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).1

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 IRPA2. 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 and shot his uncle. Subsequently, the applicant managed to leave Iraq with the help of his

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1 ┐ 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.

2 ┐ 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).

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.[3] The positive decision by the Federal Court of 10 February 2005 (Case 2005 FC 217 Geriez Zaki el Moussa and Wakim Nihay v. Minster 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.4 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 violent activities. As a result of the investigation and report by the Canadian authorities,

3 ┐ 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).

4 ┐ 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.

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.5. 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.[6] 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

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5 ┐ 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.

6 ┐ 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 Minster 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).