EM Amsterdam, Telephone: + 31 203446200. E-mail fschuller@bohler.eu

The Netherlands
Tel. +31 70 4260 585
E-mail. handmaker@iss.nl
Further relevant info: www.iss.nl/ISRPAL

New Zealand

Rodger Haines QC
Faculty of Law, University of Auckland,
PO Box 2545
Auckland
New Zealand
Telephone: + 64 9 309 0994
Email: rhaines@clear.net.nz

Norway

Norsk Organisasjon for Asylsøkere (NOAS)
Paula Tolonen
P.B. 8893 Youngstorget
0028 Oslo
Telephone: + 47 22 36 56 60
Email: paula.tolonen@noas.org
Website: www.noas.org

Poland

The Halina Niec Legal Aid Center (HNLAC)
Katarzyna Przybyslawska, PhD
Centrum Pomocy Prawnej im. Haliny Nieć
ul. Krowoderska 11/7
31-141 Kraków
Telephone: + 48 12 633 72 23
Email: przybyslawska@pomocprawna.org
Website: www.pomocprawna.org

Spain

UNHCR Spain
General Peron 32, 2,
Madrid 28020,
Spain
Telephone + 34 91 56 35 03/36 49
Email: menendez@unhcr.org

Sweden

Birgitta Elfstrom
Legal Advisor, former decision maker in the Migration Board
Email: marhaba554@hotmail.com

Switzerland

UNHCR Office for Switzerland and Liechtenstein
94, Rue Montbrilland
1202 Geneva
Switzerland
Tel.: +41 22 739 8927
Email: hbruchka@unhcr.org

United Kingdom

Ali Bandegani
Barrister at law, Grays Inn
E-mail: alibandegani@hotmail.com

US

Karen Pennington
111 W. Spring Valley Rd., #207, Richardson,
TX 75081
U.S.A.
Telephone: +1 214 210 4426.
E-mail: penningtonlaw@yahoo.com

Susan M. Akram
Boston University School of Law
765 Commonwealth Ave.
Boston, MA. 02215
U.S.A.
Telephone : + 1 (617) 353 31 48
E-mail : sakram@gbis.org

SUMMARY OF FINDINGS

1. *Interpretation of Article 1D*³

The Handbook concluded that there was a lack of consensus about the proper interpretation of Article 1D of the 1951 Refugee Convention, resulting in the non-implementation of its provisions and the determination of the status of Palestinian refugees by reference to the criteria of Article 1A(2) of the 1951 Refugee Convention. Unfortunately that is still the case five years later.

In most of the countries, there have been no changes in the authorities' interpretation of Article 1D and, hence, the provision continues to be improperly applied in these countries, notwithstanding the fact that, with the sole exception of the US, all are parties to the 1951 Refugee Convention. These include twelve countries: Australia, Canada, Denmark, France⁴, Ireland, Netherlands, New Zealand, Poland, Sweden, Switzerland, the United Kingdom and the United States. Moreover, in these countries many different interpretations continue to be adopted to dismiss the applicability of Article 1D (see further Handbook at 337). Irrespective of their differences, these interpretations of Article 1D lead to the same result: asylum claims submitted by Palestinian refugees are to be assessed under the criteria set out in Article 1A(2) and/or other criteria, for example related to subsidiary protection. Additionally, most countries agree that Article 1D covers Palestinians who are registered with UNRWA. However, some confusion exists with regard to other groups of Palestinian refugees.⁵

In two countries (Hungary and Norway), a positive practice which had begun to emerge has been reversed since the publication of the Handbook in 2005. In *Norway*, a number of Palestinian refugees from the OPT had been granted residence permits based on Article 1D and the situation in the OPT. This practice has changed, however, and Palestinians from the OPT are now treated like other asylum seekers and required to fulfil the criteria set out in Article 1A of the 1951 Refugee Convention. In *Hungary*, the authorities decided in 2003 to grant a few Palestinians asylum based on Article 1D. The authorities have reversed this practice and instead have re-applied the test in Article 1A to all Palestinian asylum seekers. The change of practice seems in both cases to have been motivated by political considerations. In Norway, the authorities noted an increase in the number of Palestinian asylum seekers from the OPT and that in comparison with other Nordic countries, Norway had become the most popular destination for these asylum

3 In addition to the countries covered by this survey, reference is made to a positive decision by the Supreme Court of Justice of Republic of Moldova in February 2007, see further Brenda Goddard, *UNHCR and the International Protection of Palestinian Refugees*, Refugee Survey Quarterly, vol 28, No 2 & 3, 2009, at 475.

4 Initially the Commission des Recours des Réfugiés recognized the special protection and assistance arrangement set up for Palestinian refugees and concluded that Article 1D could confer refugee status upon Palestinian refugees (decision of 18 April 2008 Assfour).

5 In Australia, a number of cases have defined the personal scope of Article 1D broadly to include Palestinian refugees who were entitled to be registered with UNRWA or entitled to receive services.

seekers. In Hungary, it seems that the authorities also changed their practice after realizing that as no other countries (properly) applied Article 1D, their application of Article 1D could potentially attract more Palestinian asylum seekers.

In two countries (Belgium and Spain), however, there have been positive changes as the authorities now interpret Article 1D, paragraph two as an inclusion clause on the basis of which Palestinian asylum seekers can be recognized as refugees. In *Belgium*, the Council for Aliens Law Litigation started to grant refugee status to some Palestinians in January 2010. The possibility of re-establishing effective protection is however an essential part of the assessment of Article 1D, and, hence, the Council will verify whether a Palestinian can effectively place himself once more under UNRWA's mandate. For example, a Palestinian from Syria was denied refugee status and subsidiary protection explicitly on the ground that he could return to Syria and enjoy protection in that country. On the contrary, asylum seekers from Lebanon were recognized as refugees without an assessment under Article 1A(2) because they could not return to Lebanon.

In *Spain*, as a result of discussion with UNHCR and others, the Spanish authorities began in 2005 to accept a proper application of Article 1D of the 1951 Geneva Convention. The availability of effective protection in the country or area of former residence also plays a role in the status determination process in Spain. Moreover, in both Spain and Belgium, UNHCR's interpretation of Article 1D, as well as its role in general, has been significant in promoting such positive changes.

Finally, in *Italy*, it seems that the authorities now recognize Palestinian refugees *ipso facto* as refugees without requiring evidence of a well-founded fear of persecution (Article 1A(2) test). However, given that decisions are not motivated, it is difficult to verify in which cases Article 1 D was the legal basis.

2. Lack of Implementation of the 1954 Stateless Convention

Most countries still lack a procedure by which statelessness can be determined. Only *Spain* and *Hungary* provide designated authorities a clear procedure with which to determine stateless status. Some other countries have authorities (either administrative or judicial) empowered to recognize that an individual is stateless (e.g., Belgium and France) or procedures by which a person can apply for a 1954 Convention Travel Document (Sweden). The case law from these countries clearly illustrates how stateless Palestinians can benefit from a determination of their status as stateless persons. Since Hungary introduced its new stateless procedure, three Palestinians have been recognized as stateless persons. Moreover, Belgium and France now have clear case law stating that the exclusion clause in the 1954 Stateless Convention does not exclude Palestinians from being recognized as stateless persons in those countries.

However, most countries noted that there had been no changes over the last five years in this regard. Therefore, Palestinians in those countries would not be able to obtain legal status on the basis of being a stateless person. When applying for protection within the asylum framework, having regard to the lack of proper implementation of Article 1D,

they would have to prove a risk of persecution or the need for protection. National courts agree, however, that statelessness does not per se amount to persecution under Article 1A(2) of the 1951 Refugee Convention.

3. Lack of Adequate Solutions for Rejected Palestinian Asylum-Seekers with Nowhere to Go

Like other asylum seekers, Palestinians with final negative decisions in their asylum applications and who are not granted subsidiary protection are ordered to leave the country of asylum. However, as stateless persons, they often have nowhere to go because no state will allow them to (re-)enter their territory. The removal of stateless Palestinians to the OPT, Lebanon, Iraq and the Gulf countries, for example, continues to be difficult for various reasons. Authorities and judges continue, to reject that denial of re-entry by the authorities of their former habitual residence (in the case of OPT, this would be the Israeli authorities) constitutes persecution. Moreover, the countries agree that although this problem is unique for stateless persons, statelessness as such is not a ground for granting protection, as discussed above.

In Europe, the standards of Article 3 of the European Convention on Human Rights have been applied in a few cases in relation to deportation/removal of Palestinians. The District Court in Arnhem in the Netherlands discussed whether it was (in)appropriate to deport a Palestinian to Egypt on the basis of his personal circumstances (his wife and child were of Dutch nationality) as well as the specific implications of being deported to Egypt as a Palestinian without possessing a valid residence permit. The Court concluded that return of a Palestinian to Egypt, who was not in possession of a valid Egyptian residence permit, would potentially violate his rights under Article 3 of the European Convention on Human Rights. Moreover, the European Court of Human Rights concluded on two occasions that Sweden did not violate its obligations under Article 3 by expelling rejected Palestinian asylum seekers.

Procedures for legalizing the stay of persons who cannot be expelled and who are therefore caught in a state of legal limbo are often lengthy and difficult to access. This is a problem in Sweden, for example, where rejected Palestinians have languished for years without any legal status.

4. Detention

Rejected Palestinians who cannot be returned are forced to live in the US with final orders for removal and are subject to forced return. They may be taken into custody at any time and held for an indefinite period until removal becomes possible. Recently, however, two judges have concluded that Palestinian asylum seekers who were detained pending removal from the US should be released after it was clear that no country would accept them and that they could therefore not be deported in the reasonably foreseeable future.

RECOMMENDATIONS

◀ **Based on the analysis in this survey, BADIL recommends that all national parties:**

1. Recognize the particular status and protection rights, under international refugee and human rights law, of Palestinian refugees as a group who:

- Are defined as refugees vis-à-vis Israel, and not on grounds of (a well-founded fear of) persecution by/in their Arab host states (countries of habitual residence);
- Have lacked the protection of the international agency especially established for this purpose United Nations Conciliation Commission for Palestine (UNCCP) since its demise in the 1950s;
- Currently only receive assistance and some forms of protection from the United Nations Relief and Work Agency for Palestine Refugees (UNRWA), an agency with a humanitarian assistance mandate, which cannot provide the full panoply of international protection;
- Are mostly stateless persons, whose travel documents issued by Arab host states and the Palestinian Authority often do not protect basic human rights, including the right to residence.

2. Enhance the protection of Palestinian Refugees under the 1951 Refugee Convention by:

- Adopting the proper interpretation of Article 1D as recommended by UNHCR. States that have not yet done so, are called upon to incorporate Article 1D into national legislation and to apply Article 1D to asylum cases involving Palestinian refugees;
- Fully implementing Article 1D, including its inclusion clause which provides that national authorities and courts are called upon to adopt the interpretation of Article 1D as recommended by UNHCR, conferring the status and benefits of the 1951 Refugee Convention to Palestinian refugees;

3. Provide subsidiary protection and effective protection to Palestinian refugees by: complying with relevant UNHCR Standards:

- States that do not recognize the refugee status of Palestinian refugees under the 1951 Refugee Convention should at least grant them subsidiary protection that will entitle them to formal legal status and basic human rights;
- Abstain from ordering the return/deportation to countries not offering effective protection. No Palestinian refugee should be returned/deported, unless asylum

authorities are able to establish that effective protection is guaranteed in the country to which s/he is to be removed.

4. Use the 1954 Stateless Convention as a tool for effective protection of stateless Palestinian refugees by implementing the Protection Standards of the Convention:

- Heightened attention should be given to the merits of the statelessness regime by governments and international organizations, including UNHCR;
- States are called upon to ratify and accede to the 1954 Stateless Convention;
- States that are already signatories should develop appropriate procedures for the assessment of protection claims under the Convention. Authorities and courts should interpret its provisions (including Article 1(2)) to provide for the inclusion and recognition of stateless Palestinian refugees in line with the proper interpretation of Article 1D, 1951 Refugee Convention, and grant them the benefits of the Convention.

◀ **Based on the analysis in this survey, BADIL recommends that UNHCR:**

1. **Continue to engage with national authorities with a view to ensuring a proper interpretation and application of Article 1D of the 1951 Refugee Convention;**
2. **Develop guidelines on the issues of returnability and effective protection in the Arab host countries.**

◀ **Based on the analysis in this survey, BADIL recommends that UNRWA clarify:**

1. **The Agency's rules on registration for Palestinian refugees who wish to register with the Agency for the first time.**
2. **That registration with the Agency is possible for Palestinian refugees who are entitled to register with the Agency but who have never lived within UNRWA's area of operation and who do not intend to live within UNRWA's area of operation.**
3. **That UNRWA's mandate does not include effective protection in its area of operation.**

GENERAL DEVELOPMENTS CONCERNING PROTECTION OF PALESTINIAN REFUGEES 2005-2010

EUROPE

1. *Harmonization of Asylum Legislation*

Since the early 1990s, Member States of the European Union (EU) began adopting a common asylum system that includes uniform status for those granted asylum or subsidiary protection. The major aims and principles of the EU asylum policy were agreed upon in October 1999 at the [European Council in Tampere](#) (Finland). These recent initiatives have so far resulted in the adoption of four major legal instruments: 1) the Reception Directive⁶; 2) the Asylum Procedures Directive⁷; 3) the Qualification Directive⁸; and 4) the Dublin Regulation.⁹ Harmonization of other issues related to asylum is also under way, including issues regarding the return of asylum seekers who who have illegally remained in European countries.¹⁰ Finally, there exists ongoing research on other issues of concern, such as the non-harmonized status categories. ¹¹

The Qualification Directive, which applies to all member states except Denmark, contains minimum standards necessary for obtaining refugee or subsidiary protection status and sets out associated rights with each category. This is the first time that the concept of subsidiary protection has been defined at the EU level. The Directive therefore introduced a harmonized regime for *subsidiary* protection in the EU for those persons who fall outside the scope of the 1951 Refugee Convention but who still need

6 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. See also Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

7 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status Implementation of the Asylum Procedures Directive is discussed in the report by the European Commission of 8 September 2010, COM (2010) 465 2005/85/EC. The directive applies to all Member States except Denmark and it has been implemented in all countries except Belgium and Ireland.

8 [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](#). See also Handbook p 93.

9 Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

10 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. The directive has to be implemented by member states by the end of the year.

11 See, for example, research by European Migration Network and report by Gabor Gyulai, Hungarian Helsinki Committee available at <http://helsinki.hu/dokumentum/Non-EU-Harmonised-Protection-Statuses-Hungary%20final.pdf>

international protection.¹² Article 2(e) of the Qualification Directive defines a person eligible for subsidiary protection as :

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.

Article 15 defines the concept of “serious harm” as consisting of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

With regard to Article 1D of the 1951 Refugee Convention, the Directive stipulates exclusion reasons in Article 12. Paragraph 1 (a) mirrors Article 1D:

1. 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 1 D 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.¹³

The adoption of a common asylum system entails a new role for the Court of Justice in this matter. Within the preliminary ruling procedure, national courts might ask the Court for advice concerning the interpretation of certain EU asylum rules, which reflect provisions of the 1951 Refugee Convention to which all Member States are signatories. Therefore the Court will be required to interpret, albeit indirectly, the 1951 Refugee Convention and Member States’ obligations under the Convention. Its rulings will

¹² See further Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, *Int. L. Refugee Law* (2005) 17(3): 461-516.

¹³ Article 12(1)(b) refers to Article 1C of the 1951 Refugee Convention: “he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.”

eventually contribute to the uniform interpretation of the asylum rules within the EU. Additionally, when its rulings relate to the 1951 Refugee Convention they might be considered authoritative decisions by judges and authorities outside the EU.

The deadline for the legislation of the directive into national laws by the Member States expired in October 2006 and today all member states (except Denmark – see above) have implemented the directive. 14 The adoption of legislation by member states has resulted in new regulations in several countries, for example regarding subsidiary protection, as further described in the country profiles.

2. *Jurisprudence by the Court of Justice: Bolbol case*

Ms. Bolbol was a Palestinian refugee from the Gaza Strip who arrived in Hungary in 2007 to live with her Palestinian husband who was already living in Hungary and who had a long term residency permit in Hungary. Hungary granted her a residency permit. In June 2007 she submitted an asylum application to the Office of Immigration and Nationality (OIN). She sought to obtain refugee status so that in the event that her residency permit expired she would not have to return to Gaza where the internecine conflict between Fatah and Hamas made the situation unsafe. While her father still lived in Gaza and worked as a university lecturer, the rest of her family had emigrated. OIN rejected her asylum application in September 2007, but granted her tolerate status and placed her under the protection of a non-*refoulement* order on the grounds that the “readmission of Palestinians is at the discretion of the Israeli authorities, and that Ms. Bolbol would be exposed to the risk of torture or inhuman and degrading treatment in the Gaza Strip on account of the conditions there.”¹⁵ Ms. Bolbol then brought a case against the OIN before the Budapest Metropolitan Court. As the case involved the interpretation of article 12(1)(a) of the Qualification Directive, the court referred three questions to the Court of Justice and asked for a preliminary ruling:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact 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 this directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and

14 See Report on the application of 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, 16 June 2010, COM(2010)314.

15 Advocate General Opinion, at 33.

the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion in the scope *ratione personae* of the directive?

From the facts of the case it was clear that Ms. Bolbol had never received education in an UNRWA school or other services from UNRWA. She claimed, however, that she was entitled to receive such assistance. In support of her claim she submitted an UNRWA registration card issued to the family of her father's first cousin. Apparently, OIN disputed "the existence of a family connection in the absence of any direct documentary evidence. UNRWA has not expressly confirmed whether she would be entitled to be registered".¹⁶

Ms. Bolbol's attorney argued that Ms. Bolbol fell within the scope of Article 1D of the 1951 Refugee Convention and that she was therefore eligible to be automatically recognized as a refugee in Hungary. OIN had argued against granting refugee status on the basis of the second paragraph of Article 1D since the provision simply allows Palestinian asylum seekers to apply for protection under the 1951 Refugee Convention, and hence, their cases must be examined in light of the Article 1A test. In May 2009, UNHCR published a statement related expressly to Ms. Bolbol's case (revised in October 2009) that was treated as an unofficial *amicus curiae* brief by the Advocate General (AG) Sharpston. Five governments, Belgian, German, French, Hungarian and the United Kingdom, as well as the EU Commission, submitted observations.

Sharpston's opinion on 4 March 2010 did not follow the UNHCR Note on two key issues: a) the AG failed to understand that the scope of Article 1D is defined by the two groups of Palestinian refugees who are *entitled* to receive assistance or protection under the special regime set up for Palestinian refugees; and b) the AG interpreted Article 1D, second sentence as a conditioned inclusion clause - which could potentially open up for various (likely restrictive) interpretations by national authorities as to the meaning "of his own volition"¹⁷ as we know from the case law in Germany:

If such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of his own actions, he cannot claim automatic refugee status.¹⁸

However, on the positive side, the AG dismissed the UK's arguments concerning a very restrictive interpretation of the temporary scope of Article 1D. The AG also clearly understood the historical background to Article 1D and, hence, accepted that Article 1D

¹⁶ Opinion of Advocate General Sharpston in *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09 (2010) at para. 33.

¹⁷ *Ibid.* at 111: "The words 'cessation of the agency's protection or assistance' mean that the person concerned is no longer in the relevant geographical area and has ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed immediately before leaving that geographical area.

¹⁸ *Ibid.* at 90

entitles Palestinian refugees to special treatment and thus can convey the status and the benefits of the 1951 Refugee Convention:

I therefore conclude that *ipso facto* entitlement means the automatic grant of refugee status, without further individual assessment.¹⁹

We can only guess about the AG's motivation for limiting the scope of Article 1D given the convincing *legal* arguments for not doing so.²⁰ On various occasions, the AG alluded to the necessity of balancing various concerns (humanitarianism versus pragmatism). Already in the opening paragraph, the AG noted:

Preferential treatment of any particular class or group of refugees, for whatever reason, will therefore – if not kept in proportion and balance – come at the expense of appropriate treatment for other persons who, from an objective humanitarian perspective, are equally deserving.²¹

Moreover, the AG developed this idea further:

The very presence of the second sentence implies a greater consequence than that, when its specific conditions are fulfilled, such persons merely join the queue with every other potential applicant for refugee status under Article 1A.²²

...because *all* genuine refugees should be able to obtain protection or assistance but the capacity of States to absorb refugees is not infinite, Article 1D cannot be interpreted either as entitling every displaced Palestinian, whether or not actually being or having been in receipt of UNRWA assistance, to leave the UNRWA zone voluntarily and claim automatic refugee status elsewhere. Such an interpretation would provide disproportionately favourable treatment for displaced Palestinians at the expense of other genuine applicants for refugee status displaced by other conflicts in the world.²³

It is significant that the AG mentioned these considerations before her legal analysis and explicitly noted that in light of the ambiguous wording of Article 1D “I therefore think it essential to set out, clearly and unambiguously, the principles that guide my thinking”. Thus, the need to take into consideration various interests, including Member States' limited resources. Ultimately, the requirement to balance such interests might have influenced her legal interpretation of Article 1D and it was likely the key underlying motivation for her conclusion. As the AG noted:

¹⁹ *Ibid.* at 89.

²⁰ See for example [case law](#) from Australia supporting the argument that the personal scope of Article 1D is not limited to Palestinians who had actually received UNRWA services.

²¹ *Supra* note 15 at 1.

²² *Ibid.* at 54.

²³ *Ibid.* at 55.

It therefore seems reasonable to read the two sentences [of Article 1D] (and hence their component elements) consecutively, not disjunctively; ...and to seek a reading for the provision as a whole that strikes a reasonable balance between caring for displaced Palestinians (under Article 1D) and caring for other potential refugees (under the 1951 Convention as a whole).²⁴

The judgment of the Court of Justice on 17 June followed the AG's recommendation to limit the scope of Article 1D to those Palestinian refugees who prior to their asylum application²⁵ had actually availed themselves of protection or assistance from UNRWA (para 53)²⁶:

In those circumstances, the answer to the first question referred is that, for that 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.

The court's reasoning was also based on the wording of Article 1D (para 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.

It is not clear from the ruling what motivated the judges to follow the AG's opinion. The decision to adopt an interpretation of the scope of Article 1D based on the wording of the first paragraph is probably not convincing given the purpose of the provision. However, as discussed above, one can only speculate about the motivations for this restrictive legal interpretation. In addition to the pragmatic concerns expressed by the AG, the position of the governments that submitted observations is also relevant. One can see from the submissions of the various governments that none of them had advocated UNHCR's position but instead suggested some limitation of the scope of Article 1D – for example by requiring that the applicant had actually received services from UNRWA or had been registered with UNRWA. As rightly noted by the court (para 46), the latter position would not be correct, as some non-registered refugees receive assistance from UNRWA, so a limitation of the scope of the provision could only be done by requiring that Palestinian asylum seekers have actually received assistance from UNRWA.

²⁴ *Ibid.* at 56.

²⁵ Judgment of the ECJ in *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09 (2010) at para. 54. It is unclear whether this should have happened immediately prior to the submission of a claim for asylum or whether a asylum seeker who at one point in his her life had received services from UNRWA would fall inside the scope of Article 1D.

²⁶ It is worth noting that in the view of the judges (*ibid.* at 34), UNHCR Note failed “to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision with regard to Palestinians”, *Ib.* at 34

Finally, the question arises whether registration with UNRWA is a matter of evidence or substance.²⁷ The Court briefly noted that (para 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.

Moreover, the judges added that if the asylum seeker fell outside the scope of Article 1D s/he would still be entitled to seek asylum under the normal criteria set out in Article 2 (c) of the Directive (i.e., Article 1A of the 1951 Refugee Convention).

Based on the Court's reply to the first question, the Court noted that it was not necessary to address the following questions. Thus, we do not know whether the Court would share the AG's view on the interpretation of the second paragraph of Article 1D.

It is worth recalling that national judges have also struggled with how to define the scope of Article 1D. In Australia, for example, the conclusion is that the group of persons that fall under Article 1D is defined broadly as Palestinian refugees who fall under the special institutional system composed of UNRWA and UNCCP. This means that a Palestinian from the West Bank not registered with UNRWA, a 1967 displaced person, and a Palestinian born in Iraq all fall within the scope of Article 1D (see more in the Australian section).

DEVELOPMENTS WITHIN THE COUNCIL OF EUROPE

1. Jurisprudence of the European Court of Human Rights

The European Court of Human Rights (ECHR) has on a few occasions adjudicated cases involving Palestinian asylum seekers. In the case *Riad and Idiab and others v. Belgium* concerning two Palestinian asylum seekers who had been kept in the transit zone of Brussels Airport 28 (see Handbook at 151), the ECHR concluded that Belgium had violated Articles 3²⁹ and 5(1)³⁰ of the Convention and that as a result, the plaintiffs were

²⁷ See Opinion of Advocate General Sharpston, *supra* note 15 at 96.

²⁸ Final decision of 24 January 2008 (no 29787/03 and 29810/03)

²⁹ No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

³⁰ Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when

entitled to compensation. On two occasions, the ECHR has concluded that decisions by Swedish authorities to expel Palestinians from Sweden would not violate Sweden's obligations under the European Convention of Human Rights.³¹ In contrast, the Netherland's District Court in Arnhem held that returning a Palestinian to Egypt, where he did possess a valid residency permit, may potentially violate his rights under Article 3 of the Convention.

The ECHR also deliberated the mistreatment of asylum seekers during detention. In *AA v. Greece*, the ECHR held that Greek authorities had violated articles 3 and 5 of the Convention during their detention of a Palestinian refugee from Lebanon. He was therefore was entitled to compensation.³²

UNHCR

1. UNHCR Revised Note

UNHCR's Note of October 2002 was revised by Revised Note of October 2009 (Revised Note). It seems that UNHCR's Revised Note simply clarifies UNHCR's interpretation of the key legal issues concerning Article 1D and that it does not contain any changes to UNHCR's position set out in the 2002 Note. The issues that have been clarified are:

- a) the scope of Article 1D;
- b) applicability of Article 1D, second paragraph (i.e., no separate determination of well-founded fear under Article 1A(2) required);
- c) the relationship between status determination and returnability so that until return takes place (safe third country assessment) the asylum seeker will be entitled to the protection granted on the basis of Art 1D. The 2002 Note provided that:

it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition

31 Decision of 21 October 2008 *M.H. v. Sweden* (application no 10641/08) and Decision of 22 June 2010 (application no 23354). In the former, the ECHR concluded: "...having regard to all of the above, the Court concludes that the applicant has not established that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Articles 2 and 3 of the Convention, if he were to be expelled to Gaza".

32 Decision of 22 July 2010, No. 12186/08. See also *Agna v. Romania*, decision of 12 January 2010. The decision *Hussein and others v. Italy*, decision of 19 January 2010 related to asylum seekers coming from Libya. All decisions are available at ECHR's website in the HUDOC database: www.cmiskp.echr.coe.int

The fact that such a person falls within paragraph 2 of Article 1D does not mean that he or she cannot be returned to UNWRA's area of operations, in which case, once returned, the person would fall within paragraph 1 of Article 1D and thereby cease to benefit from the 1951 Convention.

The revised Note provides that:

If the person returns to UNRWA's area of operations, he or she remains entitled to the benefits of the 1951 Convention until such return takes place.

This distinction indicates the delineation between, and separate treatment of, refugee status and returnability. This means that if a Palestinian asylum seeker is recognized as a refugee based on Article 1D, but then deemed removable, then he/she would still benefit from the protection granted by the 1951 Refugee Convention until such removal takes place. However, to benefit from this clarification would require that host countries apply Article 1D properly in the first place.

NATIONAL JURISPRUDENCE

EUROPE

BELGIUM³³

1. Statistical Data³⁴

According to statistics available to UNHCR Belgium, 52 Palestinian refugees were living in Belgium at the end of 2009.³⁵ However, given the various categories under which Palestinians might be registered (see below), this figure and other statistics concerning Palestinian asylum-seekers are not reliable.

Palestinian asylum-seekers are registered by the Aliens Office (“*Office des Etrangers*”) under different categories: Palestinians from Palestine; Lebanese or Syrian citizens of Palestinian origin; Stateless Persons; or persons with “Un-established Nationality”.

In the period 2007-2009, 21 asylum applications involving “Palestinians from Palestine” were registered with the Aliens Office and transferred to the Commissioner General for Refugees and Stateless Persons (CGRA). During those three years, CGRA issued 33 decisions of which 18 were negative and 17 positive (i.e., the asylum seekers were granted refugee status or subsidiary protection).³⁶

	2007	2008	2009	Total ³⁷
Total decisions	14	8	11	33
Refugee Status	3	3	1	7
Subsidiary Protection	4	3	1	8
Rejection	7	2	9	18

2. Status of Palestinians upon Arrival or Entry into Belgium – Asylum Procedure

As in the case of other asylum-seekers, Palestinians who are in Belgium³⁸ may submit an application for asylum to the Aliens Office in Brussels which will then examine the

³³ Based on information provided by UNHCR Belgium. This section does not necessarily reflect the views of UNHCR.

³⁴ Statistics from the national population’s registry, the Aliens Office and the Commissioner General for Refugees and Stateless Persons. See also UNHCR annual Statistical Report.

³⁵ This number does not include Palestinians who have obtained Belgian nationality.

³⁶ Statistical data is also available for January to October 2010: 30 asylum applications involving Palestinians from Palestine were registered with the Aliens Office and transferred to the CGRA. Refugee status was granted in three cases during this period, and subsidiary protection in four cases. The total number of decisions is not known. The backlog of the CGRA by mid 2010 was five cases from Palestine and 50 cases from Lebanon.

³⁷ Source: Statistics of CGRA concerning Palestinians registered as ‘Palestinian from Palestine’ (files, not persons).

application and determine whether the claim is admissible. If the asylum application is admitted, the case will be transferred to CGRA that will examine the merits of the case, i.e., the refugee status determination.

During the asylum procedure, the asylum-seeker who is in Belgium will be accommodated in a reception centre managed by Fedasil (Federal Agency for the Reception of Asylum-seekers), and s/he will be provided with material assistance in accordance with the Reception Law of 2007.³⁹ Since January 2010, asylum-seekers are allowed to work if their asylum procedure has lasted longer than six months.

3. Status Determination Process: Refugee and Subsidiary Protection Status

In general, asylum-seekers may be granted refugee or subsidiary protection status in accordance with the Aliens Act.⁴⁰ The law was amended in 2006 as part of the introduction of subsidiary protection. The amended law entered into force in June 2007. Asylum claims are examined on the basis of the criteria set out in Article 48 of the Aliens Act, which directly refers to the 1951 Refugee Convention. Article 48(3) provides:

- (1) Le statut de réfugié est accordé à l'étranger qui satisfait aux conditions prévues par l'article 1er de la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés, modifiée par le protocole de New York du 31 janvier 1967.

Article 55/2 of the Aliens Act refers directly to Article 1D of the 1951 Convention.

“Un étranger est exclu du statut de réfugié lorsqu'il relève de l'article 1^{er}, section D, E ou F de la Convention de Genève. Tel est également le cas des personnes qui sont les instigatrices des crimes ou des actes énumérés à l'article 1 F de la Convention de Genève, ou qui y participent de quelque autre manière. »

Although Article 55/2 of the Aliens Act does not explicitly refer to the independent inclusion clause of Article 1 D 2nd paragraph, it is generally accepted that Article 1D is fully part of domestic law.⁴¹

A review of CGRA's practice, through appealed decisions taken by the CALL, shows that Article 1D, paragraph 1 and paragraph 2 are not generally applied in cases involving

³⁸ Palestinians who arrive at the border are detained in a closed “extra-territorial” centre (Transit Centre 127) at Brussels Airport. This area is deemed formally not to constitute part of Belgian territory. Their cases follow an accelerated procedure.

³⁹ Loi du 12 Janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers.

⁴⁰ Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Aliens' Act). See also Arrêté Royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

⁴¹ Article 55/2 of the Aliens Act refers directly to Article 1D, first paragraph, but it does not contain a reference to the second paragraph of Article 1D.

Palestinians⁴², rather such cases are solely examined on the basis of Article 1A of the 1951 Refugee Convention. A number of Palestinians have been recognized as refugees under these criteria. An appeal against negative decisions by CGRA can be submitted to the Council for Aliens Law Litigation (“*Conseil du Contentieux des Etrangers*” (CALL)).⁴³ Prior to January 2010, CALL did not examine Palestinian claims on the basis of Article 1D and dismissed the argument that such an examination was relevant.⁴⁴ In its judgment of 21 April 2009,⁴⁵ the Council for the first time explicitly referred to Article 1D, but only to confirm that its exclusion clause did not apply in the case “*since the assistance of UNRWA should be considered as having ceased as soon as the applicant is outside UNRWA’s area of operation*”.⁴⁶ CALL did not refer to Article 1D, paragraph 2 as an independent inclusion clause and followed the arguments of the CGRA, stating that the principal question should remain whether the applicant has a well-founded fear of persecution in the sense of Article 1A of the Convention. This reasoning was also applied in two judgments of 14 May 2009 and of 16 December 2009.⁴⁷ Palestinians whose origin from Gaza and the West Bank is credible have, however, been granted subsidiary protection status.

In three judgments of 29 January 2010⁴⁸, however, CALL for the first time accepted the arguments by the applicant and explicitly considered both the exclusion and inclusion clauses of Article 1D of the 1951 Convention. CALL stated that in accordance with Article 1D, Article 12(1)(a) of the EU Qualification Directive, the Aliens Act and UNHCR’s interpretation of Article 1D:

⁴² Decisions by CGRA are confidential and not published, however reasoning of the CGRA is reflected in decisions taken on appeal by the CALL. Decisions of the CALL are frequently published in an anonymous version. BADIL has not been able to obtain cases illustrating CGRA’s practice.

⁴³ CALL is an administrative court established by Law of 15 September 2006. It has assumed competences of the Council of State in matters of litigation regarding aliens as well as competences from the former appeal commission for refugees, the Permanent Board for Refugees’ Appeal (PBRA-CPPR). The CALL is composed of 6 chambers: a first chamber, two French and two Dutch speaking chambers and a bilingual chamber. Most decisions are taken by a chamber with one judge. When the president of a chamber finds that a case is dealing with a complex matter or a matter of principle and for reasons of consistency in jurisprudence, a case is treated by a chamber with three judges or exceptionally even by a general assembly of judges.

⁴⁴ See, for example, judgment no. 611-987 of 6 July 2007 (Dutch-speaking chamber), judgment no. 18844 of 20 November 2008 (Dutch-speaking chamber). Some judgments are published on its website www.rvv-cce.be.

⁴⁵ Judgment no. 26112 of 21 April 2009 (French-speaking chamber).

⁴⁶ See para. 3.8 : [Le Conseil note qu’il peut être déduit de l’acte attaqué que, nonobstant l’enregistrement du requérant au Liban auprès de l’Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA), la partie défenderesse a directement envisagé le récit produit sous l’angle de la protection octroyée par la Convention de Genève du 28 juillet 1951. Dès lors, ce n’est que pour autant que de besoin que le Conseil fait observer qu’il ne peut être considéré que le requérant soit écarté des bénéficiaires de la Convention de Genève précitée en application de l’article 1er, section D de ladite Convention, l’assistance de l’UNRWA devant être regardée comme ayant cessé dès lors que le requérant se trouve en dehors de la zone d’activité de cet organisme (v. aussi CPRR décision 99-0689/R7968, du 17 novembre 1999).] Note that the CPRR was the Council’s predecessor, the appeal court at the time.

⁴⁷ Judgments no. 27366 of 14 May 2009 and no. 36107 of 16 December 2009 (French-speaking chamber).

⁴⁸ Judgments no. 37910, no. [37912](#) and no. [37913](#) of 29 January 2010 (Dutch-speaking chamber).

It is thus imperative to verify whether a Palestinian, who is entitled to protection and assistance of UNRWA, can effectively place himself again under this protection.

CALL concluded that if the country of habitual residence obstructs the return of the Palestinian asylum seeker, s/he:

should be recognized as a refugee without examination of Article 1 A of the Refugee Convention, since he/she is already a refugee.

Two of the CALL judgment of 29 January 2010 involved a Palestinian family from Nahr al-Bared refugee camp in northern Lebanon.⁴⁹ In May 2007 when the fighting between the Lebanese Army and Fatah al-Islam began, the applicant was called to the office of the Palestinian Popular Struggle Front (PPSF) and asked to participate in the fight against the Lebanese Army. When he refused to do so, he was warned that ‘he would pay for this’. When the shelling of the camp began, the applicant fled with his family and many other inhabitants of the camp to the nearby refugee camp Beddawi where he was beaten up by members of PPSF. Subsequently, he was again summoned to a meeting with the PPSF who requested that he joined their armed struggle. Following his refusal to join PPSF, he received a death threat from PPSF, sent by mail on 1 November 2008. The following day, the applicant decided to flee to Tripoli with his wife and two children. Later on he travelled to Belgium via Turkey and Syria. On 14 November 2008 the family asked for asylum in Belgium. Subsequently the applicant’s brother informed him that on two occasions the PPSF came to his house and inquired about his whereabouts. CALL concluded that Palestinians from Lebanon are not allowed to return to Lebanon, and that the applicants were therefore entitled to refugee status based on Article 1D. The third case (37910) involved a Palestinian who was originally from Lebanon, but since 1983 he had lived in Yarmouk refugee camp in Damascus together with his Syrian spouse. CALL concluded that:

The Council does not believe the applicant’s allegation that his residence in Syria would have been illegal. Due to the fact that the applicant declares that he never encountered any difficulties with the Syrian authorities, that he does not present any element that could prove that he might be at risk of persecution in the sense of Refugee Convention, that he is in possession of valid travel documents, namely a “document de voyage pour les réfugiés palestiniens”, issued in Beirut on 22 August 2008 and valid until 21 August 2013, and that his family is still living in Damascus, it is not plausible that he would not be able to return to Syria. The applicant does not seem to be in any way obstructed by the Syrian authorities from joining his family in Damascus, in particular since he has travelled back and forth to Syria on several earlier occasions. According to the Council there are thus no obstacles that might hinder the applicant from placing himself again under the protection of UNRWA and benefiting from its assistance.⁵⁰

⁴⁹ No. 37912 involved the husband and no. 37913 involved his wife.

⁵⁰ No. 37912 at 2.5.

This argumentation was confirmed in two judgments of 21 April 2010 (Dutch-speaking chamber) in which another Palestinian family from Nahr el-Bared was granted refugee status.⁵¹ The applicants also fled the camp as a result of the fighting in May 2007 and came to Beddawi refugee camp. Then the applicant started to work in his brother's telephone operator office. In September, the local leader of the al-Aqsa Martyrs' Brigades approached the applicant and asked him to join their organization. He then attended some meetings with the organization but never became a member of the organisation. Regularly the local leader asked him to pass on information concerning the telephone communications of former members al-Aqsa Martyrs' Brigades. The following year, the applicant realized that the Lebanese authorities were observing the movements of the local leader and he therefore decided to stop dealing with this person. When the local leader of al-Aqsa Martyrs' Brigades contacted him again, he refused to pass on the requested information. Following a second refusal to another member of al-Aqsa Martyrs' Brigades, the applicant's wife was threatened in the hall of their apartment, and the applicant was threatened twice over the phone during November 2008. He was told that he would be killed if he did not comply with their request. He then filed a complaint to the camp authorities who informally advised him to flee the camp. On 15 December 2008, the applicant and his family then fled to Turkey via Syria and finally arrived in Belgium where they sought asylum. CALL again stressed that the relevant question was whether the applicant could effectively place himself once again under the protection or assistance of UNRWA if he returned to Lebanon.

The French-speaking chambers of CALL accepted this jurisprudence in three judgments of 6 May 2010 and granted refugee status to some Palestinians from Lebanon. The Case 43061 involved a Palestinian refugee from Ein el-Hilweh camp near Sidon in the south of Lebanon who was registered with UNRWA. The applicant was not politically active but his brother-in-law was a member of a Palestinian militant group in the camp and the applicant was often seen with him. In June 2007, an explosion near a mosque in the camp injured three persons. The following day, some armed men came to the house of the applicant's sister to search for her husband. When told that he was not at home, they asked for the applicant. The sister told them that her brother was not in the house. Her response made them angry and they destroyed several things in the house. As a result of this incident, the applicant's father advised him to flee the country. He did so and arrived in Belgium in July 2007 and asked for asylum or subsidiary protection. His claim was rejected by CGRA, but CALL followed the previous case law from 2010 and concluded that as the Lebanese authorities would not allow him to return, he was not able to resume UNRWA's protection and assistance. Therefore, he should be granted refugee status on the basis of Article 1D. Case 43062 involved the brother of the applicant in 43061 and similar facts. Case 43063 involved a Palestinian refugee from Lebanon who had also lived in the US and Libya for some years. He arrived in Belgium in autumn 2000 with his wife and sought asylum. Prior to his arrival in Belgium he had worked as a journalist in Lebanon, but he had faced serious problems with Hizbollah due to the content of some of his articles. In October 2000, a friend from PLO told him that Hizbollah had asked PLO to arrest the applicant and turn him over to them. As a result, he decided to flee the

⁵¹ Judgments no. 42062 and no. 42063 of 21 April 2010 (Dutch-speaking chamber).

country and he managed to travel legally to Turkey. CALL followed the above-mentioned case law.

Thus, the possibility of return played an essential role in CALL's examination of Article 1D. If the Palestinian asylum seeker can return to UNRWA's area of operation and regain assistance or protection of this agency, s/he will not be recognized as a refugee on the basis of Article 1D. BADIL has not been able to verify whether CGRA has changed its practice as a result of CALL's new interpretation of Article 1D.

4. Status Determination Process – Outcome

Recognized refugees in Belgium (including Palestinians) are registered in the Aliens Register and they receive a permanent residence permit valid for five years. After five years of legal residence, they have the right to establishment in Belgium and to be registered in the Population Register. They will then receive an electronic identity card for foreigners, valid for five years and automatically renewable. After three or four years of legal residence in Belgium (depending on the family composition), refugees are entitled to apply for Belgian citizenship. Recognized refugees are provided with travel documents and entitled to family reunification and to work without a permit (even as self-employed persons).

Beneficiaries of subsidiary protection status are also registered in the Aliens Register, but they receive a temporary residence permit valid for only one year. If the situation in their country of origin has not fundamentally changed after five years, they will be entitled to a permanent residence permit. They are entitled to family reunification, but during the period of temporary residence in Belgium, they need a work permit in order to be allowed to work.

5. Return – Deportation

Asylum-seekers who receive a final negative decision are required to leave Belgium. If they do not leave the country voluntarily, they may be forcibly returned. Since the reform of the asylum procedure in 2006, Palestinians from the OPT who have been refused refugee status can seek subsidiary protection if they meet the requirements of Article 48/4, § 2, c) of the Aliens Act and Article 15C of the Qualification Directive.

6. Protection under the Statelessness Conventions

Belgium is party to the 1954 Stateless Convention, but not to the 1961 Statelessness Convention.

Recognition as a stateless person is granted by civil courts. Such recognition does not, however, automatically entail a right to residence. Recently, the Cour de Cassation interpreted the exclusion clause provided in Article 1, paragraph 2 (i) of the 1954

Convention.⁵² The case involved a Palestinian student from Lebanon. After an examination of UNRWA's mandate and the situation in Lebanon, the Court concluded that:

Since he [the Claimant] has left one of these areas [UNRWA], which include Lebanon, and stayed there, even temporarily, in a country in which the aforementioned agency [UNRWA] does not have an office, the Palestinian refugee no longer enjoys its protection or assistance. Accordingly, the decision [of The Brussels Court of Appeal], which, after finding that the applicant has left Lebanon and stayed in Belgium, denied the applicant the status of stateless pursuant to Article 1, § 2, (i) [] on the grounds that his "stay [...] in Belgium is only temporary and limited to the duration of his studies and does not terminate the right of [the plaintiff] to receive assistance from UNRWA upon completion of his studies and return to the Lebanon, violates that provision."⁵³

Links

Aliens Office: <https://dofi.ibz.be>; CGRA: <http://www.cgvs.be>; CALL: <http://www.rvv-cce.be>; Fedasil: <http://www.fedasil.be>; ADDE: <http://www.adde.be>

⁵² [*A.M.M. c. Procureur Général près de la Cour d'appel de Bruxelles, C.06.0427.F/1, Cour de cassation, 22 January 2009.*](#)

⁵³ (Translated from its original format in French: Dès lors qu'il [the claimant] a quitté une de ces zones [UNRWA], parmi lesquelles figure le Liban, et séjourné, fût-ce temporairement, dans un pays dans lequel l'office précité [UNRWA] n'exerce pas sa mission, le réfugié palestinien ne bénéficie plus de la protection ou de l'assistance de celui-ci. Partant, l'arrêt [of the Brussels court of appeal], qui, après avoir constaté que le demandeur a quitté le Liban et séjourne en Belgique, refuse au demandeur le statut d'apatride par application de l'article 1er, § 2, (i), précité, aux motifs que son « séjour [...] en Belgique n'est que temporaire et limité à la durée de ses études et qu'il ne met pas fin au droit [du demandeur] de bénéficier de l'assistance de l'U.N.R.W.A. lorsqu'il aura terminé ses études et pourra regagner le Liban », viole ladite disposition.)

DENMARK

1: Article 1D in the Refugee Determination Process

Article 1D continues to play no role in the determination of refugee status of Palestinian asylum-seekers in Denmark because Danish authorities consider the provision to be inapplicable as long as UNRWA continues its functions.

With regard to Palestinian refugees from Lebanon, Danish authorities contend that Lebanon cannot be considered a new home country for them. Therefore, in light of the circumstances in their original home country, in present-day Israel as opposed to their host country, authorities recognize their status as refugees. Palestinians from Lebanon are therefore recognized as refugees under Section 7.1. of the Danish Aliens Act and the essential question in cases involving these refugees is whether the applicant can obtain the necessary protection in Lebanon and, hence, return to Lebanon.

Over the last five years, a number of stateless Palestinians from Lebanon have sought asylum in Denmark. Authorities have rejected their applications if their key argument revolves around the dismal conditions of Palestinian in Lebanon or, alternatively, if the applicant can obtain sufficient protection from Lebanese authorities.⁵⁴ However, authorities have granted asylum to those applicants who could demonstrate a lack of adequate protection in Lebanon, for example due to involvement in some Palestinian organization⁵⁵ or due to specific personal circumstances.⁵⁶

Authorities consider Palestinians arriving from the OPTs or countries other than Lebanon, like Syria, Iraq or Jordan, to have obtained a new home country and their asylum claim will be assessed in accordance with Sections 7.1 and 7.2 of the Aliens Act.

2: Protection under the Stateless Convention

BADIL is not aware of decisions in Denmark involving Palestinians seeking protection under the 1954 Stateless convention.

⁵⁴ Decisions by the Danish Refugee Council are published in Danish in the Board's annual reports and/or on its website www.fln.dk. The decisions are published in an anonymous form without names of the parties, case numbers and dates. See, for example, a case from September 2008 concerning a Palestinian woman who was involved in a dispute with Fatah; a case from August 2008 concerning a Palestinian woman and her four children who were involved in a dispute with Hamas; and a case from May 2007.

⁵⁵ See a case from June 2009 concerning a Palestinian who had been involved in PFPL and even been tortured, or a case from June 2008 concerning a Palestinian who had worked for UNRWA but was considered a collaborator by PFPL.

⁵⁶ See a case from February 2009 concerning a homosexual Palestinian from Lebanon.

FRANCE

1: Article 1D in the Refugee Status Determination Process

Asylum-seekers are now granted asylum in France in accordance with “le code de l'entrée et du séjour des étrangers et du droit d'asile” (Code of the Entry and Stay of Foreigners and Asylum Law) (CESEDA). An important decision concerning the interpretation of Article 1D, second paragraph, had been issued by the National Court of Asylum (la cour nationale du droit d'asile (CNDA)) and Conseil d'Etat. Previously, French authorities interpreted Article 1D in accordance with the decision by the Commission des Recours des Réfugiés (CRR) in DAMASI (25 July 1996) in which CRR concluded that Article 1D, second paragraph, was not applicable because UNRWA assistance had not ceased. However, as the Palestinian asylum-seekers who arrived in France had left UNRWA's area of operation, they did not receive UNRWA's assistance and therefore were not excluded from applying for asylum under Article 1A(2) of the 1951 Refugee Convention (see Handbook page 169).⁵⁷

In 2007, the National Court of Asylum supplanted the CRR. On 18 April 2008⁵⁸ the National Court of Asylum deliberated the case of Mahmoud Assfour, a Palestinian refugee born in Kuwait in 1976, who, following the 1990 US invasion of Iraq, moved to Nablus in the West Bank where his father was born. In 1992 Israeli authorities expelled the applicant and his family from the West Bank. The family then moved to a refugee camp in Irbid, Jordan where UNRWA provides services. The applicant registered with UNRWA and received assistance from the Agency. In Jordan, his family faced problems with the intelligence authorities due to both their involvement with the Democratic Front for the Liberation of Palestine as well as a serious familial dispute with an influential Jordanian family. As a result, Mr. Assfour and other members of his family were sent to prison. The dispute continued and Mr. Assfour could not obtain proper protection from Jordanian authorities. He consequently decided to flee the country using forged passports. CNDA concluded that:

Considering, in view of the “travaux préparatoires” of the Geneva convention, that the State parties to the aforementioned convention intended to set up for the Palestinians registered with the United Nations Relief and Works Agency for Palestinians in the Near East (UNRWA) a particular protection regime in the form

⁵⁷ Other decisions by CRR included a case involving a Palestinian from Iraq who was granted refugee status, *M. Farouk Hossine Jounaidat*, 583443, CRR, 10 January 2007: « M. Farouk Hossine JOUNAIDAT, qui est d'origine palestinienne, a été victime d'une agression perpétrée par des musulmans chiites irakiens en raison de son origine palestinienne ; qu'en raison des avantages que lui ont accordés les autorités baasistes, il est considéré comme un partisan du régime déchu de Saddam Hussein ; qu'il craint donc avec raison, au sens des stipulations précitées de la convention de Genève susvisée, d'être persécuté en cas de retour en Irak ; que, dès lors, M. Farouk Hossine JOUNAIDAT est fondé à se prévaloir de la qualité de réfugié »

⁵⁸ [Mohammad Assfour, No 493412, La cour nationale du droit d'asile, 18 April 2008](#). (Click [here](#) for English version)

of special assistance arrangements; that the provisions of the second paragraph of article 1D must be interpreted with the aim of ensuring the continuity of such protection; that, from the moment it ceases, the equivalent protection provided by the provisions of the Geneva convention should be substituted, without prejudice to the application of article 1E and article 1F of the Geneva convention or the existence of a protection provided by a State or another international or regional organization; Considering, in the present case, that Mr. ASSFOUR was registered with UNRWA; that the assistance he was entitled to by the UNRWA is deemed to have ceased from the moment he left the area of activity of the above mentioned agency; that it does not appear from the documents enclosed in the file that he has Jordanian citizenship or enjoys rights and obligations derived from Jordanian citizenship; that the mere provision of the copy of a passport is insufficient to invalidate this analysis; that, finally, it does not appear from the documents enclosed in the file nor is it alleged that the applicant could have committed acts likely to exclude him from the protective provisions of the Geneva convention; Considering that, on the basis of the above, Mr. Mohammad ASSFOUR is entitled to claim refugee status.⁵⁹

This suggests that CNDA decided to view Article 1D, second paragraph, in accordance with UNHCR Note so that the provision was interpreted as an inclusion clause on the basis of which Palestinian refugees would be entitled to refugee status without having to fulfill the criteria set out in Article 1A(2) of the Refugee Convention.

The decision was, however, appealed by OFPRA to the Conseil d'État whose final decision revoked the above-mentioned decision by the National Court of Asylum and adopted the previous practice that Article 1D is only applicable when UNRWA assistance has ceased:

... the clause of automatic inclusion provided by the second paragraph of Article 1D of the Geneva Convention, which allows those registered with UNRWA to take advantage of the right and the benefits of this Convention only if the organization ceased all activity and if no resolution was adopted by the UN General Assembly to finally settle the case of the Palestinian people.⁶⁰

The Conseil d'État applied this interpretation of Article 1D to the facts and concluded:

Whereas it is clear from the documents submitted to the judges that Mr. A was registered with UNRWA in Jordan; he voluntarily left the country in 2003; and since then he has lived in France where he has sought refugee status.

⁵⁹ Translated by UNHCR.

⁶⁰ [Decision 23 July 2010, no 318356](#). (Translated from original format in French: ...qu'elle ne saurait toutefois utilement se prévaloir de la clause d'inclusion automatique prévue par la second alinéa du D de l'article 1^{er} de la convention de Genève, qui ne permettrait aux personnes enregistrées auprès de l'UNRWA de bénéficier de plein droit du régime de cette convention que si cet organisme cessait toute activité et si aucune résolution n'était adoptée par l'Assemblée générale des Nations Unies pour régler définitivement le sort des populations palestiniennes.)

Moreover, the National Court of Asylum granted him refugee status on the sole ground that, living outside the area of UNRWA's operations, he could no longer be considered as continuing to receive assistance from this organization; he did not have Jordanian nationality, nor enjoyed the rights and obligations attached to such citizenship. Thus, based on these circumstances his voluntary departure from Jordan made him entitled to recognition of refugee status on the basis of the second paragraph of Article 1D of the Convention of 28 July 1951. However, it [the court] should have verified before granting refugee status if he was a risk of persecution, if returned to Jordan, for reasons of race, religion, nationality, membership in a particular social group or political opinion within the meaning of paragraph 2 of Article 1, or otherwise, [it should have verified] whether he [the applicant] fulfilled one of the criteria mentioned in Article L. 712-1 of the Code of Entry and Stay of Aliens and Asylum to qualify for subsidiary protection. [Thus] the court committed an error of law, and without the need to examine other grounds of appeal, OFPRA is entitled to request the annulment of the contested decision.⁶¹

This means that claims submitted by Palestinians will continue to be examined according to the criteria set out in Article 1A(2) of the 1951 Refugee Convention as opposed to the UNHCR Note.

2: Protection under the Statelessness Convention

As stated in the Handbook, Palestinians might be recognized as stateless persons under the 1954 Stateless Convention and granted a residence permit after three years of regular residence in France, now in accordance with L. 314-11.9 of CESEDA.

In the case of 22 November 2006 (No 277373), OFPRA concluded that the exclusion clause in the stateless convention is not applicable in the case of a stateless Palestinian from Syria who had left UNRWA's area of operation:

⁶¹ *Ibid.* (Translated from original format in French: Considérant qu'il ressort des pièces du dossier soumis aux juges du fond que M. A était enregistré auprès de l'UNRWA en Jordanie ; qu'il a volontairement quitté ce pays en 2003 et qu'il réside depuis lors en France où il a demandé à bénéficier de la qualité de réfugié ; que la Cour nationale du droit d'asile lui a accordé la qualité de réfugié, au seul motif que, demeurant à l'extérieur de la zone d'activités de l'UNRWA, il ne pouvait plus être regardé comme continuant à bénéficier de l'assistance de cet organisme, ne possédait pas la nationalité jordanienne, ni ne jouissait des droits et obligations attachés à cette nationalité ; qu'en déduisant de l'ensemble de ces circonstances que son départ volontaire de Jordanie lui ouvrait droit à la reconnaissance de la qualité de réfugié sur le fondement du second alinéa du D de l'article 1er de la convention du 28 juillet 1951, alors qu'elle aurait dû vérifier avant de lui reconnaître cette qualité s'il craignait avec raison en cas de retour en Jordanie d'être persécuté du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques au sens du 2 du A de cet article, ou à défaut s'il ne remplissait pas l'un des critères mentionnés à l'article L. 712-1 du code de l'entrée et du séjour des étrangers et du droit d'asile pour bénéficier de la protection subsidiaire, la cour a commis une erreur de droit ; que par suite, et sans qu'il soit besoin d'examiner les autres moyens du pourvoi, l'OFPRA est fondé à demander l'annulation de la décision attaquée.)

[W]hat is clear from these provisions is that a person outside the area or UNRWA's operations is no longer eligible for its assistance or protection and thus, s/he is likely to fall under the 1954 Convention.⁶²

⁶² (Translated from original format in French: [Q]u'il résulte de ces stipulations, qu'une personne se trouvant en dehors de la zone où l'UNRWA exerce son activité ne peut plus bénéficier de l'assistance ou de la protection de ce dernier et est, par suite, susceptible de bénéficier du régime de la convention de 1954.)

HUNGARY⁶³

1. Statistics from 2005-2009 regarding Palestinian asylum seekers in Hungary:

The Hungarian Helsinki Committee (HHC) has provided the following statistical data:

	2005	2006	2007	2008	2009	TOTAL
asylum applications	25	38	54	41	23	181
refugee status	1	1	2	1	10	15
subsidiary protection	/	/	/	9	5	14
tolerated status	/	/	2	/	2	4
Rejection	2	19	10	5	4	40

A Police representative has informed the HHC that in the past a number of asylum seekers have claimed to be of Palestinian origin but they were actually from the Maghreb (a statement not contested by the HHC). As a result, the Police developed a questionnaire in order to check the validity of claims of origin.

2: New Legislation

Since 2005, there has been a change in Hungarian asylum and alien policy legislation. The Act XXXIX (2001) on the entry and stay of foreigners was replaced with the Act II (2007) (Act II of 2007) on the entry and stay of third country nationals and the Act CXXXIX (1997) on Asylum was replaced with the Act LXXX (2007) (Asylum Act). According to the new Asylum Act, there exist three different forms of protection:

- **Refugee status (*menekült*):** A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his/her origin and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country.
- **Subsidiary protection (*oltalmazott*):** A person who does not satisfy the criteria of recognition as a refugee but there is a risk that, in the event of his/her return to his/her country of origin, s/he would be exposed to serious harm and is unable or, owing to fear of such risk, unwilling to avail himself/herself of the protection of his/her country of origin. Serious harm is defined as death penalty; torture, inhuman or degrading treatment or punishment; serious threat to a civilian's life or person because of indiscriminate violence in an armed conflict.
- **Tolerated status (*befogadott*) - protection against refoulement:** A person who cannot be returned to the country of her/his nationality, or in the case of a stateless person, to the country of habitual residence, for fear of facing death penalty, torture, cruel, inhuman or degrading treatment or punishment, and there is no safe third country that would admit her/him, and who is not entitled to refugee or stateless status, subsidiary or temporary protection

63 Based on information provided by the Hungarian Helsinki Committee.

Asylum seekers who have been granted refugee status or subsidiary protection enjoy the same rights, except in relation to the period of validity for the status. In contrast, refugee status is granted for an indefinite time whereas persons under subsidiary protection are granted a renewable five-year residence permit. Refugees and persons under subsidiary protection receive a Hungarian identity card, and they are entitled to work and to receive a travel document. They can apply for Hungarian citizenship after three years.

Refugees and beneficiaries of subsidiary protection are entitled to stay in a reception centre for up to six months if they are unable to ensure their own accommodation. This period may be extended by a further six months. In addition, they may be entitled to various forms of financial support aiming to assist them to move out of the reception centre and to establish their own home. They are also entitled to a wide range of public health care services for a period of two years following the recognition of their status.

In contrast, persons who are granted a tolerated status receive a renewable temporary (“humanitarian”) residence permit, which is valid for one year increments. They need to obtain a work permit in order to be entitled to work. They are entitled to family reunification if they can support their family. They cannot receive a Hungarian travel document. They can apply for Hungarian citizenship after eight years starting from the time they established a place of residence (*lakóhely*) in Hungary, which depends upon obtaining a permanent residence permit (*letelepedési engedély*). This takes at least three years of stay so in practice they cannot obtain a permanent residence until after at least 11 years of stay in Hungary.

At the time of writing this report major immigration and asylum reform is underway in Hungary. Therefore, part of the above regulation and practices may change as of 2011.

3: Article 1D in the Refugee Status Determination

According to the information available to the HHC, Palestinian asylum seekers are no longer automatically recognized as refugees under Article 1D as was the practice in 2002-2004 (See “Jurisprudence” in the Handbook, page 188). The Office of Immigration and Nationality (OIN) now takes the view that Article 1D allows Palestinians who are registered with UNRWA to ask for asylum after they left the territory of UNRWA, but they are not entitled directly to refugee status under Article 1D. Their claim would therefore be assessed in light of Article 1A of the 1951 Refugee Convention and the criteria for subsidiary protection (see above).

The HHC is aware of three decisions in which Palestinian asylum seekers received a negative decision:

- a) In one case of 15 December 2009, OIN denied protection to a Palestinian man from Jordan⁶⁴. He had a Jordanian passport and enjoyed nearly the same rights as

⁶⁴ [Case No. 106-2-17515/15/2009-M.](#)

Jordanian citizens, as stated by OIN. Previously, the applicant had sought asylum in Norway but his claim was rejected. He stated that when he returned from Norway to Jordan, the Jordanian secret service waited for him at Amman airport and then took him to prison where he was tortured, allegedly because he had submitted an asylum application in Europe. Allegedly after his release from prison he had to sign a statement promising that he would not leave the country. He was told that if he submitted an asylum application again, he would be put to jail for 2-3 years. He stated that the Secret Service issued an arrest warrant and gave it to his family. Finally, he claimed that in Norway he had converted to Christianity and that he would be subject to persecution due to his new religious beliefs. He also claimed that he was subject to discrimination in Jordan due to his nationality.

The OIN was not convinced about his claim and concluded that Jordan could be considered a safe country for the applicant.

- b) The other cases concerned two UNRWA-registered Palestinian refugees from a refugee camp in Lebanon. OIN rejected their claims for asylum.⁶⁵

The applicants arrived in Hungary without any documents. They claimed to be members of PLO and that their duty was to protect a military leader of Fatah. They explained that as a result of their positions they were exposed to danger in the refugee camps and that they received many threats. They explained that if they were returned to Lebanon, they would probably not be accepted by the PLO again. The OIN concluded that they were not at risk of persecution from the Lebanese authorities and that they would enjoy protection from the authorities. The OIN also concluded that the applicants were undesirable in Hungary due to security reasons and as a result their claim for subsidiary protection was rejected.

The Bolbol decision discussed above (page []). After the decision by the European Court of Justice, Mrs Bolbol decided to withdraw her claim and the case therefore ended without a final decision by the Metropolitan court. Mrs Bolbol obtained a permanent residence permit on other grounds.

Apparently, some Palestinians have been granted refugee status, subsidiary protection and tolerated status in Hungary, but BADIL was not able to collect information about these cases.

4: Protection under the Statelessness Conventions

The new Hungarian Aliens Act also created a new separate status determination procedure for stateless persons who would then be entitled to apply for stateless status. HHC explained that the procedure has the following characteristics⁶⁶:

⁶⁵ [Case No. 106-2-4867/9/2010](#) and [case No. 106-2-4866/9/2010](#). An appeal is pending before the Metropolitan Court.

1. No strict formal requirements are applied to the application for stateless status - for example, an applicant can make such an application by way of a verbal statement alone;
2. The authority will interview the applicant who can use his/her own mother tongue during the procedure;
3. The authority shall provide access to legal assistance;
4. A lower standard of proof (similar to that applied in refugee status determination) is used in the stateless determination procedure;
5. A negative decision cannot be appealed within the administrative system but a claim for judicial review can be lodged with the Metropolitan Court; and
6. UNHCR is granted special rights and may take part in any stage of the procedure and give administrative assistance to the applicant.

Notwithstanding the clear improvements associated with a separate status determination procedure, there are still some major shortcomings associated with the stateless determination process. First, only a *lawfully* residing foreigner can apply for stateless status under the new procedure. Thus, most genuine applicants who do not enjoy such status would be excluded from applying for protection. In practice, this means that a stateless person who arrives in Hungary would first have to legalize his/her stay in the country before s/he will be entitled to seek protection under the new procedure.⁶⁷ Secondly, the actual rights attached to the stateless status are insufficient for real possibility of integration.

The HHC is aware of three cases involving stateless Palestinians who have applied for protection under the new procedure:

1. A case from 20 November 2008⁶⁸ involved a Palestinian man from Gaza who arrived in Hungary in 1994. He held expired Egyptian and Palestinian travel documents that could not be renewed. Following his arrival, the applicant was convicted of a crime and imprisoned. It proved impossible to carry out an expulsion order.

66 See further the report by HHC staff member Gábor Gyulai: *Forgotten without Reason – Protection of Non-Refugee Stateless Persons in Central Europe* (June, 2007) which is available at <http://www.unhcr.org/497099902.pdf>

67 See further Gábor Gyulai, *Practices in Hungary Concerning the Granting of Non EU-Harmonised Protection Statuses*, European Migration Network, 2009, chapters II.3.4, III.1.4, III.2 and V.2, <http://helsinki.hu/dokumentum/Non-EU-Harmonised-Protection-Statuses-Hungary%20final.pdf> The HHC will publish a comprehensive report (based on an on-going in-depth research) about protection of stateless persons in Hungary in late 2010.

68 [Case No. 106-1-15398/2008](#).

The applicant was married to a Hungarian woman and had two young children. He explained that he wished to integrate into the society. Based on these facts and the changes in his personal circumstances (e.g., marriage, children, a job and Hungarian language skills), the court decided to cancel the expulsion order and to grant the applicant stateless status.

2. A case from 23 June 2008⁶⁹ involved a Palestinian refugee from Lebanon who arrived in Hungary in 1989 and began university studies. He held valid Palestinian travel documents and the Hungarian authorities granted him a residence permit.

The applicant explained that his paternal grandparents fled from Palestine to Lebanon in 1948. His maternal grandparents who were also from Palestine fled to the Golan Heights under the same circumstances. In 1967, they fled again and settled in Damascus. His parents married in Damascus, and subsequently moved to Lebanon. Later, they traveled to Dubai where the applicant was born. His family was registered by the Lebanese embassy in Dubai as Palestinian refugees living in Lebanon. OIN checked whether the applicant could obtain citizenship in Lebanon and the United Arab Emirates, but realized that neither of the countries recognized the applicant as a citizen under their national laws. The OIN therefore granted the applicant and his family stateless status and a travel document.

3. A case from 1 April 2010⁷⁰ involved a Palestinian from Lebanon whose parents also fled from Palestine to Lebanon in 1948. The applicant received a scholarship in August 1989 and traveled to Hungary for studies. In 2009, the applicant requested an extension of his residence permit and his ID card, which was impossible as his nationality was not clarified. In the statelessness determination procedure only Lebanon was checked as a potential country of nationality, but the latter provided a negative answer. The OIN therefore granted him and his family stateless status and a travel document.

69 [Case No. 106-4-4130/9/2008-L](#).

70 [Case No. 106-4-603/15/2010](#).

IRELAND

1: Article 1D in the Refugee Status Determination Process

Since 2005, there have been no changes in the legislative framework regulating granting of refugee status in Ireland, and the Refugee Act of 1996 (as amended) continues to regulate applications for asylum.⁷¹ Section 2 of the Refugee Act contains an explicit exclusion provision based on Article 1D, paragraph one, of the 1951 Refugee Convention (i.e. Section 2(a) of the Refugee Act 1996 (as amended)) whereas the full text of the 1951 Refugee Convention, including the full text of Article 1D, is set out in the Third Schedule of the Refugee Act. As explained in the Handbook (See pp 192-194), there has been a debate in Ireland whether Article 1D has been incorporated into Irish law *en toto*. Although there seems to be a consensus that the Refugee Act 1996 (as amended) has not incorporated the second paragraph of Article 1D, this pertinent legal issue remains unresolved.

An asylum seeker who has been rejected refugee status may apply for subsidiary protection in Ireland pursuant to the provisions of the European Communities (Eligibility for Protection) Regulations of 2006 (S.I. No 518 of 2006), which gives effect to Qualification Directive. Applicants who are granted this complementary form of protection will be entitled to stay for an initial period of 3 years and to work in Ireland. This status is renewable and includes a right to family reunification. However, very few applications have been successful in acquiring these privileges to date. Unsuccessful applicants can seek leave to remain granted at the discretion of the Minister for Justice.⁷² In practice, it appears that claims submitted by Palestinians are assessed in relation to the test set out in Article 1A(2) of the 1951 Refugee Convention. Palestinian asylum seekers – of whom there are only very few in Ireland – would thus be treated as any other applicants and their claim would be treated pursuant to Section 2 of the Refugee Act 1996 (as amended). While the relevance of Article 1D is examined, the issue of registration with UNRWA is in practice dealt with as part of the assessment of the applicant's credibility.

Decisions by the Office of the Refugee Applications Commissioner (ORAC) are not made public. The Refugee Appeals Tribunal does not publish decisions and it is not bound by its own precedent. However, the Chairman of the Tribunal may publish legally important decisions but has thus far only done so on one occasion and no cases involving Palestinians has been published.

Recent case law from higher courts includes the decision by the High Court on 12 March 2009 in the case *S.H.M v. The Refugee Appeals Tribunal and the Minister for Justice*,

⁷¹ Ireland has, however, now implemented the EU Qualification Directive. The draft Immigration, Residence and Protection Bill from 2008 will introduce radical changes to the asylum process if adopted. However, it is not expected to be passed in the near future.

⁷² This means that they will be entitled to stay in the country initially on a temporary basis. Please see page 194 of the Handbook for further discussion of this matter.

Equality and Law Reform ([2009] IEHC 128, 2006 833 JR).⁷³ The case involved a 27-year-old Palestinian woman born in Libya who arrived in Ireland in 2000. Her parents fled Gaza after the 1967 war and arrived immediately thereafter in Libya where they established themselves and lived a stable life until 1993 when, in the aftermath of the Oslo Accords, Colonel Gaddafi declared that all Palestinians living in Libya must leave the country. As a consequence, the applicant's father was dismissed from his position as a teacher and the applicant and her siblings were prohibited from attending school for more than a year. The family relocated to another town in Libya (Tubrok), but her father became depressed and died suddenly in 1997. The family relocated again, but they all continued to be subjected to discrimination by their neighbors due to the fact of their Palestinian nationality. As stated by the court: "The fear of physical attacks and rapes against Palestinians prompted the applicant and her sisters to remain indoors as much as possible" (para 5).

The applicant's brother traveled to Ireland in 1994 and the applicant and her sister in 2000. Upon arrival, she was a holder of Egyptian travel documents. In Ireland, the applicant studied computer science and managed to finish her studies and obtain a national diploma in computing and software development five years later. Her sister obtained refugee status in Ireland due to her experience of persecution in Libya, and a second sister married an Irishman and obtained residence in the country. In 2006, the applicant applied for asylum in Ireland. Previously, she had married a Palestinian refugee living in Ireland, but as she had experienced some difficulties in her marriage, her application for asylum was made on her own right. The applicant stated in her application that:

'I'm a Palestinian born and lived in Libya (most of my life) for 19 years. I came to Ireland to study with my sister (Ebtessam A.M.). Now I've finished my study and I can't go back to Libya. My residency in Ireland is finished and I can't obtain a visa to my country of origin (Palestine) or any other country. I have Egyptian travel document (not a passport) which also doesn't entitle me to go to reside in Egypt. The Libyan government refused to issue me a visa to go back to Libya. I can't go back to Palestine, according to the Israeli law and Oslo agreement, I'm not entitled to go back to Palestine. After I got married, I feel that I lost my freedom of independence. Because of all the above, I decided to seek asylum in Ireland.' (para 10)

73 [2009] IEHC 128 Available at <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/744ec724fff401278025759f003d0004?OpenDocument>. Other cases include the decision of 20 November 2007 in *Y. v Refugee Appeals Tribunal & Anor* [2007] IEHC 274, in which a Palestinian from Gaza had been denied refugee status by ORAC and R.A.T due to lack of credibility concerning his story. The High Court Judge, however, accepted the applicant's argument 'that the process by which the Tribunal Member reached his conclusion as to a well-founded fear, based as it is on a lack of credibility, is lacking in sufficient examination of country of origin information, and rests more on conjecture and gut-feeling'. The applicant was therefore granted leave. In the hearing of the judicial review, however, Judge Hedigan dismissed the applicants' arguments (decision of 16 January 2008).

When asked whether she would prefer to return to Libya if the authorities would allow her to return, the applicant replied:

Yes or to go to Palestine or Egypt or if I become a refugee here, to be able to work, send money back to my family and bring my mother here because then I can take care of her. (para 16)

Her refugee claim was considered in relation to whether she had a well-founded fear of persecution in Libya. In early 2006, ORAC rejected her applicant and concluded:

It must be concluded therefore that the applicant does not have a well founded fear of persecution in Libya as she is willing to return there if she is allowed by the authorities. [...] she stated that she would be afraid of returning because she would be questioned by the authorities which would indeed be the case. [] However, in the applicant's case, it is clear from her statements that her fear of the authorities is countermanded by her desire to see her family. (para 17)

The Refugee Appeals Tribunal (R.A.T) confirmed this decision in May 2006 and concluded that the applicant had not proved a well-founded fear of persecution if she was returned to Libya, as required in the Refugee Act 1996 (as amended). Both ORAC and R.A.T had accepted that the applicant could not return to Libya due to Libyan policy generally restricting the re-entry rights of Palestinians who had left the country – for example for educational reasons. The applicant then sought judicial review by the High Court of R.A.T's decision. The High Court noted that:

The specifics of the applicant's evidence have remained consistent, i.e. that she and her sisters did not continue their third level education or go out because of fears of harassment, assault and rape. This fear came from stories they had heard of Palestinian girls being raped by Libyan men and also from their sister's experience of daily harassment while at university. This fear caused their mother to withdraw them from university and their brother to drive them, deliver them and collect them everywhere while they hid in the car. They did not want it to be known that four women lived in the house and they generally lived in fear of attack. These events and the history of persistent harassment suffered by the applicant's sister grounded her claim to refugee status and were the reasons why the applicant did not continue her education in Libya and why she came as a student to Ireland. (para 44)

The High Court then noted that while the applicant referred to her past experience in Libya, the key argument for her claim for refugee status is the fact that she, as a Palestinian, is a stateless person. The court then referred to the decision by the English Court of Appeal in *Revenko v. Secretary of State for the Home Department* [2001] 1 Q.B. 601, which established that statelessness per se does not confer refugee status, and noted that the applicant has to 'establish a well-founded current fear of persecution for a Convention reason and a stateless person who does not fear such persecution is not

eligible for protection under refugee law.’ (para 45). On the issue of persecution, the High Court noted that:

The applicant’s arguments were that her past experiences, taken with her inability to return, amounted cumulatively to current persecution but she did not make the case either in her appeal documents or in her evidence at the appeal hearing that these factors created an apprehension of future persecution creating an unwillingness to return to Libya. On the contrary, she made repeated assertions that she would return to Libya if permitted and her frequent attempts to obtain visas for visits are not demonstrative of any such feeling of apprehension or unwillingness to return. It is very probable that any feeling of apprehension she may have about her future arises from her precarious immigration status and not a fear of returning. (para 53).

On the issue of whether Libya’s policy of not allowing Palestinians to re-enter the country amounted to persecution, the judge noted that:

The policy of the Libyan State in controlling the movement of the Palestinian population within its boundaries may constitute discrimination or it may equally be consistent with the exercise of Libya’s legitimate right to regulate immigration. There are after all always many hundreds of thousands of Palestinians in the Middle East who seek temporary refuge in safe countries in which to work and live. Libya is entitled to determine whether rights to reside must be maintained to those immigrant Palestinians who leave for considerable periods. The Tribunal Member did not expressly address this issue but I do not believe that the absence of analysis of the reasons for her inability to return to Libya affects the validity of his conclusions. (para 56)

The High Court finally concluded that although R.A.T had not referred to the decision in Revenko, the conclusion was in full accordance with that decision (para 57). The court added that:

As there was no COI information before the Tribunal Member that Palestinians are currently persecuted in Libya, it was found that the applicant had not established the requisite well-founded current fear of persecution for a Convention reason if returned to Libya and her asserted stateless status therefore became irrelevant. (para 57)

The High Court did not refer to Article 1D in this decision or to UNHCR Note on Article 1D. This case confirms the position of judges in many other countries that statelessness in itself is not a justification for refugee status and that the denial of re-entry does not amount to persecution.

2: Protection under the Statelessness Convention

Ireland does not as yet have a formal procedure for assessing statelessness. This means that whereas stateless persons who are also refugees can seek protection under the Refugee Act 1996 (as amended), stateless persons who are not refugees may be diverted into the asylum process as a result of the absence of appropriate immigration procedures dealing with statelessness.⁷⁴

⁷⁴ See also decision of the High Court *AD v Refugee Appeals Tribunal & Anor.* [2009] IEHC 326, which, however, did not involve a Palestinian but a Bidun (Bedouin tribe) in Kuwait. A non-refugee stateless person may seek legal protection apart from applying for asylum by submitting a claim under Section 3 of the Immigration Act 1999 or, in the case of a stateless child born in Ireland, by making an application pursuant to the Citizenship Act. The former regulation mechanism will be abolished if the new Immigration, Residence and Protection Bill 2008 is passed into law. The new bill does not provide an alternative regulation mechanism.

ITALY

1. Statistical Data

According to the statistics of the Ministry of Interior, 122 asylum -seekers from Palestine were recognized as refugees in 2009.

2. Article 1D in the Refugee Determination Process

Italy incorporated the EU Qualification Directive and the EU Asylum Procedure Directive by the adoption of Legislative Decree n. 251/2007 and Legislative Decree n. 25/2008 respectively. Asylum claims are therefore now dealt with on the basis of these decrees in addition to the right to asylum set out in Article 10 of the Italian Constitution. The Decree 251 states the following:

1. A third country national is excluded from being a refugee, if:
 - (a) he or she falls within the scope of Article 1 D 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 third country nationals being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, they shall have full access to the forms of protection foreseen by this Decree.⁷⁵

When compared with the wording of Article 12(1)(a) of the Directive, it is clear that in contrast to the Directive, the Decree expressly excludes any reference to stateless persons in the first sentence. Moreover, the Decree 251 does not include the wording “*ipso facto*” in the last part of the second paragraph of Article 12, but instead refers to “full access to the forms of protection foreseen by this Decree.”

Based on input from the Italian Refugee Council (CIR) who has gathered information from various practitioners in Italy, it seems that the authorities now recognizes Palestinian refugees *ipso facto* as refugees without requiring evidence of a well-founded fear of persecution (Article 1A(2) test). However, given that arguments are not mentioned in the decisions, but rather only final outcomes are discussed, it is difficult to verify in which cases Palestinians were indeed recognised under Article 1D.

Furthermore, 180 Iraqi Palestinians were resettled from Al Tanf refugee camp, located on the border between Iraq and Syria, to Riace (Calabria) between the end of 2009 and February 2010 with the assistance of UNHCR. Upon their arrival, they had access to the Italian asylum procedure and obtained recognition. According to the practitioners, they might have been recognised as refugees under Article 1D.

⁷⁵ Text provided by Italian Refugee Council. This is not an official translation.

2: Protection under the 1954 Stateless Convention

Italy is a party to the 1954 Stateless Convention, but the provisions of the convention have not yet been incorporated into domestic legislation. However, a stateless person can apply for stateless status under the 1954 Stateless Convention on the basis of an administrative procedure before the Ministry of the Interior or before the civil courts.

NETHERLANDS

1. Refugee Determination Process: Article 1D

Article 1D of the 1951 Refugee Convention is directly applicable within the Dutch legal system. As explained in the Handbook, the Minister of Alien Affairs and Integration has issued guidelines regarding recognition of Palestinian refugees, Sub-chapter 2.2 (Exclusion Grounds of the 1951 Refugee Convention) of Aliens Circular C1/4.2.2 (Admission Grounds). In light of these guidelines and practice, Palestinian asylum seekers have not been granted refugee status on the basis of Article 1D, second paragraph.

Palestinians' asylum claims continue to be assessed both in relation to whether the applicant can return to UNRWA's area of operation and enjoy protection from UNRWA. If that is not the case, the authorities will assess the claim under the normal criteria in Article 1A(2) of the 1951 Refugee Convention. According to the records of the Dutch Refugee Council, and based on the contributor's interviews with private lawyers, in the last ten-year period, Palestinians have rarely been granted asylum, although some have received status on other grounds, such as for "humanitarian reasons".⁷⁶

A decision of 13 February 2009 (A)WB 09/2348, 09/2347 by the Rechtbank (District Court) in Arnhem concerned the applicant's deportation⁷⁷ and, specifically, whether it was (in)appropriate to deport him on the basis of his personal circumstances (notably the fact that he had a wife and child, both of whom held Dutch nationality) as well as the specific implications of being deported to Egypt as a Palestinian without possessing a valid residence permit. The Court concluded, on the basis of the Palestinian applicant's correspondence with BADIL and an expert witness, that return of a Palestinian to Egypt, who was not in possession of a valid Egyptian residence permit, would potentially violate his rights in terms of Article 3 of the European Convention on Human Rights. The Court did not explicitly take into account the fact that the applicant had a Dutch wife and a child. Furthermore, the applicant in this case acknowledged that he did not qualify for asylum in terms of Article 1(a). Rather than grant the applicant residence, the Court referred the matter back to the Dutch Immigration and Naturalization Service (IND) for reconsideration, as is often the case when the grounds for granting legal residence are ambiguous. The Palestinian applicant was eventually granted a temporary residence permit and permitted to work.

It is also worth mentioning that some Palestinians who have studied or worked in the Netherlands have obtained a legal residence status in the country outside the asylum procedure.

⁷⁶ Cases are available at www.rechtspraak.nl

⁷⁷ Other cases concerning deportation are available at www.rechtspraak.nl, including decision by Rechtbank Amsterdam 15 August 2008 AWB 08/27111.

2. Protection under the Statelessness Conventions

The Netherlands is party to the 1954 Stateless Convention and the 1961 Stateless Convention. However, no formal policy or consistent practice has been developed based on these Conventions, including vis-à-vis stateless Palestinians.

Stateless persons who have not obtained permission to stay in the Netherlands because of lack of asylum reasons can apply for regular residence permits in the Netherlands. They are entitled to such permits if they can prove that they are stateless and that the authorities in their country of former habitual residence will not issue travel documents to enable their return. However, it is very difficult to obtain such permits because the Dutch authorities take the view that there is no state in the world that will not allow a return of its inhabitants.

NORWAY⁷⁸

1: Article 1D in the Refugee Status Determination Process

Recently a new Aliens Act has been adopted and it entered into force in January 2010 (Lov-2008-05-15-35 Lov om utlendingers adgang til riket og deres opphold her). Refugee status may be granted in accordance with Article 28 of the Aliens Act which incorporates Article 1A(2) of the 1951 Refugee Convention (Article 28(a)) and notes that persons who fall within the scope of Article 3 of the European Convention on Human Rights will also be granted refugee status (article 28(b)). The Aliens Act also includes a reference to Article 1D (article 31 (former article 17(1))). If refugee status is not granted, the authorities will consider if the asylum seeker should be granted a residence permit on humanitarian grounds in accordance with Article 38 of the Aliens Act (e.g., health conditions).

With regard to Palestinian asylum seekers, authorities have recently debated the situation specifically for Palestinians from the West Bank and Gaza, and this has resulted in a suggested change in practice. Previously, such persons were recognized as refugees under Article 1D if they were registered with UNRWA and they were not required to fulfil the criteria set out in Article 1A(2) of the 1951 Refugee Convention (See further Handbook p 207). In April 2009, however, the Directorate of Immigration (UDI) recommended a change in practice, as explained in its letter of 3 April 2009 to the Ministry of Labour and Social Inclusion.⁷⁹ In its letter UDI explained that 90% of asylum seekers from OPT seek asylum in Cyprus, Norway, Sweden and the United Kingdom. It noted an increase in the number of Palestinians asylum seekers from these areas since 2008 and that this might have been caused by the practice in Norway that differed from the practice in the neighbouring country Sweden. UDI therefore recommended an individual assessment of each case involving Palestinians from Gaza and the West Bank so that asylum would only be granted if the criteria set out in Article 1A of the Refugee Convention were met (i.e., Article 28(a) of the Aliens Act).

The Ministry of Labour and Social Inclusion accepted UDI's recommendations, which are expected to form the basis of the assessment of future cases. Although there is still some uncertainty about the new practice among practitioners, it is expected that in future cases involving Palestinians from the West Bank and Gaza, the authorities will make an individual assessment of each case, as they do in relation to Palestinians from other countries. Asylum is granted only if the asylum seeker meets the criteria in Article 28 of the Aliens Act. Since the new practice has begun, UDI has rejected the majority of asylum claims submitted by Palestinians, and in many cases, the Appeals Board has confirmed this outcome. As a result of the new practice, there has been an increase in the number of rejected Palestinian asylum seekers from the OPT.

⁷⁸ Norway is not member state of the European Union and, hence, not obliged to implement the EU Qualification Directive.

⁷⁹ On file with author.

The first instance court in Oslo (Oslo Tingrett) decided on 1 February 2010 a case involving a Palestinian from the United Arab Emirates in which the court interpreted Article 1D.⁸⁰ The applicant was born in Gaza in 1977. His grandfather fled from Israel to Gaza following the 1948 war and his father grew up in Gaza. In 1979, he moved with his family to UAE where the applicant grew up. Later, he decided to study medicine. As he was not entitled to study this subject in the UAE he moved to Lithuania where he obtained his education. In 2001, he returned to UAE and in 2004 he traveled to Norway on Egyptian travel documents where he sought asylum. In April 2004, the UDI dismissed his application, and this decision was upheld at the appeals level in October 2005. During the following period and until January 2010, the applicant attempted to have the final decision re-examined, but he was unsuccessful. In the case before the Oslo Court, the applicant claimed that the authorities failed in not granting him asylum on the basis of Article 1D, paragraph two. The authorities claimed that the wording of Article 1D does not support the argument that any Palestinian would automatically be entitled to refugee status when seeking asylum in state parties to the 1951 Refugee Convention.

The court noted that UNRWA provides social assistance in terms of food, education, housing etc. The court then examined the decision by the German Administrative Court of 4 June 1991 (Handbook page 176), as referred to by the authorities, and agreed with the German court's interpretation of the words "for any reason", i.e., that voluntary departure from UNRWA's area of operation would not trigger the application of Article 1D, second paragraph. However, the Court did not conclude that that provision represents an inclusion clause. As stated: "It is unlikely that there are any real reasons to give the right to refugee status to someone who does not fulfil the normal conditions." The Court did not find that the wording of the Article 1D, paragraph two, clearly supported the alternative interpretation of Article 1D. The Court referred to UNHCR's interpretation of Article 1D set out in the Revised Note of October 2009, but concluded that the Note is not binding upon state parties to the 1951 Refugee Convention and that only a few countries follow UNCHR's interpretation of Article 1D.

In relation to Article 1A and, noting that the applicant is required to obtain a new sponsor and new valid travel documents, the court concluded that it is very likely that the applicant can obtain a Palestinian "passport" (eksternpass) from the Palestinian authorities and that if that is not the case, he can renew his Egyptian travel documents. The court also concluded that given the applicant's strong links with the UAE (parents and nine brothers live there with their families), it is very likely that he will be entitled to return to the UAE, get a new sponsor and obtain a work permit. This decision has upheld at appeal level by the Lagmannsrett.

2: Protection under the Stateless Convention

On the issue of statelessness, no specific procedure exists in Norway and the 1954 Stateless Convention is rarely referred to in asylum cases.

⁸⁰ A. A. M. K
030719TVI-OTIR/08, 1 February 2010.

v. Staten v/Utlendingsnemnda [Asylum Board], 09-

POLAND

1: Statistical Data

Between 2006 and 2009, 26 Palestinians from the Gaza Strip or the West Bank applied for asylum in Poland.⁸¹ However, the total number of Palestinian refugees and asylum seekers in Poland is unknown. As explained in the Handbook, most Palestinians in Poland do not seek asylum but try to legalize their stay in Poland by other means. (See Handbook page 213).

2: Article 1D in the Status Determination Process

In Poland, asylum seekers may apply for refugee status, subsidiary (or “supplementary” as stated in the law)⁸² protection or a permit for tolerated stay under the Act on Providing Protection to Aliens (Aliens Law)⁸³. Subsidiary/supplementary protection, which was introduced in 2008⁸⁴, is granted in accordance with the minimum standards set out in the EU Qualification Directive, i.e., to asylum seekers who are denied refugee status if a return to their country of former habitual residence would entail *inter alia* the risk of being subjected to torture, inhuman or humiliating treatment, or serious and individualized threat to life or health resulting from common use of violence to a civil population in the case of an armed conflict.

The Aliens Law refers to Article 1D of the 1951 Refugee Convention in the following (Article 19):

1. A foreigner shall be refused the refugee status if:
 - 1) (...)
 - 2) the refugee takes advantage of protection or aid of the organs or agencies of United Nations other than High Commissioner of the United Nations for Refugees, on condition that in a given circumstance the foreigner has practical and legal possibility to return to the territory, in which such protection or aid shall be available without jeopardizing his life, personal safety or freedom.

Article 1D of the 1951 Refugee Convention has been considered by the Office for Aliens (OA)⁸⁵ (replaced the former Office for Repatriation and Aliens) (1st instance) and the Refugee Board (2nd instance). OA has interpreted Article 1 D restrictively and stated that the provision does not apply to Palestinians born after 1951. In two cases, OA noted that the provision is unclear and ambiguous.⁸⁶ OA concluded that the wording “at present” does not mean refer to the moment of the refugee status determination procedure, as the UNHCR’s Handbook suggests art. 1D, but rather the time of signing the Geneva

⁸¹ Based on information gathered from various practitioners by The Halina Niec Legal Aid Center (HNLAC)

⁸² English translation of the Aliens Law is available at www.udsc.gov.pl

⁸³ Journal of Laws of 2003, No 128, item 1176.

⁸⁴ The Act of 2008 amending the Aliens Law.

⁸⁵ See further OA’s website: www.udsc.gov.pl

⁸⁶ Decision DP-II-2933/SU/2006 and DP-II-2724/SU/2005

Convention (i.e. 28 July 1951). OA therefore concluded that the provision should apply only to persons who were provided assistance and protection by UNRWA at that particular time.

Moreover, the High Administrative Court, which has a mandate to judicially review decisions by the OA and the Refugee Board, has interpreted the meaning of Article 1D, first paragraph, and concluded that Palestinians who have resided outside UNRWA's area of operations, including in Poland, for a number of years do not fall within the scope of the first paragraph of the provision.⁸⁷ They are therefore not excluded from applying for asylum and their claim will be considered under the general criteria of Article 1A(2) of the 1951 Convention.

In addition, the High Administrative Court has interpreted the meaning of Article 1D, second paragraph and concluded that it will only be triggered under specific circumstances, for example as a result of "objective causes" that would result in UNRWA ceasing its operations, for example due to a ban on the Agency's operations or lack of funds (see further Handbook page 210-211).⁸⁸

As a result of the restrictive interpretation by the High Administrative Court, Palestinian refugees have not been granted refugee status on the basis of Article 1D, second paragraph.⁸⁹

3: Refugee Determination Process: Outcome

With regard to refugee status based on Article 1A(2), there seems not to have been a single case in the period 2006-2009 in which a Palestinian asylum seeker was granted refugee status.⁹⁰ In the same period, three Palestinians were granted subsidiary protection by the OA on the basis of the Aliens Act.⁹¹ Two of the cases involved Palestinians from the OPT.⁹²

⁸⁷ Decision V SA 334/02.

⁸⁸ Decision V SA 1673/01.

⁸⁹ The practice of the High Administrative Court means that the positive decision by the Refugee Board in *Saleh Saleh v. Ministry of Internal Affairs and Administration*²⁵ November 1999 (available at UNHCR refworld) is not followed in practice. In that decision, which involved a Palestinian registered with UNRWA, the Refugee Board concluded that: "Therefore in this case the answers to the following questions are key: Was the person registered as someone under the care of the UNRWA and whether or not this care came to an end. During the investigation it was learned that the Party was registered with the UNRWA and materials regarding the circumstances of the case indicate that the care has realistically come to an end. The latter argument is supported by the fact that UNRWA's care is restricted in terms of geographic range while the party has been abroad for more than a dozen years. The party was under the protection of the UNRWA because of his parents and left the country at a young age and therefore in reality never took advantage of the protection. The party is uncertain of his fate upon returning to his fatherland. Therefore by meeting the UNRWA-registration requirement and practically speaking not being subject to the care of the UNRWA, the party is therefore entitled to refugee status under article 1 D section 2 of the Geneva Convention and the assessing doctrine". Practitioners continue to refer to the decision, but without success.

⁹⁰ Based on information gathered from various practitioners by HNHA.

⁹¹ Decisions by ORA and the Refugee Board are not published. The text therefore refers to the cases in an anonymous form and based on information obtained by HNLAC. One case involved a Palestinian from

In three cases Palestinians were denied refugee status and supplementary protection, but granted a permit for tolerated stay, for example in a case from 2007 concerning a Palestinian from Lebanon.⁹³ A total of 14 cases ended with an expulsion order.⁹⁴

4: Protection under the Stateless Convention

Poland is not party to the 1954 Stateless Convention or the 1961 Statelessness Convention, and no specific procedure exists to regulate stateless persons' situations. Thus, although Palestinians are treated as stateless persons under Polish law (unless holders of passports of some Arab countries), no legal implications follow from this status. However, children born to stateless parents living in Poland continue to be granted Polish citizenship, even if their parents have only temporary residence permits.

Gaza who was denied refugee status but granted supplementary protection by the OA (decision of 26 August 2010).

⁹² *Ibid.* See decision DP-II-420-1516-SU/2007.

⁹³ *Ibid.*

⁹⁴ Based on information gathered from various practitioners by HNHA. See, for example, decision DPU-420-1782/SU/2008

SPAIN

1. Statistical Data

There is currently no official source providing accurate estimates on the number of Palestinians living in Spain. Palestinian asylum-seekers are registered in official statistics in the category “non-recognized (Palestinians)”.

In the period 2005-2009, 194 Palestinians asked for asylum in Spain or at a Spanish Embassy in a third country (i.e., a total of 24).⁹⁵ During those five years, 61 asylum-seekers were granted refugee status and 16 were granted subsidiary protection.⁹⁶

	2005	2006	2007	2008	2009
Refugee status	-	2	13	20	26
Subsidiary Protection	1	4	4	-	7

2. Status of Palestinians on Entry into Spain

The new Spanish Asylum Law entered into force in November 2009⁹⁷ with the aim of transposing the EU Qualification Directive into Spanish law. Now Palestinians, or other asylum-seekers, who are in Spain apply for asylum at the border (it is usually at Barajas airport), at an Aliens’ Internment Center or inside the territory.⁹⁸

Asylum applications submitted at the border or at an Aliens’ Internment Center follow an accelerated procedure of maximum eight working days.⁹⁹ The Spanish authorities (i.e., a Hearing Officer from the Spanish Asylum and Refugee Office (*Oficina de Asilo y Refugio* OAR)) will examine the application and determine whether the claim would be considered inadmissible or rejected or, otherwise, can be admitted into the regular procedure. If the asylum claim is inadmitted or rejected, the asylum-seeker has the right to request a re-examination of the first decision (this reexamination is again assessed by the same Hearing Officer). In cases involving Palestinian asylum-seekers, the main reasons for inadmissibility or for rejection at the border are lack of credibility regarding the claimed Palestinian origin, and availability of protection in another country.

⁹⁵ UNHCR has obtained this statistical information from the Office for Asylum and Refuge.

⁹⁶ Ibid.

⁹⁷ Law 12/2009, regulating the right to asylum and subsidiary protection, 30 October 2009.

⁹⁸ Palestinians who are not in Spain can apply for asylum at a Spanish Embassy in a third country. Further information about this issue is not yet available as the relevant implementing regulation has not yet been adopted.

⁹⁹ See Article 21 of the Spanish Asylum Law. Regarding the time limits under the accelerated procedure, the eight days can be extended with ten working days if the authorities need to examine the eventual application of one of the exclusion clauses or article 33.2 of the 1951 Refugee Convention.

Palestinians who are already in Spain can submit an application for asylum to the Office for Asylum and Refuge (*OAR*). The asylum-seeker is provided with a receipt of her/his application that enables her/him to remain 30 days in Spain during which a decision on admissibility will be made.

If an asylum application, which is submitted at the border, at an Alien's Centre or within the territory, is admitted into the regular status determination procedure, the OAR (a Hearing Officer) will examine the merits of the case and determine whether the asylum seeker is entitled to refugee status or subsidiary protection.¹⁰⁰ During the procedure, the asylum seeker is protected against *refoulement* and s/he will be entitled to education and benefit from social and health related services. After six months, s/he will be entitled to work in Spain.

3. Refugee Determination Process: Refugee Status and Complementary Forms of Protection

3.1. General Legislation

In general, refugee status may be granted to persons on the basis of Article 2 of the Asylum Law, which regulated the right to asylum and subsidiary protection, stipulating that:

The right to asylum is the protection provided to persons from non EU Member States and to stateless persons, to whom is recognized the refugee status under the terms defined in Article 3 of this Law and the Convention on Refugee Status signed in Geneva on July 21, 1951, and its Protocol, signed in New York on January 31, 1967.

Refugee Status is defined in Article 3 of the Asylum Law:

Refugee status is recognized to every person who, due to a well-founded fear of being persecuted on the basis of race, religion, nationality, political opinions, membership of a particular social group, gender or sexual orientation is outside the country of his nationality and cannot or, owing to such fear, does not want to avail himself to the protection of the said country, or to a stateless person who, lacking a nationality and being outside the country of his former habitual residence, cannot or, as a result of such fear, is unwilling to return to it due to the same reasons, and it is not subject to any of the grounds for exclusion foreseen in this Law or of the grounds for rejection or denegation of article 9.

Asylum-seekers who are not recognized as refugees may be granted subsidiary protection according to Article 4 of the Asylum Law:

The right to subsidiary protection is that provided to the persons of non EU Member States and to the stateless persons who do not qualify as a refugee but in

¹⁰⁰ The OAR will also examine if the person can be authorized to stay in Spain for humanitarian reasons, within the framework of the current regulations regarding aliens and immigration.

respect of whom substantial grounds have been shown for believing that if returned to his or her country of origin in the case of nationals of a country, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering any of the serious harm as foreseen in Article 10 of this Law, and who cannot or, as a result of the said risk, do not want to subject themselves to the protection of the country in question, and it is not subject to any of the grounds for exclusion foreseen in this Law or of the grounds for rejection of article 12.

Asylum and subsidiary protection entail a number of similar rights¹⁰¹:

- Protection against *refoulement* as established in international treaties signed by Spain;
- Access to information concerning the rights and obligations of the protection granted, and this information should be provided in a language that is understandable to the beneficiary.
- An authorization for permanent residence and work permit valid for five years and renewable, as established in the Spanish Immigration Act.
- Identity and travel documents to those for whom refugee status has been recognized and, when necessary, for those who benefit from subsidiary protection;
- Access to public employment services;
- Access to education, health care, housing, to social assistance and social services; protection of rights set out in legislation concerning victims of gender violence; and access to social security and integration programs under the same conditions as Spanish nationals.
- Access, under the same conditions as Spanish nationals, to ongoing or occupational training and to work in internships, as well as to procedures for recognition of academic and professional diplomas and certificates and other proof of official qualifications issued abroad.
- Freedom of movement;
- Access to programs for integration;
- Access to voluntary repatriation assistance services which may be established;
- Protection of the family unit under the terms foreseen in the Spanish Asylum Law (Articles 39-41), and access to the support programs, which may be established for that purpose.

3.2 Article 1D in the Refugee Status Determination

There is a significant number of cases involving Palestinian refugees in Spain who originally lived within UNWRA's area of operation. As a result of many discussions between the asylum authorities and UNHCR, the authorities finally in 2005 accepted a proper application of Article 1D of the 1951 Refugee Convention.

101 See further Article 36 of the Spanish Asylum Law.

When OAR receives an application for asylum from a Palestinian who previously lived within UNRWA's area of operation, they will first request UNHCR in Madrid to check whether his/her claim to be registered by UNWRA is credible. UNHCR will then contact UNRWA and ask for verification of registration of either the applicant or his/her father. Once UNRWA has confirmed the registration, Article 1D is applied automatically by OAR and refugee status is recognized to the asylum seeker.

The Spanish Asylum Law of 2009 reflects this practice as Article 8.1.a) of the Law has incorporated Article 1D, second paragraph into law¹⁰²:

the persons who are included within the scope of Article 1 D of the Geneva Convention, relating to the 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 asylum regulated in this Law.

This new practice takes into consideration UNHCR Revised Note on Article 1D of October 2009.

The decisions by OAR are not made public so the above is based on information provided by UNHCR Madrid which is not aware of any court case relevant to the interpretation of Article 1D as it is directly applied by the asylum authorities.

4. Refugee Determination Process: Outcome

Palestinians, who have been registered by UNWRA and whose registration has been verified, are granted asylum as they are recognized as refugees.

It may also be possible that some Palestinians from the OPT who are not registered by UNRWA are granted asylum on their own merits. These cases are very few as the Spanish authorities most often would prefer to grant Palestinian asylum seekers from the OPT who are not registered with UNRWA subsidiary protection as they consider these claims are generally based on the situation of prevailing generalized violence in the OPT and other types of violence.

There are very few cases in which Palestinians asylum seekers come from other countries living outside UNRWAS's area of operation. In those cases, the Spanish authorities usually assess if they will have effective protection in that country.

¹⁰² There is no reference to Article 1D, first paragraph.

The main reasons for final rejection of Palestinian claims have been lack of credibility with regard to the claimed Palestinian origin and availability of protection in another country.

5. Return – Deportation

Asylum seekers whose claims for international protection (asylum or subsidiary protection) are rejected and who are not granted protection on humanitarian grounds will be asked to leave the country within 15 days. After this period, the person will be subject to expulsion from Spain. The authorities may detain him/her in order to ensure the enforcement of his/her deportation order. Such detention must be authorized and controlled by a judge and can never exceed 60 days.

Currently all Palestinian asylum-seekers who are not recognized as refugees or are granted subsidiary protection or protection on humanitarian grounds, are subject to forcible return, unless they meet the requirements for an alien's residence or work permit. Often in practice, however, it proves difficult or even impossible to return such rejected asylum seekers.

6. Temporary Protection

Additional Provision Two of the Spanish Asylum Law relates to displaced persons and it stipulates:

Temporary protection, in the event of a massive flow of displaced persons, shall be that which is foreseen in the Regulation on the system of temporary protection in the event of a massive flow of displaced persons, approved by Royal Decree 1325 of October 24, 2003.

This regime has never been ever applied to Palestinians.

7. Protection under the Stateless Conventions

Spain became party to the 1954 Stateless Convention on 12 May 1997. Relevant Spanish legislation was enacted on 20 July 2001, including a procedure for the recognition of stateless persons.¹⁰³

From January 2005 to April 2010, three Palestinians were recognized as stateless persons: two by the stateless authorities at OAR104 and one by the National High Court.¹⁰⁵

¹⁰³ The Stateless People regulation, approved by Royal Decree No. 865/2001.

¹⁰⁴ This statistical information has been given by the Spanish Asylum Office which is also responsible for examining these claims. See Sentencia de la Audiencia Nacional, de 2 de abril de 2008

¹⁰⁵ Judgement of the National High Court (Audiencia Nacional) 2 April 2008 (28079230052008100645) which involved a Palestinian from Libya who was registered with UNRWA. He had lived in United Arab Emirates and was a holder of Egyptian travel documents. The decision is available at <http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=137286&links=apatrida&OPTimize=20080522>

8. Reference to Relevant Jurisprudence

Decisions by OAR are not made public for reasons of confidentiality. Decisions by the courts of appeal cases are public. However, UNHCR has not been able to find any court case relevant to the interpretation of Article 1D as it is directly applied by the asylum authorities. Most of the decisions made by the National High Court and the Supreme Court in cases involving Palestinians confirm the first instance decision and were dealing with the issue of lack of credibility regarding the claimed Palestinian origin.¹⁰⁶ (See further the relevant legal database.)¹⁰⁷

¹⁰⁶ See, for example, judgement of the national High Court, 30 April 2008 available at <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=105731&links=asilo%20y%20palestina&OPTimize=20080605>. See also judgement of the National Court 14th December 2007.

<http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=298480&links=asilo%20y%20palestina&OPTimize=20080131>

¹⁰⁷ <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm>

SWEDEN

1: Article 1D in Refugee Status Determination

A new Aliens Act (2005:716) entered into force on 31 March 2006¹⁰⁸. It was lastly amended in January 2010 to make it correspond with the EU Qualification Directive and the EU Asylum Procedure Directive. Asylum seekers can now apply for refugee status, subsidiary protection or protection as a person otherwise in need of protection. The latter group would include persons who need protection due to external or internal armed conflicts or who, due to other severe conflicts in his or her native country has a well-founded fear of being exposed to serious abuses.

Swedish authorities are still not applying Article 1D, paragraph two, in order to recognize Palestinians *ipso facto* as refugees without an Article 1A(2) test. Article 1D, however, comes into play once a Palestinian asylum seeker has been granted permanent residence to stay in Sweden. The Swedish authorities have adopted the interpretation of Article 1D that UNRWA assistance has “ceased” – and Article 1D is therefore applicable – when Palestinian asylum-seekers have obtained a permanent residence permit in Sweden. Thus, Article 1D only becomes applicable once the asylum-seeker is granted a permanent residence permit, and then Article 1D ensures that the refugee is entitled to travel documents and other benefits stipulated in the 1951 Refugee Convention. If Article 1D is found to apply, i.e., if s/he is registered or eligible to be registered with UNRWA¹⁰⁹, s/he is entitled to travel documents and other benefits of the 1951 Refugee Convention.¹¹⁰

Article 1D, therefore, does not play a role in the refugee status determination procedure. Palestinian asylum seekers continue to be treated like other asylum seekers who are required to prove a well-founded fear of persecution for one of the Convention reasons. See, for example, cases involving Palestinians from Iraq¹¹¹ and from Gaza.¹¹²

With regard to the issue of deportation of Palestinian refugees who have received a negative decision concerning their asylum claim, Swedish authorities continue to discuss the issue in particular reference to Palestinians from the Gulf countries, Iraq and the OPT.

¹⁰⁸ Available in English at <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf>

¹⁰⁹ See decision by Swedish Migration Board, no 11604 from 1994 concerning a Palestinian refugee who had never resided within UNRWA’s area of operation but who was entitled to registration. See the Handbook, at 225, for other relevant cases.

¹¹⁰ If the applicant holds a Syrian or Lebanese travel document, s/he is also entitled to 1951 travel documents. Palestinians granted permanent residence permit in Sweden may be entitled to travel documents on other grounds as well, for example by being recognized as refugees under the 1951 Refugee Convention.

¹¹¹ Many Palestinians from Iraq have been denied protection in Sweden. See, for example, the decision by the Migration Board of 7 March 2008 involving a Palestinian from Karrada area in Baghdad who was not entitled to asylum. The Migration Board also concluded that he could return to the area (decision on file with BADIL). His parents were 1948 refugees but there was no reference to the application of Article 1D. However, some have received positive decisions. See, for example, the decision by the Migration Court of Appeal of 5 June 2009 (UM 1132-09) in which the applicant was granted protection.

¹¹² See, for example, instructions of 1 April 2010 (RCI 05/2010) and of 15 March 2010 (RCI 04/2010) by the legal director of the Board of Migration.

The key question raised is whether the rejected asylum seeker can prove that it is impossible to return to the country of former habitual residence (“verkställighetshinder”). If s/he can provide such evidence, s/he would be entitled to submit a new application for a residence permit to the Migration Board. If the Migration Board concludes that it is impossible to execute the deportation order, the person may be granted a residence permit on humanitarian grounds (5 kap. 6 § Aliens law).

- With regard to Palestinians from the Gulf countries, the Migration Board and the Appeals Board take the view that neither the general situation of Palestinians in the Gulf States, nor the difficulties in returning there justify the granting of residence permits in Sweden. Moreover, the authorities hold that these Palestinians should assist in the effort to return them by, for example, attempting to find a new job and a new sponsor in order to be entitled to new work and re-entry permits. The decision of 3 January 2008 by the Migration Court of Appeal¹¹³ for example, involved a Palestinian from Saudi Arabia who came to Sweden in July 2005 and who was denied refugee status and complementary protection. He allegedly could not return to Saudi Arabia because he could not get a sponsor in the country. The Saudi Embassy in Sweden had confirmed to him that he could not return. The Migration Court of Appeal concluded, however, that he had not done enough to get a new sponsor and that there had not been any attempt to deport him to Saudi Arabia.¹¹⁴ The Court of Appeal therefore concluded that there was no proof that it was impossible to return the applicant to Saudi Arabia, overruled the decision by the Migration Court and concluded that he should be deported. As of writing this report, the applicant was still in Sweden – now more than five years since his arrival - and he continues to cooperate with the police to see if he can be returned to Saudi Arabia. He has been informed by the Egyptian embassy in Saudi Arabia that he is not entitled to new travel documents because he does not have a valid residence permit in Saudi Arabia.
- With regard to return of Palestinians from Iraq, the Swedish authorities have concluded that it is not generally impossible to return Palestinians to Iraq (see decisions referred to in footnote above). However, the Iraqi Embassy in Sweden has informed some Palestinians that if they have been out of Iraq for more than six months, they will not be entitled to Iraqi travel documents.¹¹⁵

¹¹³ Board of Migration v. stateless, UM 2750-07, 3 January 2008.

¹¹⁴ “Det är den enskilde som har att visa att förutsättningarna för uppehållstillstånd är uppfyllda (jfr MIG 2006:1). har som grund för uppehållstillstånd uppgett att han inte kan få någon sponsor, vilket krävs för inresa till Saudiarabien, och att beslutet om utvisning därför är omöjligt att verkställa. Det framgår emellertid inte av utredningen i målet att gjort något försök att erhålla en sponsor och något försök att verkställa utvisningen har ännu inte gjorts. Det är således inte visat att det finns något konkret verkställighetshinder som skulle kunna beaktas vid den samlade bedömningen av om synnerligen ömmande omständigheter föreligger. Migrationsöverdomstolen finner att det inte heller i övrigt föreligger omständigheter som medför att bör beviljas uppehållstillstånd på grund av synnerligen ömmande omständigheter.”

¹¹⁵ This issue is being debated in the Swedish Parliament when MP Tomas Eneroth on 21 October 2010 raised a question to Minister for Migration concerning how to solve the problem that rejected stateless Palestinians have no country to return to.

- With regard to return of Palestinians from the OPT who have not been granted protection, Swedish authorities follow the instruction of 29 September 2009 by the Board of Migration concluding that it is not generally impossible to return Palestinians to the Gaza Strip¹¹⁶. See, for example decision of 19 March 2010 by the Migration Court of Appeal.¹¹⁷

On two occasions, the European Court of Human Rights has concluded that a decision to expel a Palestinian from Sweden would not violate Sweden's obligations under the European Convention of Human Rights.¹¹⁸ In page 223 of the Handbook, a reference was made to a case before the ECHR. This case ended without a court decision because in 2008 the Swedish authorities decided to grant a permanent residence permit to the applicant and his family.

2. Protection under the Stateless Convention

Sweden is party to the 1954 Stateless Convention. The convention continues to be applied with regard to travel documents for persons who have obtained permanent residence permits to stay in Sweden.¹¹⁹

The practice with regard to stateless Palestinians is that when they have obtained a permanent residence permit they are entitled to apply for travel documents. If they are registered with UNRWA or entitled to be registered with UNRWA¹²⁰ or holders of travel documents from Lebanon or Syria, they will be entitled to apply for travel documents under the 1951 Refugee Convention, as explained above. This practice was recently discussed by the Migration Court of Appeal (Migrationsöverdomstol) in its decision of 9 March 2009 (UM 7388-08) in which the court overruled a decision by the Migration Court of 24 October 2008 concerning a stateless Palestinian who was registered with UNRWA and who had been granted travel documents under the 1954 Stateless Convention by the Swedish Migration Board. The Court of Appeal concluded that the Migration Court should have accepted the appeal concerning the issue of travel documents and therefore returned the case to the Migration Court for re-consideration.

With regard to other Palestinians who have been granted a permanent residence permit in Sweden, but who were *not* registered or entitled to be registered with UNRWA and who did *not* hold Syrian or Lebanese travel documents, the Appeals Board had concluded that they are entitled to travel documents under the 1954 Stateless Convention.¹²¹

¹¹⁶Document is available at www.mirgrationsverket.se. The conclusion was: "Enligt rättschefens bedömning bör det därmed inte heller generellt sett i verkställighetsärenden anses föreligga hinder mot verkställighet till Gaza."

¹¹⁷ UM 8638-08 available at www.mirgrationsverket.se

¹¹⁸ Decision of 21 October 2008 M.H. v. Sweden (application no 10641/08) and Decision of 22 June 2010 (application no 23354).

¹¹⁹ The issue of travel documents is regulated in Utlänningsförordningen Kap 2, para 7, and Utlänningslag (2005: 716) Kap 4, para 4.

¹²⁰ See decision of 17 June 2004 by the Appeals Board.

¹²¹ See decision of 10 May 2004 (Handbook page 224)

SWITZERLAND

1. Statistical Data

By late 2009, 163 Palestinians were residing in Switzerland with either a yearly or a permanent residence permit.¹²² Of these, 35 had been recognized as refugees. Moreover, 77 Palestinians were granted provisional admission and enjoyed a complementary form of protection. They received a permit to stay (the different permits are discussed below). Palestinian asylum-seekers who claim to come from Palestine are registered in official statistics under the category of “stateless or nationality unknown” (“staatenlos oder Staat unbekannt”/“apatrides, Etat inconnu”). This category is used because these persons come from an area that is not recognized by the Swiss government.

2. Status of Palestinians upon entry into Switzerland

As in the case of other asylum-seekers, Palestinians in Switzerland may submit their applications for asylum to one of the reception centers of the Federal Office for Migration. They are provided with an “N-permit” for asylum applications that is valid for the duration of the asylum procedure. After a certain period at one of the five initial reception centres, they are relocated to a Canton and usually accommodated in a collective center.

Asylum-seekers who are not in Switzerland may file an asylum application at a Swiss airport (Zurich or Geneva). A full asylum procedure is conducted in the respective airport reception facility. If after the assessment of their protection needs the persons are allowed to enter the Swiss territory, they receive the same treatment as other asylum-seekers.

3. Refugee Determination Process: Refugee Status

Applications for asylum are considered on an individual basis by the Federal Office for Migration, and by the Federal Administrative Court at appeal level, on the basis of the revised Asylum Law of 26 June 1998 (Swiss Asylum Law). Article 3 of the Swiss Asylum Law provides that:

1. Refugees are any persons who, in their country of nationality or country of former residence, are exposed to or have a well-founded fear of being exposed to serious harm for reasons of race, religion, nationality, membership of a particular social group or political opinion.
2. Regarded as serious harm are in particular threats to life, physical integrity or freedom, as well as measures that amount to an unbearable psychological pressure. Reasons for fleeing specific to women must be taken into consideration.

¹²² The statistical data is based on the ethnicity of the Palestinians. No statistical information is available on the countries of origin of Palestinians in Switzerland.

3.1 Article 1D in Refugee Status Determination

There is no reference to Article 1D of the 1951 Refugee Convention in the Swiss Asylum Law. However, the 1951 Refugee Convention, which entered into force in Switzerland on 21 April 1951, is directly applicable in Swiss law, like other international treaties to which Switzerland is party. Its provisions, including Article 1D, may therefore be taken into consideration in asylum cases.

In a leading decision of [11 September 2008 \(BVGE 2008/34\)](#), the Federal Administrative Court confirmed that asylum applications of Palestinians have to be considered on an individual basis, as UNRWA is not protecting Palestinian refugees to an extent that would justify a general exclusion of all Palestinians from international protection (see below). This means that in practice, the refugee status determination of Palestinians is conducted by the Swiss authorities solely on the basis of Article 3 of the Swiss Asylum Law and in accordance with Article 1A of the 1951 Convention. There is currently no assessment of Article 1D of the 1951 Convention. This means that there is no difference between the examination of asylum claims submitted by Palestinians and those submitted by persons of other origin.

4. Refugee Status Determination Process: Outcome

Asylum-seekers who are recognized as refugees on the basis of Article 3 of the Swiss Asylum Law are entitled to stay in Switzerland (Article 2 of the Swiss Asylum Law). They are issued a residence permit (B-permit, article 60 of the Swiss Asylum Law) which is valid for one year and therefore needs to be renewed. It can, however, be revoked only under very special circumstances (article 62 Swiss Foreigners Law). After five years with a B-permit, refugees are entitled to a permanent residence permit (C-permit), which entails almost the same rights as Swiss citizenship, except for political rights.

Jurisprudence

In a leading decision (BVGE 2008/34), the Federal Administrative Court confirmed that asylum applications of Palestinians have to be considered on an individual basis, as UNRWA is not protecting Palestinian refugees to an extent that would justify a general exclusion of all Palestinians from international protection under the 1951 Convention (cf. Erwägung 6.5. of the judgment).

Some Palestinians have been granted refugee status in Switzerland on the basis of Article 3 of the Swiss Asylum Law. However, many applications for asylum submitted by Palestinians have been rejected by the authorities on the basis that there was no well-founded fear of persecution in the applicant's country of former residence.

Some rejected Palestinian asylum-seekers have been granted provisional admission on the basis that expulsion was technically impossible. In the case 2002/17 of 19 August 2002, the Asylum Appeal Commission (which was replaced by the Federal Administrative Court in 2007) granted provisional admission to a female Palestinian from Lebanon because she did not possess any travel documents and the Lebanese authorities would most likely not allow her to return to Lebanon. The provisional admission can be considered a complementary form of protection, although it is not a residence permit as such (see more below)

5. Return – Deportation

The Federal Office for Migration undergoes an individual analysis of each asylum application. If the asylum application is rejected, the Federal Office will further analyze whether return is admissible, reasonable and technically possible. If these three conditions are fulfilled, return will be executed (article 44 paragraph 2 of the Swiss Asylum Law). Following a final negative decision, the applicant is required to leave Switzerland voluntarily (article 44 of the Swiss Asylum Law). Failure to leave the country voluntarily within the specified time limit normally results in the enforcement of the expulsion order by the police. Forced deportation can be carried out.

Provisional admission (“admission provisoire”/“vorläufige Aufnahme”) may be granted if the enforcement of the expulsion order is deemed technically impossible (“pas possible”/“nicht möglich”), is not allowed under international law (“illicite”/“nicht zulässig”) or is not “reasonable” (“pas raisonnablement exigée”/“nicht zumutbar”, for example in situations of war, civil war, generalized violence or medical distress in the country of origin), (see article 44 of the Swiss Asylum Law and article 83 of the Swiss Foreigners Law). Provisional admission may also be granted to persons who are recognized to be refugees for whom it is found that the threat of a serious harm arose because of the departure from the country or of actions following departure or because they are held not to deserve asylum, because they committed a reprehensible act (“actes répréhensibles”/“verwerfliche Handlungen”) or because they have endangered or pose a threat to the internal or external security of Switzerland (articles 53 and 54 of the Swiss Asylum Law).

Persons who are granted provisional admission do not enjoy the same rights as recognized refugees. They are entitled to an F-permit valid for one year, and their situation will be re-examined every 12 months. The permit is withdrawn if the reason for its granting ceases to exist. The F-permit is not considered a residence permit as it does not provide the right to residence in Switzerland. Rather, the permit represents an alternative to an unenforceable expulsion order. Although holders of an F-permit may apply for a residence permit (B-permit) after five years, in principle, the F-status can last indefinitely, along with its restrictions (for example, freedom of movement is restricted, travel abroad is difficult, access to work is limited and family reunification is only possible after three years and under certain circumstances, see article 85 of the Swiss Foreigners Law). Social benefits such as health insurance social assistance are equivalent to those of asylum-seekers.

6. Temporary protection

In accordance with Article 4 of the Swiss Asylum Law (“Octroi de la protection provisoire”), temporary protection can be provided to people (mostly groups) in need of protection as long as they are exposed to a serious general danger, in particular during war or civil war, as well as in situations of generalized violence. This provision has not been applied to Palestinians. It should be noted that this provision is generally not applied at present. It was applied in the past to the large groups of persons who arrived during the

Balkan conflicts. Persons who flee generalized danger are normally granted provisional admission.

7. Protection under the Statelessness Conventions

Switzerland is party to the 1954 Stateless Convention, but not to the 1961 Stateless Convention. Persons recognized as stateless persons by the Swiss government have the same rights as recognized refugees, e.g. the right to obtain travel documents or social benefits.

Since 1 January 2008, they obtain a B-permit (a yearly residence permit) and have the right to a permanent residence permit (C permit) after five years (pursuant to Article 31 of the Swiss Foreigners Law).

However, since Switzerland ratified the 1954 Stateless Convention in 1972, only a small number of applicants have been recognized as stateless persons (currently, there are 67 persons recognized as stateless residing in Switzerland).

Applications by Palestinians for recognition of stateless status are very rare and the last application dates back several years. The number of Palestinian stateless persons whose asylum claims were accepted is unknown. Normally a determination as to statelessness is not made if the person is granted asylum, and there is no need to do so if asylum is granted, since the rights are the same.

8. Reference to Relevant Jurisprudence

Decisions by the Federal Office for Migration are not published. Decisions by the Swiss Federal Administrative Court are available at <http://www.bundesverwaltungsgericht.ch/index/entscheide/jurisdiction-datenbank.htm>. Decisions by the former “asylum court”, the Asylum Appeal Commission, are available at <http://www.ark-cra.ch/emark/index.htm>

THE UNITED KINGDOM¹²³

1. Statistical Data

According to figures published by the United Kingdom Border Agency (UKBA), which has replaced the Immigration and Nationality Directorate of the Home Office,¹²⁴ asylum applications made by Palestinians, who were non-dependants, totaled 260 in 2009.¹²⁵ Of the 225 applications reviewed, the UKBA rejected the vast majority of them (91%) granted only 2% of them refugee status, and gave 7% the choice to leave or to remain.¹²⁶

2. Status of Palestinians upon Entry into the United Kingdom

As in the case of other asylum seekers, Palestinians may claim asylum at the port of entry by communicating a fear of return to an immigration officer of the UKBA or if already in the UK they may submit an application to UKBA. They are subject to a screening interview within a matter of days.¹²⁷ After the interview they are provided with an Application Registration Card (ARC)¹²⁸ containing their personal details. Some will be held in immigration detention. Asylum seekers, who are not kept in detention, will be given Temporary Admission (TA) to the UK. This 'status' is usually accompanied with reporting obligations and specific residence conditions, i.e., the asylum seeker may be dispersed to specific areas within the UK.

Those who cannot support themselves may be eligible for aid from the National Asylum Support Service (NASS), which provides subsistence payments and accommodation on a no-choice basis in parts of the United Kingdom. Asylum claimants wishing to take up employment may only do so under certain circumstances, namely if the claimant is made to wait longer than 12 months for an initial decision to be made.¹²⁹

123 Based on information gathered by Ali Bandegani (Barrister at law, Grays Inn). Mr Bandegani has been involved in a number of cases involving Palestinians. For the purpose of this research, he has provided summaries of cases that are not included in this section, but they are available with the author.

124 The UKBA is an agency of the Home Office. It is responsible for securing the UK border and controlling migration in the UK. The agency also considers applications for permission to enter or stay in the UK. See further the UKBA website: <http://www.ukba.homeoffice.gov.uk/> and <http://www.ukba.homeoffice.gov.uk/aboutus/>

125 Source: Home Office, Migration Statistics.

126 *Ibid.*

127 See further information at UKBA's website, at <http://www.ukba.homeoffice.gov.uk/asylum/process/screening/>

128 See further information at UKBA's website, at <http://www.ukba.homeoffice.gov.uk/asylum/support/arc/>

129 See further information at UKBA's website, at <http://www.ukba.homeoffice.gov.uk/asylum/support/employment/>

3. Status Determination Process: Refugee Status and Humanitarian Protection

3.1 General Legislation

The EU Qualification Directive was transposed into UK law in 2006 by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006,¹³⁰ which maintained the criteria and practice for granting refugee status¹³¹ but introduced a new status of “Humanitarian Protection” in accordance with the status of subsidiary protection established by the Directive.¹³²

Specifically with regard to granting subsidiary protection to Palestinians from the OPT, the contributor noted that no reported decision has yet addressed directly whether conditions in the West Bank or Gaza constitute a situation of armed conflict for the purposes of the Directive.¹³³

130 The Immigration Rules were also amended by command paper 6918 (Cmnd 6918) in October 2006.

131 Paragraph 334 of the Immigration rules (HC395) and Regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

132 **Immigration Rule 339C:** ‘A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006; (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and (iv) he is not excluded from a grant of humanitarian protection. Serious harm consists of: (i) the death penalty or execution; (ii) unlawful killing; (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or (iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’ These provisions are broadly in line with Articles 2 and 3 of the European Convention of Human Rights. UKBA relevant policy can be located at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/hpanddl.pdf?view=Binary>

133 In *QD & AH v Secretary of State for the Home Department* [2008] EWCA Civ 396, the Court held *inter alia* that an “armed conflict” is not to be understood as under IHL, at 6 and 8: ‘International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts. It thus has a specific area of operation. It also, however, has defined and limited purposes which do not include the grant of refuge to people who flee armed conflict...’ and noting the humanitarian objective underpinning IHL, concluded that: ‘None of this, however, is in our view sufficient to introduce an unarticulated gloss of a fundamental kind into a Directive which goes far wider in its purposes than states of armed conflict. We consider that the Directive has to stand on its own legs and to be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous.’ See, however, the tribunal in *WK (Article 8 – expulsion cases – review of case-law) Palestinian Territories* [2006] UKAIT 00070 describing the situation in the OPT, at 75. This would appear to meet the test per *QD & AH*, at 35: ‘We therefore accept the proposition, on which the parties before us and the intervener agree, that the phrase “situations of international or internal armed conflict” in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*. [*Elgafaji v Staatssecretaris van Justitie* (C-465/07)]. The level of indiscriminate violence need not be ‘exceptional’ at [36].

The court system has been further changed by the Tribunals, Courts and Enforcement Act 2007 (TCE Act). The Act provides a new judicial and legal framework bringing together individual tribunals into a unified tribunal structure composed of a two-tier Tribunal system: A First-tier Tribunal and an Upper Tribunal, both of which are split into Chambers (e.g. the Immigration and Asylum Chamber). The new chambers replace the former 'single tier' Asylum and Immigration Tribunal (AIT).

The Immigration and Asylum Chamber of the First Tier Tribunal (hereinafter IACFTT) is made up of Immigration Judges (IJ) and Designated Immigration Judges (DIJ) who preside over first instance appeals brought against negative immigration decisions of the UKBA. 134 The First tier tribunal sits in several places in London and throughout the UK.¹³⁵

3.2 Article 1D in Refugee Status Determination

Palestinian asylum applications continue to be examined by the authorities in accordance with an Asylum Policy Instruction: "Applications for Asylum from UNRWA-assisted Palestinians: Article 1D of the Refugee Convention," issued by UKBA. The Instruction was based on the precedent-setting decision of the Court of Appeals in the cases El-Ali and Daraz issued in July 2002 (see Handbook 232) according to which Article 1D is relevant only to a person who was receiving protection or assistance from UNRWA on the date on which the 1951 Convention was signed, i.e., 28 July 1951. It is not relevant to anyone else, including the descendants of persons who were receiving such protection or assistance on that date. In light of this judgment, claims brought by stateless Palestinians in the United Kingdom rarely if ever focus on Article 1D of the Refugee Convention 1951.

There have been no *reported* decisions of the UK Courts or Tribunals in which the decision of the Court of Appeals has been reconsidered. The contributor is aware of only one *unreported* decision of the Upper Tribunal (the Immigration and Asylum Chamber) emanating from Scotland, *Islam El-naouq v. Secretary of State for the Home Department* in which the plaintiff argued for the application of Article 1D and referred to the UNHCR Statement in May 2009.¹³⁶ The tribunal dismissed the appeal, including the Article 1D

134 See further <http://www.tribunals.gov.uk/ImmigrationAsylum/HearingCentres/HearingCentres.htm>

135 A losing party may challenge the First Tier decision by making an application for permission to appeal to the Upper Tier Tribunal on the basis the decision was reached in error of law. Such applications must initially be made to the First Tier. If the First Tier Tribunal find there is no arguable error of law, the application may be renewed by the Immigration and Asylum Chamber of the Upper Tribunal (IACUT) which is made up of Senior Immigration Judges (SIJ), some DIJs and a small number of judges from the High Court and/or Court of Appeal. If permission to appeal is granted (at either level), the parties are invited to attend a hearing at the IACUT during which one or more SIJs or higher court judges will determine whether the First Tier perpetrated an error of law. If that is the case, the matter will be substantively re-determined by the IACUT. If permission to appeal is not granted (at either level), there is no further right of review or appeal except in exceptional cases. (see *Cart, R (on the application of) v The Upper Tribunal & Ors* [2010] EWCA Civ 859).

136 Ref IA/10756/2009, at 88 to 103. As mentioned elsewhere, the May 2009 Statement was replaced by UNHCR Revised Statement on Article 1D in October 2009.

argument. An application for permission to appeal to the Scottish Court of Session was made on the basis that the tribunal made material errors in law, including in its interpretation of the scope of meaning of Article 1(D). The decision whether to grant permission remains pending at the time of writing this report.

3.3 Jurisprudence involving Palestinian asylum seekers

In light of the restrictive interpretation of Article 1D, asylum claims made by Palestinians are generally examined pursuant to Article 1A of the Refugee Convention, as well as pursuant to Article 15 of the Qualification Directive in relation to the status of “humanitarian protection”. The removal of rejected Palestinian asylum seekers will be examined in light of *inter alia* the standards of Article 3 of the European Convention of Human Rights. The following briefly summarizes some of the key issues.¹³⁷

3.3.1 Refusal of re-entry to the OPT

In a number of cases, judges have considered the issues of a) whether a refusal of re-entry into the OPT in and of itself would amount to persecution and b) if return of failed asylum seekers would be possible, whether such a return would be in breach of some of the UK’s obligations. Key decisions of the IACUT, as well as the former Asylum and Immigration Tribunal (AIT), which replaced Immigration and Appeals Tribunal (IAT), and the Court of Appeals (Civil Division) of England and Wales are summarized below. The case, *AB & others (Risk – Return – Israel Check Point) Palestine, CG [2005] UKIAT 00046*, involved three rejected Palestinian asylum seekers from the OPT who were subject to removal to the OPT. In its decision of 1 February 2005, the Tribunal considered, first, whether the denial of re-entry to a stateless person in and of itself amounted to persecution, and, secondly, whether Palestinians from the OPT would be at risk of persecution or ill-treatment if they eventually were returned. First, the Tribunal concluded that it was likely that the Israeli authorities would deny the applicants re-entry to the OPT:

There is, therefore, no evidence before us that anyone has ever been successfully removed to any part of the Occupied Territories or that the Secretary of State would seek the procurement of any Emergency Travel Documents other than such as might be issued via the Palestine General Delegates Office in London as described in the filed statement of Ms Heaney.¹³⁸

Given that if there were any prospect of a successful return it would inevitably follow that each Appellant would be placed in the control of the Israeli Authorities at the point of entry to the Occupied Territories, there was a properly arguable issue as to whether this of itself would expose any of them to the real risk of persecution or a breach of their protected human rights. The objective evidence,

¹³⁷ Other cases involve, for example, a case concerning detention, *M.A.S. v. Secretary of State for the Home Department*, [2009] CSOH 32, United Kingdom: Court of Session (Scotland), available at UNHCR Refworld, and *MS (Palestinian Territories) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2010] UKSC 25 concerning a procedural matter.

¹³⁸ [AB & others \(Risk – Return – Israel Check Point\) Palestine, CG \[2005\] UKIAT 00046](#), at 24.

however, simply does not support such a proposition. The only relevant evidence is that the Israeli security forces will not allow ethnic Palestinians being forcibly returned from abroad to re-enter the Occupied Territories.¹³⁹

Secondly, the Tribunal concluded that in the hypothetical situation of return not all Palestinians from the OPT would be at risk of persecution by the Israeli authorities.¹⁴⁰ Finally, the tribunal concluded that statelessness alone does not necessarily put the applicant at risk of persecution:

The mere fact of being stateless, whilst we acknowledge the difficulties which it poses for each of the Appellants, cannot of itself amount to persecution or a breach of their human rights because there is no country which is excluding them from a nationality to which they would be otherwise entitled. There is no state of Palestine to offer them citizenship and neither is there any international obligation on the State of Israel, who retain a large measure of control over the Occupied Territories, to offer them citizenship.

The Tribunal then recommended that the Secretary of State consider how to deal with the matter given that “there is no realistic prospect that any of them can be returned to any part of the Occupied Territories so that there is no realistic prospect on the basis of the current removal directions that they can be removed from the United Kingdom.”¹⁴¹

The case, *MA (Palestinian Arabs - Occupied Territories - Risk) Palestinian Territories v. Secretary of State for the Home Department*, CG [2007] UKAIT 0001142, involved a Palestinian from Tulkarem in the northern part of the West Bank. At the second rehearing on 15 November 2006 the newly established UKAIT noted that SSHD had proposed to remove the appellant to the OPT via Jordan and the King Hussein Bridge (also known as the Allenby Bridge). The tribunal also noted that the Appellant would have to pass through checkpoints manned by the Israeli authorities at the King Hussein Bridge and that, thereafter, he would have to pass through checkpoints in order to travel back to his hometown. The tribunal accepted that Palestinians would not be allowed to return to the OPT and concluded that refusal of re-entry at King Hussein Bridge would not amount to persecution:

In our judgment, in the event that a Palestinian Arab is denied re-entry to the Occupied Territories at the Israeli end of the crossing at King Hussein Bridge, this would not amount to persecution. Palestinian Arabs from the Occupied Territories

¹³⁹ *Ibid.* at 33.

¹⁴⁰ *Ibid.*, at 32: This would mean, therefore, that no ethnic Palestinian could be safely returned to the Occupied Territories. Whilst we accept that it is arguable that someone with a known anti-Israel profile by reason of past actions might be at risk of arbitrary detention and ill-treatment at an Israeli checkpoint, the general evidence does not, in our judgment, justify the conclusion that all ethnic Palestinians from the Occupied Territories are at such a risk

¹⁴¹ *Ibid.* at 35. According to the contributor, the Secretary of State has conceded that no removals to the OPT have taken place over the last five years.

¹⁴² Read together with *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ. 304.

are stateless and have no right of re-entry into the Occupied Territories unlike a citizen. For the same reason, we do not consider that the denial of re-entry would in itself amount to degrading or inhuman treatment contrary to Article 3.¹⁴³

As in *AB and others* the tribunal also addressed the hypothetical situation of re-entry and concluded that the level of Article 3 in the European Convention on Human Rights was not reached.¹⁴⁴

The Court of Appeal (Civil Division) of England and Wales have followed the above-mentioned case law and concluded that refusal or re-entry to the OPT would not amount to persecution.¹⁴⁵ The Court of Appeals has drawn a distinction between nationals and stateless persons.

It is now necessary to confront the question whether, in principle, it is persecutory without more, to deny a stateless person re-entry to "the country of his former habitual residence". In my judgment, it is not. The denial does not interfere with a stateless person's rights in the way that it does with the rights of a national. There is a fundamental distinction between nationals and stateless persons in that respect. It is one thing to protect a stateless person from persecutory return to the country of his former habitual residence (as the Refugee Convention does), but it would be quite another thing to characterise a denial of re-entry as persecutory. The lot of a stateless person is an unhappy one, but to deny him a right that he has never enjoyed is not, in itself, persecution. Stateless persons are themselves the subject of an international treaty, namely the Convention relating to the Status of Stateless Persons (1954). The United Kingdom is a party to that Convention but it has not been incorporated into domestic law and Miss Collier does not suggest that it protects the appellant in this case.¹⁴⁶

In the case (*MA (Palestinian Territories) v Secretary of State for the Home Department*) the appellant tried to advance a subsidiary argument based on Article 12(4) of the International Covenant on Civil and Political Rights and that the prohibition against arbitrary denial of a right to enter ones '... own country' should be construed broadly to cover facts as in MA's case. This argument was also rejected by the Court of Appeals.¹⁴⁷

¹⁴³ Supra note 130, at 58.

¹⁴⁴ *Ibid.* at 117. See also at 129

¹⁴⁵ See, for example, *AK v Secretary of State for the Home Department* [2006] EWCA Civ 1117. See also *MT (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1149, *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150.

¹⁴⁶ *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304, MA and its lead judgment of Lord Justice Maurice Kay. Lawrence Collins LJ and Sir Auldous both agreed. At 26.

¹⁴⁷ *Ibid.* at 28: The Human Rights Committee established under Article 28 of the Covenant has opined that "his own country" is broader in scope than "country of his nationality" and embraces "at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien". It refers to "close and enduring connections": General Comment 27, Freedom of Movement (Article 12), 2 November 1999. Commentators have suggested the possible relevance of Article 12 in the context of Palestinians seeking to return to the West Bank: Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed, 2004, para

3.3.2. Other Country Specific Issues

Lebanon

The case, *WD (Lebanon – Palestinian – ANO – risk) Lebanon CG* [2008] UKAIT 00047, involved a Palestinian from Lebanon who had been a member of Fateh. He also claimed that the (Fateh) Revolutionary Council, or the Abu Nidal Organisation (hereinafter ‘ANO’), threatened that he and his family would be kidnapped and harmed if he did not divulge confidential information about Fateh to them. The SSHD denied him asylum, and at appeal the tribunal considered his affiliation with ANO and in that connection the status of Fateh. The tribunal concluded that Fateh was not as a matter of law competent to be an agent of protection.

We are entirely satisfied for the reasons set out in the skeleton in particular, and also in the light of the other evidence to which we have referred above, that the Fatah in Lebanon which currently only owns one refugee camp, cannot be an agent of protection as it does not control a “substantial part of the territory of the State” as defined in Regulation 4 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006...There is a clear distinction between the situation of Fatah, which in Rashidieh, the only camp which it controls, is in a refugee camp of less than 2 sq. miles in contrast to the total area of Lebanon of 10,452 km and the contrasting populations are as in the case of Rashidieh, 26,000 people; in Lebanon, slightly under 4,500,000 people. We take these figures from the quotations in the sources set out at paragraph 38 of Mr. Blum’s skeleton. Although clearly the process cannot be a purely mathematical one, we consider that there is a clear contrast between the situation here and that as considered by the Tribunal in *DM (Majority clan entities can protect) Somalia* [2005] UKAIT 00150 concerning the situation of majority clans in Somalia. Accordingly we conclude as a matter of law that Fatah cannot be an agent of protection for the purposes of the Directive and of domestic law. That finding has to be seen in the context of our conclusion above that the appellant does not face a real risk from the ANO.148

12.37 and Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd ed, 2005, pp 287-288. Miss Collier seeks to rely on Article 12 in support of her submission that the AIT’s consideration of statelessness was inadequate. In my view, however, this material does not advance the appellant’s case under the Refugee Convention, nor does it provide a right enforceable by itself in the AIT. Moreover, even if the broader construction of “his own country” is correct, it is difficult to see how it can avail someone who has eschewed “close and enduring connections” and “special ties”. As we have only had limited written submissions on this point, I am reluctant to say more about it in this judgment, save to observe that in *Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* [1995] 5 HKPLR 490, Keith J, sitting in the High Court of Hong Kong, held (at paragraph 26) that “his own country” in Article 12(4) “can only be the country of which he is a citizen as defined by that country’s nationality.

148 *WD (Lebanon – Palestinian – ANO – risk) Lebanon CG* [2008] UKAIT 00047, at 82.

The case, *MM and FH (Stateless Palestinians – KK, IH, HE reaffirmed) Lebanon* [2008] UKIAT, involved two Palestinians from Lebanon. The SSHD refused to grant them asylum. At appeals, the tribunal considered whether or not the appellants as stateless Palestinians would suffer discrimination on return to Lebanon and whether such discrimination that would amount to persecution or breach of Article 3 or Article 8 of the European Convention on Human Rights. The Tribunal upheld the decision in *KK, IH, HE*¹⁴⁹, and wrote:

We recognise the serious difficulties faced by Palestinians living in the camps in Lebanon. However we conclude that their living conditions and treatment by the Lebanese authorities is not discriminatory on the grounds of race. We further find on the evidence presented to us that it does not reach the minimum level of severity to establish persecution or so as to breach the Article 3 threshold.¹⁵⁰

The tribunal also held that the employment situation of Palestinians in Lebanon did not reach the level of “punishment”:

The undoubted difficulties that Palestinians face in the employment field, still comes down to the fact that these difficulties stem, again, from the Palestinians’ inability to avail themselves of reciprocal agreements. We accept the point made that it is possible for the impairment of ability to earn a living to amount to discrimination, constituting persecution. However we find that the limitations placed by the Lebanese authorities on Palestinians are properly justified on the grounds of their statelessness. We do not agree that this can be seen as analogous to a deliberate imposition of punishment: it is a state of affairs that exists in relation to Palestinians, outside of the control of the Lebanese authorities, i.e. that the Palestinians are stateless. In any event, this again was considered fully by the Tribunal in *KK*. We agree with Miss Laing’s submission that even if the reforms of 2005 have not been implemented consistently, nevertheless it does show a significantly changed approach from the Lebanese authority. Whilst we accept that the reality on the ground is that a very small percentage of Palestinians obtain lawful employment, that situation prevails because of the lack of status of Palestinians.¹⁵¹

The case, MA (Lebanon – Palestine - Fear – Fatah - Relocation) Palestine [2004] UKIAT 00112, involved a Palestinian refugee from Ain al Hilweh camp in Lebanon. The tribunal accepted that the applicant, who had deserted Fateh, faced a risk of persecution if returned to Lebanon. However, the tribunal accepted that he had an internal flight possibility, or the opportunity to seek protection elsewhere in Lebanon¹⁵²:

¹⁴⁹ *KK IH HE Palestine v. Secretary of State for the Home Department*, CG [2004] UKIAT OO293.

¹⁵⁰ *MM and FH (Stateless Palestinians – KK, IH, HE reaffirmed) Lebanon* [2008], at 144.

¹⁵¹ *Ibid.* at 136.

¹⁵² For a similar conclusion see also *BS (Palestinian – Lebanon – relocation) Lebanon* [2005] UKIAT 00004

This claimant could relocate. The camps in the north are camps where there is only a minimal presence of Arafat supporters and indeed the camps seem to be under the control of people who are antipathetic to Arafat. If he were to relocate to one of those camps we cannot see that there would be any real risk that he would be persecuted by Fatah or indeed by anyone else.

It was submitted to us that because the claimant is a minor, he would be subjected to undue hardship. We note that the Adjudicator accepted tacitly, if not expressly, that he was the age he claimed to be. In those circumstances it is true to say that he is still a minor and will not attain his eighteenth birthday until December 2004 but he is not, looked at realistically, someone who is so young that it would be improper for him to be returned, although we would expect the Home Secretary to adhere to his usual policy in respect of unaccompanied minors. The practicalities are that he is unlikely to be returned in the next few weeks in any event and his eighteenth birthday is soon going to be upon him. In any event, before he left Lebanon he had been in employment, selling vegetables. His family is still in Lebanon and, whether they remain in Ain Al Hilweh or choose to go with him to a northern camp, they will not be far from him and can provide moral support, if not financial support. These, however, are matters of speculation and we prefer to take the view that his age is not a factor that leads us to conclude that he would be at risk of being placed in a situation of undue hardship if he were to relocate to the north, because he is now seventeen and a half and he has been in the working environment already in Lebanon.¹⁵³

Iraq

The case, NA (Palestinians - risk) Iraq CG [2008] UKAIT 00046 involved a stateless Palestinian from Iraq. In 2001 she married a citizen of Iraq and thereafter lived in Baghdad with their three children. Following the removal of Saddam Hussein's regime in April 2003 the whole situation for Palestinians in Iraq changed. Significantly, members of the Ba'ath Party, as well as various militias in Iraq, launched a campaign against sections of the Palestinian community. The applicant explained that Palestinians in general were treated badly and abused by the authorities. The Interior Ministry refused to renew their residence permits and they were unable to travel outside Iraq. Lacking residence permits, their presence within Iraq became illegal. Some managed to escape and fled to Syria and Jordan but the governments of those countries refused to accept them and they were left in refugee camps in the desert. The tribunal referred to *JA (Ethnic Palestinian-Iraq-Objective Evidence) Iraq CG [2005] UKIAT 00045*, where it was concluded that the totality of the "objective evidence" then available, did not show that a Palestinian in Iraq faced a real risk of persecution or breach of human rights purely on account of their ethnicity. Since then, however, the tribunal noted that there had been a considerable volume of new evidence, much of which relates to events since the Samarra bombing of February 2006. In the light of that evidence, the tribunal considered that *JA* should no longer be treated as authoritative.¹⁵⁴ The tribunal then concluded that after having

¹⁵³ *Supra*, note 152 at 14-16.

¹⁵⁴ *Ibid.* at 32 and 49.

surveyed a number of credible country reports it was clear that the appellant and other ethnic Palestinians were at real risk of persecution in Iraq:

Of central importance in our judgement is that the Appellant as an ethnic Palestinian will face targeting by insurgents. We have already referred to the background evidence showing that there have almost daily attacks on Palestinians. We remind ourselves that the number of ethnic Palestinians in Iraq is relatively small. In our view there are no particular facts about her that would mean that she was less at risk than are stateless Palestinians generally.

The findings we have just made suffice for the appellant to succeed in her appeal.’¹⁵⁵

4. Protection under the Stateless Convention

The United Kingdom is a party to the 1954 Stateless Convention. No information could be obtained regarding decisions in the UK involving stateless Palestinians seeking protection under the 1954 Stateless Convention.¹⁵⁶

Five years ago, BADIL was informed that an official Asylum Policy Instruction on statelessness was in preparation, but it seems that the document has not yet been finalized.

¹⁵⁵ *Ibid*, at 91 and 92. For completeness it should be noted that the tribunal concluded in the alternative that the appellant had established a real risk of persecution due to the cumulative effect of a number of other risk factors, no one being determinative. These are: her status as an academic at [95] and [96]; as a woman, and returnee with dependant children in the context of an overall dire security situation at [97] and [98].

¹⁵⁶ See, however, case above: *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304 at [26].

NORTH AMERICA

CANADA

1: Article 1D in the Refugee Status Determination Process

Claims for refugee status in Canada continue to be considered by the Refugee Protection Division (RPD) under the Immigration and Refugee Protection Act (IRPA). The 1951 Refugee Convention is only partially incorporated into Canadian law. There are no references to Article 1D in domestic law.

The leading decision concerning Article 1D continues to be the case *El-Bahisi* in which the Federal Court concluded that Article 1D should be interpreted as an exclusion clause that applies only in the areas where UNRWA operates, and hence Palestinian asylum seekers in Canada are entitled to apply for asylum (see Handbook page 241).¹⁵⁷

In practice, claims for refugee status submitted by Palestinian asylum-seekers continue to be considered by the authorities on the basis of Articles 96 and 97 of IRPA and, thus, what is relevant for the authorities is whether Palestinian asylum-seekers can demonstrate a well-founded fear of persecution in their country of former habitual residence under one of the Convention's grounds, or whether they are in need of protection for the reasons enumerated in Article 97 of IRPA.¹⁵⁸ This issue has been discussed for example in relation to Palestinian refugees from Lebanon. In the case 2009 FC 768, the RPD had concluded that the applicant had not proved a well-founded fear of persecution or that he was in need of protection under IRPA. The Federal Court of Canada, however, in its decision of 27 July 2009 overruled RPD's decision and noted that RPD needed "to articulate why the long history of appalling discrimination by the State of Lebanon against the Applicant as a stateless Palestinian does not amount to persecution. There is no indication in the Decision as to what test and what reasoning the Board applied to the issue of whether the cumulative impact of discrimination did not amount to persecution" (para 67). Palestinians from Iraq have also sought protection in Canada. RPD concluded in its decision of 24 October 2007 (case x (Re), 2007 Can LII 71083 (I.R.B.)) that a Palestinian refugee born in Iraq was not entitled to protection in Canada (his parents were born in Palestine and fled to Iraq after the war in 1948). After the regime change in 2003, the applicant and his family became the target of various fundamentalist groups. In 2006, for example, some Shiite gunmen came to the applicant's home, threatened the family

157 See also [Edward C. Corrigan, *The Legal Debate in Canada on the Protection of Stateless Individuals Under the 1951 Geneva Convention*, *Immigration Law Reporter*, 23 *Imm. L.R.* \(3d\), 2003 at 197.](#)

158 The practice with regard to the status of registration with UNRWA (i.e., cogent but not determinative evidence of refugee status) has been repeated by the Legal Service of the Immigration and Refugee Board of Canada in its document "Interpretation of the Convention Refugee Definition in the Case Law" (31 December 2005): Having regard to paragraph 143 of the UNHCR *Handbook*, an UNWRA document issued to a Palestinian refugee was found to be cogent, though not determinative evidence of refugeehood. It is a reviewable error not to specifically consider a claimant's UNWRA registration document when assessing a claim for refugee protection. It is a highly relevant document, provided the conditions that originally enabled qualification are shown to persist (para 2-12).

and shot his uncle. Subsequently, the applicant managed to leave Iraq with the help of his brother who was a US citizen. The RPD did not find his story convincing and concluded that there was not a serious possibility that the claimant would be persecuted for a Convention reason or be at risk if he returned to Iraq. The Federal Court overturned this decision on 26 May 2008 (case 2008 FC 662 Samir Mahmood Muhamed Atia v. MCI). The court noted “the applicant’s own evidence as well as the documentary evidence show that the applicant was not an Iraqi but a stateless Palestinian without definite residency rights in Iraq. The evidence strongly supports the applicant’s testimony that he has no right of return to Iraq and that he may be detained if he returns there” (para 21). The court therefore concluded that “the applicant testified and provided some evidence that showed he had subjective fear of persecution in Iraq. There were no major inconsistencies in his testimony to ground a finding that the applicant lacked credibility. Moreover, the applicant’s testimony was well supported by the documentary evidence. For these reasons, I have concluded that the RPD erred in making the Decision and that this matter should be referred back to a new panel” (para 24).

2. Return – Deportation

Palestinians who have received a negative decision but who fear that they would be at risk if they return to their country of origin or country of former habitual residence can apply for a Pre-Removal Risk Assessment (PRRA). The Federal Court has allowed judicial review of negative decisions concerning PRRA.¹⁵⁹ The positive decision by the Federal Court of 10 February 2005 (Case 2005 FC 217 Geriez Zaki el Moussa and Wakim Nihay v. Minister of Citizenship and Immigration) involved some Palestinian Christians from Lebanon.

Canadian anti-terrorism legislation allows for the removal of non-citizens who allegedly have been or are members of various terrorist organizations. Such persons may become subjects of a so-called security certificate.¹⁶⁰ Some Palestinians have recently been deemed inadmissible in Canada due to their membership of various Palestinian organizations now considered terrorist organizations by the Canadian authorities. Mr. Yamani, for example, is a Palestinian refugee from Lebanon who emigrated to Canada in 1985 and who immediately after was granted permanent resident status by the Canadian authorities. He is married with two children. In 1988 he applied for Canadian citizenship. He then became the subject of an investigation by the Canadian Security Intelligence Service, and in their final report he was alleged to be a member of PFLP – Popular Front for the Liberation of Palestine. Mr Yamani had explained that his father was one of the founding members of PFLP and that many of his extended family members and friends also became affiliated with the PFLP. At the age of 18 he joined a cell of the PFLP in Lebanon. When in Canada he continued his association with the PFLP – although he claimed to be involved only in the political activities of the organization and not in any

¹⁵⁹ Decision of 23 July 2008, 2008 FC 898, *Tareq Mughrabi v. MCI*. (See decision of 1 October 2007 case 2007 FC 991, *Omar al Asali and others v. Minister of Public Safety and Emergency Preparedness*, and decision of 19 September 2006, [Saleh Omar Osama Fi v. MCI \(2006 FC 1125\)](#)).

¹⁶⁰ Following the decision by the Supreme Court of Canada of 23 February 2007, *Charkaoui v. Canada (MCI)* (2007 SCC 9) parts of the security certificate system was amended.

violent activities. As a result of the investigation and report by the Canadian authorities, Mr. Yamani was then considered to be inadmissible to Canada on security grounds. Subsequently, two security certificates were issued, but the Federal Court dismissed them both.¹⁶¹ The latest attempt by the authorities to have him removed was taken within the framework of immigration law: the Immigration Division of the Immigration and Refugee Board issued a decision of 22 November 2005 in which he was considered inadmissible on security grounds (*Canada (Citizenship and Immigration) v. Yamani* 2005 CanLII 56976 (I.R.B.)). He sought judicial review of this decision from the Federal Court but it was dismissed on 1 December 2006 (2006 FC 1457). He then sought Ministerial relief, which was denied on 20 April 2006 by Justice Snider. His request for judicial review of the Minister's decision was allowed on 12 April 2007 (2007 FC 381) in which Justice Mactavish decided to remit the matter to the Minister of Public Safety and Emergency Preparedness for re-determination. He is still in Canada and apparently under no immediate threat of removal.

The case 2010 FC 2003 of 17 March 2010 (*Mashhour Saleh v. MCI*), for example, involved a Palestinian refugee from Ein-el-Hilweh camp in Lebanon who in 1996 was denied refugee status in Canada but who remained in the country because he could not be returned to Lebanon. The applicant noted that he had been residing in Canada since November 1993 and that "over the past 16 years I have been continuously employed. I established my own business ... in July of 2000, which I continue to manage until today. I have remained a self-sufficient and contributing member of Canadian society from the time of my arrival."

On 15 June 2009, an immigration officer concluded that the applicant was inadmissible in Canada due to his engagement in terrorism (Article 34 (1) (f) of IRPA), a claim based on his previous membership with various organisations. The officer noted that the "Applicant's limited activities in the GUPS, the Fatah faction of the PLO and the Popular Committee of the PLO, as a member of such organizations, constituted his membership in organizations that there are reasonable grounds to believe have engaged in terrorism" (para 13). The Federal Court interpreted the meaning of "membership" and concluded that mere formal membership without any active involvement in the organization constitute "membership" for the purposes of paragraph 34(1)(f) of IRPA and the application for judicial review was therefore dismissed.¹⁶² Once a person has been deemed inadmissible in Canada it is impossible for him or her to further apply for permanent residence or citizenship even if s/he cannot be removed.

3. Protection under the Stateless Convention

Canada has still not signed the 1954 Stateless Convention. Stateless persons are therefore not entitled to claim protection pursuant its provisions in Canada. Their claims are dealt with within the legal framework governing asylum seekers. The authorities continue to

¹⁶¹ See, for example, *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 433, 186 F.T.R. 161 (T.D.) (Justice Gibson) and *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 F.C. 174, 103 F.T.R. 105 (T.D.) Justice MacKay.

¹⁶² Concerning the issue of inadmissibility due to membership of a Palestinian organization, see also case 2008 FC 898 of 23 September 2009, *Tareq Muqhrabr v Minister of Citizenship and Immigration*.

conclude that denial of return in itself does not constitute persecution as discussed by Justice Simpson in the Federal Court in the case *Altawil v MCI* of 25 July 1996 (see Handbook page 254). In a decision of 22 January 2007 (*Karsova v. MCI*) (2007 FC 58), for example, the judge concluded, “I am left to conclude, as did Justice Simpson in *Altawil*, that the IRB did not err in determining that the denial of a right of return does not constitute persecution. As noted by Justice Simpson in the penultimate paragraph in her reasons for decision in *Altawil*, “...not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee” (para 38).

THE UNITED STATES

1. Article 1D in Refugee Status Determination

The United States is still not a party to the 1951 Refugee Convention. It is, however, a party to the 1967 Protocol. The issue of whether Article 1D has been incorporated into US law by virtue of the US' ratification of the 1967 Protocol has been discussed by some courts. In a case before the 3rd Circuit Court of Appeals, the applicant who was a Palestinian refugee from Khan Younis¹⁶³ argued that he qualified as a refugee pursuant to the 1951 Refugee Convention and the 2002 UNHCR Note on Article 1D. The Court concluded, however, that his argument was without merit and noted that:

The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), which incorporated the 1951 Convention. The Attorney General implemented regulations to comply with its terms [...]. In 1980, Congress amended the INA through passing the Refugee Act which brought the domestic laws of the United States in conformity with its treaty obligations under...the 1967 Protocol [...] The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation [...]. Accordingly, Petitioner cannot assert rights beyond those contained in the INA and its amendments.

Thus, the judges were convinced by the counter argument that Article 1D is not one of the provisions of the Immigration and Nationality Act (INA) [8 USC, section 1101] and, pursuant to the 1967 Protocol, is not self-executing, Palestinian asylum seekers cannot base their claim for asylum upon Article 1D. The 5th Circuit Court of Appeals has adopted a similar position.¹⁶⁴ Some of the lawyers acting on behalf of Palestinian asylum seekers continue, however, to make the claim before the authorities that Article 1D should be applied.

As Article 1D continues not to be applied to Palestinian asylum cases in the US, the assessment of a well-founded fear of persecution remains the core element in Palestinian refugee status determination. According to practitioners, final negative decisions in Palestinian asylum cases before the Immigration authorities involved:

- Credibility issues.
- Claims based on general discrimination.
- Palestinians from Jordan who enjoy protection from the authorities there.
- Palestinians who have firmly resettled in a safe third country; and
- Palestinians from Arab Gulf States who arrived in the US as students and whose student residence permits had expired.

¹⁶³ *Al-Fara v. Gonzales*, 404 F.3d 733 (3d Cir. 2005).

¹⁶⁴ See for example *Majd. v. Gonzales*, 446 F.3d 590 (5th Cir. 2006).

The issue whether denial of re-entry to aliens, including stateless persons, may constitute persecution continues to be an issue and plaintiffs refer to the legal opinion of the INS General Counsel's Office (Genco Op. No. 95-14, 1995 WL 1796321 (INS Oct 27, 1995), (see Handbook page 268). BADIL is not aware of any court cases supporting the guidelines by the INS General Counsel, and practitioners have referred to cases in which courts have dismissed the argument that denial of re-entry constitutes persecution, for example the Fifth Circuit in *Faddasal v Ins* 37.F.3d 185 (5th Cir 1994).

At the Courts of Appeals level, Palestinian plaintiffs have asked for review of decisions by the Board of Immigration Appeals (BIA), for a number of reasons, including alleged violations of their constitutional right to due process. The case, *Zayed v. Gonzales*, 2005 U.S. App. LEXIS 14938, 139 Fed. Appx 689 (6th Cir. 2006), for example, involved a Palestinian from the West Bank whose asylum claim was denied by the authorities. After an appeal by the BIA, he was ordered removed to Jordan. He claimed that 'his hearing was fundamentally unfair because the immigration judge ordered him removed to Jordan, rather than to Israel, without having given him prior notice that Jordan was under consideration'. The 6th Circuit Court of Appeals rejected his argument. The issue of the designation of the country of removal was also discussed by the 7th Circuit Court of Appeals in the case *Zahren v. Gonzales*, 487 F.3d 1039 (7th Cir. 2007) in which a Palestinian asylum seeker, who had lived 20 years in Hebron in the West Bank before entry to the US, was ordered to be removed to Jordan. The judges upheld the removal order.

As regards deportation, the return of Palestinians to Arab Gulf States remains a challenge. Practitioners noted that Palestinians have been returned to Jordan and from there, in turn, to Syria. Palestinians who cannot be returned are then forced to live in the US with a final order of removal and are subject to forcible return to the Gulf States at any time.

Palestinians who have been issued a deportation order may be held in custody depending upon the circumstances of the case in question. The United States Supreme Court has held that detention up to six month without assessment of the likelihood of the removal is reasonable (See *Zadvydas v. Davis*, 533 U.S. 678). After the initial six months, the authorities are requested to assess the likelihood of removal, but rejected asylum seekers can continue to be detained "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future" (*Zadvydas v. Davis*, 533 U.S. 678). In practice, this means that stateless Palestinians, who have nowhere to go, may be detained for a very long time and even indefinitely. Recently, however, two judges have concluded that Palestinian asylum seekers who were detained pending removal from the US should be released after it was clear that no country would accept them and that they could therefore not be deported in the reasonably foreseeable future. The first case involved a Palestinian refugee from the OPT.165 Judge Kane in the District Court for the Middle District of Pennsylvania concluded that:

[t]he lengthy history of Petitioner's efforts, made while in custody, and those of the [Bureau of Immigration and Customs Enforcement] to repatriate him to the

165 *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d, 418 (M.D. Pa. 2004)

West Bank, support his claim that he cannot be deported in the reasonably foreseeable future.

The second case involved a Palestinian from Gaza who had been sentenced to 84 months imprisonment following his violation of various regulations by for example exporting goods to terrorist states (i.e., Libya and Syria).¹⁶⁶ After completing his sentence, he was taken into custody in January 2009. In his habeas corpus petition to the United States District Court for the Middle District of Pennsylvania, he did not contest the final order of removal but he claimed that his continued detention pending removal from the US was in violation of para 241 (a) (6) of the INA. The claimant noted that as a Palestinian who was not listed on the Israeli population registry, who did not have an Israeli identification number; and who had no family residing in the Palestinian territories, he had no right to return to the OPT. Moreover, 14 countries, including Israel, Jordan and Egypt, UNHCR and the Palestine Liberation Organization Mission had informed him that they would not issue travel documents to him and that he had been unsuccessful in obtaining travel documents from 41 other countries from which he had sought permission to enter. The court concluded that:

We will grant [Elashi]'s habeas corpus petition because the Government has not rebutted [Elashi's] reasons to believe that there is no significant likelihood of this removal in the reasonably foreseeable future.

2. Protection of Palestinians under the Stateless Convention

The US has still not become a party to the 1954 Stateless Convention. Although Palestinians are recognized as stateless persons in the US, this recognition alone does not afford them protection. The case from the last five years which best demonstrates American rejection of statelessness as a basis for asylum is *Abauaelian v. Gonzales*, 2005 U.S. App. LEXIS 8577, 132 Fed. Appx. 121 (9th Cir. 2005). The applicant argued that his status as a stateless Palestinian amounts, and is equivalent, to persecution. The Court held: "Statelessness alone does not warrant a grant of asylum; the INA specifically contemplates asylum applicants with "no nationality." 8 U.S.C. §1101(a)(42)(A). Such applicants are evaluated by referring to their country of last habitual residence. *Id.* The applicant must demonstrate he is "unable or unwilling to return to...that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." *Id.*

Abauaelian asserts he is stateless, but has failed to establish that he suffered past persecution or that he has a well-founded fear of future persecution. The IJ's denial of asylum and withholding of removal, affirmed by the BIA, is supported by substantial evidence." In another case considering the issue of statelessness, *Abdallah v. Gonzales*, 2005 U.S. App. LEXIS 9076, 132 Fed. Appx. 12 (5th Cir. 2005), the stateless Palestinian applicant was ordered to be removed from the United States "to such nation as may accept him" by the immigration judge. The applicant argued that his statelessness and the

¹⁶⁶ United States District Court for the Middle District of Pennsylvania, No. 4: CV-09-2201, decided on 18 March 2010 by Judge Muir, *Bayan Elashi vs Mary E. Sabol, et al.*

removal order “to nowhere” deprived him of due process. The Court held that the removal order was valid under the American immigration statutes and did not entitle the applicant to asylum. Practitioners noted that Adballah has not been detained.

OCEANIA

AUSTRALIA

1. Article 1D in Refugee Status Determination Process

There have been no changes in the legal interpretation of Article 1D of the 1951 Refugee Convention. In accordance with the leading decision by the Full Federal Court in [WABQ v. MIMA \[2002\] FCAFC 329](#) (Handbook page 283), the authorities continue to adopt a “class of person” approach to interpreting Article 1D. Thus, the conclusion would be that since UNCCP is no longer providing Palestinian refugees with protection, they are not excluded from the right to apply for refugee status under Article 1A(2) of the 1951 Refugee Convention. However, the Australian authorities continue to reject that Article 1D, paragraph two, contains an inclusion clause which would automatically confer refugee status upon Palestinian refugees.

With regard to the scope of the class of Palestinians to whom Article 1D applies, Hill J concluded in *WABQ v MIMA* that the ‘class of persons’ referred to “the class of persons who are at present receiving assistance or protection from an organ or agency of the United Nations. “167 The majority of subsequent cases in which the WABQ formula has been cited involved Palestinian refugees who were registered with UNRWA.

In a recent decision of 19 May 2010¹⁶⁸, for example, RRT concerning a Palestinian from Nahr el Bared refugee camp in Lebanon who was registered with UNRWA noted that:

A threshold question is the applicability of Article 1D of the Refugees Convention to the applicant. Article 1D operates to exclude from the Convention persons presently receiving protection or assistance from a United Nations organ or agency other than the United Nations High Commissioner for Refugees (UNHCR). Article 1D states:

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 Commission 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.

167 Judge Hill stated at para. 69: “‘persons receiving’. There are two possible interpretations. The first is that the Article is referring to individual persons, that is to say the Article looks at each potential person and asks if he or she is actually receiving assistance or protection. The alternative construction is that the Article is looking at a class of persons and that it speaks of the class of persons receiving assistance or protection. In my view the latter is the correct construction. It is not, in applying Article 1(D) relevant to consider whether a particular person is actually receiving assistance or protection. It suffices only to know whether that person is within the class of persons to which the first paragraph of the Article applies, that is to say the class of persons who are at present receiving assistance or protection from an organ or agency of the United Nations.”

168 1001150 [2010] RRTA 404 (19 May 2010). Other cases are available at www.austlii.edu.au

The Full Federal Court in *MIMA v WABQ* (WABQ) held that the first paragraph of Article 1D applies to exclude a person from the Convention if the person belongs to a class of persons who were receiving protection or assistance from organs or agencies of the United Nations other than UNHCR as at 28 July 1951, the date when the Refugees Convention was signed, this being the time referred to by the words ‘at present’ The relevant factual issue in relation to the first paragraph is whether the applicant belongs to the relevant class of persons. In the case of a stateless Palestinian applicant, if Palestinians as a group were as at 28 July 1951 receiving protection or assistance then the first paragraph applies. The Full Court in *WABQ* observed that the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency (UNRWA) appeared to have been providing protection and/or assistance to Palestinians at the relevant time.

If a person falls within the terms of the first paragraph, it is then necessary to consider if the second paragraph applies. The Full Court in *WABQ* held that the second paragraph is also concerned with a class of persons rather than individuals and that it is sufficient if *either* protection *or* assistance has ceased for any reason in respect of the class (without their position being definitively settled) for the second paragraph to apply. It will not be sufficient that protection or assistance has ceased in relation to an individual member of the class. Whether protection or assistance has ceased in relation to the class of persons is a question of fact for the Tribunal to determine according to the material before it. In relation to a stateless Palestinian applicant, if it is found that either protection or assistance has ceased in relation to the class, the applicant is entitled to have his or her application for a protection visa determined according to the Convention definition in Article 1A(2): *WACG v MIMA*

The Tribunal is satisfied, based on available information, that Palestinians as a group were, as at 28 July 1951 receiving protection from the United Nations Conciliation Commission for Palestine (UNCCP). The Tribunal is satisfied that the position of Palestinians has not been definitively settled. It also finds, based on the factual information before it, that “protection”, which was provided only by the UNCCP, ceased in the early 1950s when the UNCCP reached the conclusion that it was unable to fulfil its mandate: see BADIL Handbook.

Accordingly, the Tribunal finds that the applicant is a member of a class of persons not presently receiving protection from a UN organ or agency, and that he is not excluded from the operation of the Refugees Convention under Art. 1D

However, the WABQ formula has also been applied in cases where the Palestinian refugee was not registered with UNRWA.

Consider the of 7 April 2004 wherein RTA applied the interpretation of Article 1D set out in WABQ to a Palestinian from the West Bank who was not registered with UNRWA and who had not received services from the Agency:

The applicant, on the evidence he gave the Department, is not registered with UNRWA nor has he received any assistance from it. In any event, I find on the independent evidence before me that whether or not UNRWA ever did provide protection to Palestinians, it does not do so now. UNRWA provides assistance to stateless Palestinians, primarily in the areas of “health, education, social and emergency aid” (Report from the Fact-Finding Mission to Lebanon, 1-8 May, 1998, [s.5](#) A - C, Danish Refugee Council and Danish Immigration Service, October 1998, RRT Library). When UNRWA was specifically asked by the Danish researchers for its view of the Article 1.D clause and its scope, its head office in Gaza stated that:

... [I]t is the UNRWA's clear understanding that its mandate does not extend to protection from persecution, but merely embodies a number of practical aid measures. Independent evidence shows that the UNCCP has not been formally abolished but seems to be largely inactive. Since independent evidence shows that the class of persons to which the applicant belongs does not enjoy protection from a relevant UN body, I find that the applicant is not excluded from the Convention. On this basis, I have addressed his claims of persecution.

Also consider that the RRT has concluded that a descendant of a 1967 displaced parents who were born in Gaza in 1942 fell within the scope of Article 1D.¹⁶⁹ RRT used the WABQ reasoning (para 70-77):

70. Article 1D of the Refugees Convention operates to exclude from the Convention persons presently receiving protection or assistance from a United Nations organ or agency other than the United Nations High Commissioner for Refugees (UNHCR). Article 1D states:

The Full Federal Court in *MIMA v WABQ (WABQ)* held that the first paragraph of Article 1D applies to exclude a person from the Convention if the person belongs to a class of persons who were receiving protection or assistance from organs or agencies of the United Nations other than UNHCR as at 28 July 1951, the date when the Refugees Convention was signed, this being the time referred to by the words ‘at present’ The relevant factual issue in relation to the first paragraph is whether the applicant belongs to the relevant class of persons. In the case of a stateless Palestinian applicant, if Palestinians as a group were as at 28 July 1951 receiving protection or assistance then the first paragraph applies. The Full Court in *WABQ* observed that the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency (UNRWA)

169 0808284 [2009] RRTA 454 of 21 May 2009

appeared to have been providing protection and/or assistance to Palestinians at the relevant time.

72. If a person falls within the terms of the first paragraph, it is then necessary to consider if the second paragraph applies. The Full Court in *WABQ* held that the second paragraph is also concerned with a class of persons rather than individuals and that it is sufficient if either protection or assistance has ceased for any reason in respect of the class (without their position being definitively settled) for the second paragraph to apply. It will not be sufficient that protection or assistance has ceased in relation to an individual member of the class. Whether protection or assistance has ceased in relation to the class of persons is a question of fact for the Tribunal to determine according to the material before it.

73. Whether protection or assistance has ceased in relation to the class of persons is a question of fact for the Tribunal to determine according to the material before it [*sic.*]. In relation to a stateless Palestinian applicant, if it is found that either protection or assistance has ceased in relation to the class, the applicant is entitled to have his or her application for a protection visa determined according to the Convention definition in Article 1A(2): *WACG v MIMA* [2002] FCAFC 332 (Hill, Moore and Tamberlin JJ, 8 November 2002).

74. Independent country information available supports the Full Court's view that there were two UN agencies primarily concerned with the provision of protection or assistance to Palestinians at the time of signing the Convention in 1951: the United Nations Conciliation Commission for Palestine (UNCCP) and UNRWA.

75. The country information indicates that whether or not UNRWA ever did provide protection to Palestinians, it does not do so now. UNRWA provides assistance to Palestinians primarily in the areas of health, education, social and emergency aid (Report from the Fact-Finding Mission to Lebanon, 1-8 May, 1998, [s.5](#) A - C, Danish Refugee Council and Danish Immigration Service, October 1998). When UNRWA was specifically asked by the Danish researchers for its view of the Article 1(D) clause and its scope, its head office in Gaza stated that:

... [I]t is the UNRWA's clear understanding that its mandate does not extend to protection from persecution, but merely embodies a number of practical aid measures.

76. Independent country information also shows that the UNCCP has not been formally abolished but seems to be largely inactive and has been for many years. BADIL Resource Center for Palestinian Residency and Refugee Rights is, according to its website www.badil.org, "a Palestinian community-based organization that aims to provide a resource pool of alternative, critical and progressive information and analysis on the question of Palestinian refugees" Badil, in an information paper on the UNCCP says:

The United Nations Conciliation Commission for Palestine (UNCCP) was established under paragraph 2 of UN General Assembly Resolution

194(III). The durable solutions for Palestinian refugees displaced in 1948, including internally displaced Palestinians inside Israel. The Commission is composed of representatives of the United States, France and Turkey and is empowered to create sub-organs, as necessary, in order to fulfill its mandate...

By the early 1950s, the UNCCP had reached the conclusion that it was unable to fulfill its mandate. The decision by the UN General Assembly to merge the role of international protection for the refugees with the larger task of Arab-Israeli conciliation ultimately compromised the Commission's ability to protect and promote the legal rights of the refugees. Moreover, the Committee noted that the conditions for return assumed under Resolution 194 had changed in the intervening years since the adoption of the resolution... Since this period, the UNCCP has not provided Palestinian refugees with the basic international protection accorded to all other refugees.

77. Since the independent evidence shows that the class of persons to which the applicant belongs does not enjoy protection from a relevant UN body, the Tribunal finds that the applicant is not excluded from the Convention.

A further case of 4 March 2010 involved a Palestinian born in Iraq in the mid-1980s whose parents fled Palestine following the 1948 war and who fled the country following the regime change in 2003. The RRTA noted:

The Tribunal is satisfied based on available information that Palestinians as a group were, as at 28 July 1951 receiving protection from the United Nations Conciliation Commission for Palestine (UNCCP). The Tribunal is satisfied that the position of Palestinians has not been definitively settled. It also finds, based on the factual information before it, that "protection", which was provided only by the UNCCP, ceased in the early 1950s when the UNCCP reached the conclusion that it was unable to fulfil its mandate [reference to BADIL Handbook]. Accordingly, the Tribunal finds that the applicant is not excluded from the operation of the Refugee Convention under Article 1D.¹⁷⁰

Other cases regarding Article 1D involved Palestinians from Lebanon¹⁷¹, Syria (e.g., Wabq) or the OPT. Thus, the conclusion seems to be that Justice Hill's reasoning and subsequent case law support the argument that the group of persons that fall under Article 1D is defined broadly as Palestinian refugees who fall under the special institutional system composed of UNRWA and UNCCP.

With regard to the temporary protection visa (TPV) (see Handbook page 288), this type of protection ceased on 9 August 2008. Now if a refugee applicant either lawfully or unlawfully enters Australia, not by first entering an offshore excised area, then they can

170 0909179 [2009] RRTA 200 at 57-58.

171 10000094 [2010] RRTA 277 of 16 April 2010

immediately apply for a Protection Visa. However, if a person unlawfully enters Australia by first entering an offshore excised area (i.e., part of Australia that has been removed from the Australian migration zone – like Christmas Island), then they are subject to a non-statutory process (referred to as Refugee Status Assessment or RSA). The assessment of refugee protection needs in the RSA process is, for the purposes of considering the substantive issues, materially similar to assessing refugee protection obligations on application for an onshore Protection Visa. If in the RSA process they are found to be refugees, then a recommendation is made to the Minister who will then ordinarily exercise his or her non-compellable discretionary power (section 46A of the *Migration Act 1958*) to allow them to apply for an onshore Protection Visa (for which all onshore refugee applicants apply). The grant of the Protection Visa then becomes a formality. If the person is refused refugee protection, they can apply for a second merits assessment of their case. At the moment, it is thought this RSA process may be outside the power of the domestic court system – though this has recently been taken to the High Court of Australia for guidance.

Important decisions by the RRTA 2005-2010¹⁷²

1. Palestinians from Iraq

The Refugee Review Tribunal of Australia (RRTA) has granted protection to Palestinian refugees from Iraq who arrived in Australia after the recent regime change. The case 0909179 RRTA 200 of 4 March 2010, for example, involved a Palestinian whose family had fled Palestine in 1948 and travelled to Iraq. The applicant, who was born in the mid-1980s, stated that she left Iraq with her family because following the regime change in 2003, her and her family were threatened by various militias who had told them to leave or they would be kidnapped. Some of her siblings were kidnapped for some days and the family had been told that if they did not leave, the siblings would never come back. She noted that the Shi'ite militias were targeting Palestinians who as a result were now trying to leave the country. She also mentioned that they could not return to Iraq because they would at risk of harm by the militias. Before arriving in Australia, she had resided for some time in an UNHCR refugee camp in the desert in Country A. There she met her husband who was from another country and they married. The applicant stated that she had no citizenship but was a holder of a “passport”/travel document issued by the Palestinian Authority.

RRTA accepted that the applicant was a stateless Palestinian and that the PA travel document does not confer nationality. RRTA also concluded that the applicant had never resided in OPT and that it was highly unlikely that the applicant would be able to enter

172 The Federal Magistrates Court has also dealt with cases involving Palestinians, but many have been dismissed due to credibility issues, see e.g., *WAHS v. MIMIA* [2004] FMCA 417 of 28 June 2004; *SZLLL v. MIAC & Anor* [2008] FMCA 809 of 20 June 2008; *SZKUG v. MIAC & Anor* [2008] FMCA 1 of 22 February 2008; *MZYCO v. MIAC & Anor* [2009] FMCA 363 of 29 April 2009 and *SZHRZ v. MIMA & Anor* [2006] FMCA 1066 of 19 July 2006. The Federal Court has also decided a case involving a Palestinian, but dismissed it due to credibility problems (*SZJLZ v. MIAC* [2008] FCA 158 of 26 February 2008)

and reside there. RRTA also concluded that Iraq was the applicant's country of former habitual residence and that since the fall of Saddam Hussein's regime in 2003, Palestinians in Iraq have faced persecution.

RRTA concluded that the applicant and her family had a well-founded fear of persecution for an enumerated Convention reason because "Palestinians in Iraq were at serious risk of being persecuted, primarily by Shi'ite militias. The information indicates that they were targeted because Palestinians were regarded as having been given preferential treatment under Saddam's regime, and because they were suspected of assisting the Sunni insurgency..." (para 60) and "...that Palestinians were the subject of a campaign to drive them from the country...that they were deliberately targeted in mortar attacks; that they were subjected to abduction, torture, murder and threats of the above." (para 61)

Finally, RRTA concluded that the applicant and her family were not able to return to Iraq: "...as a Palestinian, [the applicant] continues to have a well founded fear of persecution now and for the reasonably foreseeable future. Despite some changed circumstances in Iraq, the information indicates that there is at least a real chance that Palestinians in Iraq would still face harm amounting to persecution as a consequence of being targeted by Shi'ite militant groups and the Iraqi authorities, for the same reasons as they were in the past." (para 63)

2. Palestinians from Lebanon

Australian courts do not consider general discrimination against Palestinians from Lebanon as tantamount to persecution in the sense of Article 1A(2) of the Convention, however specific individual circumstances may merit protection in Australia. In its decision of 16 April 2010 (1000094 [2010] RRTA 277), for example, the RRTA granted a Palestinian refugee from Lebanon, registered with UNRWA, protection, because if he eventually was returned, he would likely be detained and questioned by the authorities because he had traveled on a fraudulently obtained passport. The court stated that there existed 'the potential for the applicant to be treated considerably more harshly during a process of investigation and detention simply because he is a Palestinian refugee in Lebanon' (para 155). Moreover, the case 0905729 [2009] RRTA 981 of 28 September 2009 involved a Palestinian from Nahr al Bared refugee camp in Lebanon. He claimed to fear being arrested and tortured by the Lebanese authorities who believed that his family was directly involved with the group Fatah al-Islam. He also feared retaliation by other Palestinians who believed his family was responsible for the destruction of the refugee camp. The Tribunal concluded that the applicant's Palestinian ethnicity is an essential and significant reason, which is provided for in section 91R(1)(a) of the Migration Act for the persecution he faces. Having considered his circumstances as a whole, the Tribunal is satisfied that relocation to another camp or elsewhere within Lebanon is neither reasonable nor would it provide the applicant with means to escape the harm he fears" (para 82). The Tribunal therefore concluded that he and his family members were entitled to protection in Australia.

3. Sponsorship system Gulf countries

Some cases concern the sponsorship system in the Gulf countries and the problem facing Palestinians from these countries who will lose their residency rights absent a sponsoring employer. The decision of 21 May 2009 (0808284 [2009] RRTA 454), for example, involved a Palestinian who was born in Kuwait and whose parents were born in the Gaza Strip. Upon arrival in Australia as a student, he was still employed by an employer in Kuwait who had assured him that he could travel to Australia without fear that his residence permit in Kuwait would be terminated. Subsequently, however, his employer fired him and he subsequently lost his residency rights in, and ability to return to, Kuwait. His claim for protection in Australia thus related to his lack of residency rights in Kuwait and his likely treatment if he were returned as an illegal non-citizen. The Tribunal concluded that although Palestinians may be ‘subject to potentially indefinite detention in Kuwait due to the fact that there is no country to deport them to’ (para 112), this would not amount to a Convention ground because it would amount to ‘the application of a law of general application’ (para 112). The Tribunal added, however, that it has ‘considerable sympathy for the applicant’s circumstances’ and therefore concluded that the case should be referred to the Minister of Immigration who has the power to grant residency on humanitarian grounds (see Handbook page 289).

4. Individual Circumstances Amounting to Persecution for a Convention Reason

In some cases, Palestinian asylum seekers have managed to satisfy the Tribunal member that they were entitled to protection in Australia due to specific circumstances, for example because they were suspected of being collaborators in the OPT (case 060793720 [2006] RRTA 197 of 21 Nov 2006 and case No5/51852 RRTA 277 of 18 October 2005). Further, the case 0907886 [2009] RRTA of 1177 of 17 December 2009 involved a Palestinian refugee from Jordan registered with UNRWA who had serious problems with the authorities who had forced him to sign a document stating that he was a member of Hamas involved in recruiting militants to cause trouble in Jordan and who had also forced him to spy on other Palestinians. He had been tortured by the authorities. The Tribunal accepted that he was entitled to protection in Australia. In the case 0805551 [2009] RRTA 24 of 15 January 2009, the Tribunal also granted protection to a Palestinian from Jordan.

2. Protection under the Stateless Convention

The 1954 Stateless Convention has still not been incorporated into domestic law. Palestinians and other stateless persons can therefore not seek protection under that Convention. However, the consequences of statelessness may nonetheless be considered when (for instance) the Minister for Immigration considers exercising their non-compellable humanitarian discretion. That said, claims from stateless Palestinians are most commonly dealt with in the context of claims for refugee status.

NEW ZEALAND

1. Article 1D in Refugee Status Determination

Claims for asylum are dealt with on the basis of the Immigration Act 1987, which by late 2010 will be replaced by the Immigration Act 2009. Article 1D was interpreted by the Refugee Status Appeals Authority (RSAA) in its principle decision [case No. 1/92 ReSA of 30 April 1992](#) (see link to the case and discussion of the case in the Handbook p. 293). As a result of this case, Palestinian asylum cases are determined under Article 1A(2) of the Refugee Convention, and the provisions of Article 1D are de facto irrelevant in this context.

RSAA decisions involving Palestinian asylum seekers during the last five years have involved, for example, decision No. 76328 of 26 June 2009, regarding a Palestinian refugee from Syria who provided evidence of a well-founded fear of persecution due to his Palestinian ethnicity.¹⁷³

2. Protection under the Stateless Convention

New Zealand is still not party to the 1954 Stateless Convention. RSAA has concluded concerning a Palestinian living in Kuwait that the fact of being stateless was not a result of discrimination against Palestinians in Kuwait:

The failure to accord the appellant Kuwaiti citizenship at birth was a function of Kuwaiti nationality laws, with citizenship based on descent and not on the place of birth (see *Refugee Appeal No 72635* [44]). He never acquired nationality or even permanent residence (nor did his father) and he lost such right as he had to remain when his father left Kuwait.

Therefore, the Authority does not accept that the appellant's condition as a stateless person was caused (or even contributed to) by discrimination against Palestinians. Neither his lack of nationality at birth, nor the loss of whatever immigration status he did have in Kuwait, is "for reasons of" any Refugee Convention ground.¹⁷⁴

¹⁷³ The decision is available at www.nzrefugeeappeals.govt.nz Decision No. 76183 of 7 May 2008 also involved a Palestinian from Syria who was granted refugee status. Decision no 76168 of 30 June 2008 involved a Palestinian from Gaza. Other decisions include no. 75892 of 25 September 2006, no. 73873 of 28 April 2006, no. 75292 of 13 April 2006 and no. 73726 of 21 December 2005.

¹⁷⁴ Decision No. 73701 of 6 October 2006, at 97-98.