Upper Tribunal
(Immigration and Asylum Chamber)

Said (Article 1D: interpretation) [2012] UKUT 00413(IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 8 August 2012	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge McGeachy

Between

IBRAHIM SAID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr J Bryce, instructed by Drummond Miller

For the Respondent: Mr A Mullen, Home Office Presenting Officer

1. Because of the wording of the Qualification Directive, Community law looks outside itself for the interpretation of article 1D, and the CJEU's pronouncement on the meaning of this aspect of refugee law is a pronouncement on the autonomous meaning of article 1D.

2. Following the CJEU's reversal of the operative part of the decision of the Court of Appeal in El-Ali [2002] EWCA Civ 1103, the other elements of the latter decision may need to be reconsidered, possibly along the lines set out by the Advocate General in Bolbol v Bevándorlási és Állampolgársági Hivatal Case C-31/09.

DETERMINATION AND REASONS

Introduction

1.
The appellant is from Palestine. He has a long immigration history in this country, which we set out below. Most recently he was refused leave to enter on 19 August 2011. He appealed, on grounds primarily relying on the Refugee Convention, to the First-tier Tribunal. Judge Scobbie, basing his

reasoning almost exclusively on a previous determination of an appeal by the appellant, found that his account was not, in some important matters, worthy of credit. He dismissed the appeal. The appellant has permission to appeal to this Tribunal, granted by the First-tier Tribunal on grounds that largely refer to article 1D of the Refugee Convention and claim that the finding as to credibility, even if it were sound and complete, is not a sufficient answer to it.

The Appellant's Immigration History

2.
The appellant was born in 1943. His nationality is recorded by the Secretary of State as "Palestinian Authority". Although "Palestine" is commonly used to describe a part of the Middle East and the authorities in place there, it is not a State recognised in international law so far as we are aware; and it is not capable of being a "country of nationality" for the purposes of the Refugee Convention. The appellant is stateless. His country of former habitual residence is Lebanon. He was born in Abllen, and grew up and lived in camps in Lebanon housing Palestinians.

3.
He first came to the United Kingdom in 2001. He claimed asylum but was refused. We do not know if he appealed: in any event he left the country reluctantly, returning to Lebanon in August 2004 under the assisted voluntary return (AVR) scheme.

4.
In June 2007 he returned to the United Kingdom, travelling on a document issued by the Palestinian Authority in Beirut. He claimed asylum. He was refused. He appealed to the Asylum and Immigration Tribunal. Immigration Judge Forbes dismissed his appeal in a determination prepared following a hearing on 8 October 2007 ("the Forbes determination"). Reconsideration was refused, so the Forbes determination stood as the authoritative decision on the appellant's claim. By the end of 2007 his appeal rights were exhausted.

5.
Further submissions purporting to be a fresh claim were made on the appellant's behalf on 20 March 2008, 24 February 2009, 22 December 2009, 29 April 2010 and 21 June 2010. These submissions were all rejected as not amounting to a fresh claim, or not one that would have a realistic prospect of success before a Tribunal, within the meaning of paragraph 353 of the Statement of Changes in Immigration Rules , HC 395. Following the lodging of a Petition for Judicial Review of the last decision it was, however, withdrawn and the appellant was issued with an immigration decision carrying a right of appeal, which he exercises by these proceedings.

6.
In the mean time, the appellant has twice applied for AVR to Lebanon. His applications were made on 23 September 2008 and 5 January 2010, that is to say during the period when he was making submissions to the Secretary of State in support of his asylum claim. His applications for AVR were rejected, because he had already had the benefit of the scheme once and the rules of the AVR scheme do not allow a person to have its benefits twice. In his most recent submissions the appellant said that he no longer wished to return voluntarily to Lebanon.

7.
These applications postdate the Forbes determination and, although Judge Scobbie records them, he makes only the briefest comment on them. It is convenient for us to note their importance here. It is that, while making his asylum claims, the appellant made it clear that he was not unwilling to return

to Lebanon, his country of former habitual residence. On the contrary, he was willing to return, provided he could obtain the benefits (that is to say, largely financial benefits) of the AVR scheme. His subsequent decision not to pursue the matter adds nothing to his claim. It must now be clear to him that the Secretary of State is not prepared to make a financial grant to the appellant to leave the United Kingdom. We note that the appellant's declared change of mind in this regard is not said to be the result of any change of circumstances in Lebanon. His claim was and is based on the events which he says happened before his last departure from that country in June 2007.

The Appellant's Claim and the Forbes Determination

8.
Immigration Judge Forbes set out the basis of the appellant's claim in the terms in which it had been summarised by the Secretary of State in refusing it. There was and is no doubt that that summary was accurate as far as it goes, and we adopt it too, subject to the comments we have already made on the phrase "Palestinian nationality":

"6. You are a Palestinian national, having left Palestine originally in 1948. You possess a Lebanese travel document that confirms your Palestinian nationality, and which allows you to exit and enter Lebanon. You previously came to the United Kingdom in 2001, you claimed asylum which was refused and you returned to Lebanon voluntarily in August 2004.

7. You are claiming asylum in the UK on this occasion due to events which occurred when you returned to Lebanon. You claim that your son was kidnapped in April 2004 by an Islamic militant group Fatah al-Islam. You returned to the Naher al-Bared refugee camp in Lebanon, and began attempts to find your son by attempting to infiltrate the organisation.

8. As a result of a close association with the militant group you were able to identify a secret tunnel network. You passed this information to the Lebanese Army. An attack was carried out in May 2007 by the Lebanese Army on the tunnels in which 14 militants were killed. After the attack you sought refuge with the Lebanese Army. You believe the militants can correctly identify you as the informant and for this reason your life would be at risk on return to Lebanon."

9.
It is clear that at that stage the primary claim being made to the Secretary of State and to the Tribunal was that the appellant's removal to Lebanon would breach the Refugee Convention because he was a refugee as defined by article 1A(2) of that Convention, having a well-founded fear of persecution for one of the five reasons there set out and unwilling to return to Lebanon because of that fear. The immigration judge set out the terms of article 1A(2) and determined the appeal by reference to it. After deciding that the basic story on which the appellant relied was not true, he concluded in paragraph 39:

"This appellant can safely return to the Lebanon. He has no factual basis for the fear he has expressed. … He… has a network of family on whom he can rely."

10.
In reaching that conclusion the Immigration Judge had also had to examine article 1D of the Convention. As Laws LJ said in El-Ali [2002] EWCA Civ 1103, [2003] 1 WLR 95 at [22] "it is entirely plain, from the travaux and the Convention's historical setting, that article 1D is only concerned with Palestinian Arabs". It reads as follows:

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

11.
The “agency” in question, in relation to Palestinian Arabs, is and always has been, the United Nations Relief and Work Agency for Palestinian Refugees in the Near East (“UNRWA”), which runs the camps including those in which the present appellant has lived.

12.
As Immigration Judge Forbes appreciated, the opening words of article 1D might have been a complete answer to the appellant’s case. If the Refugee Convention did not apply to the appellant, his removal could not constitute a breach of it. He dealt with that issue in paragraphs 16 and 18 of his determination as follows:

“16. The first issue for me is whether the appellant, as a citizen of Palestine who last lived in the Naher al-Bared refugee camp in Lebanon under the protection of the UNHCR is entitled in his circumstances to argue that he is entitled to refugee status in this country.

...

18. There was no dispute that the Naher al-Bared refugee camp was the scene of prolonged hostilities between Fatah al-Islam and the Lebanese Army from around mid-May 2007, the fighting having been instigated by the former organisation. As a result of the fighting some 30000 Palestinians staying in the camp had to flee. The appellant claims that his position differed from other Palestinians in the camp on the basis of his having informed on those whom the Lebanese Army were seeking to detain. He claims that he had no protection within Lebanon. Such protection as he had prior to May 2007 appears to me to have ceased. Moreover he claimed he could distinguish his position from those fleeing the fighting. It seemed to me therefore the appellant could bring himself within the provisions of the 1951 Convention and that he was and is entitled to make a claim for protection under the provisions of that instrument.

13.
It was having cleared the deck in that way that he went on to reach the conclusions we have summarised. In brief, article 1D did not prevent the appellant from being entitled to the benefits of the Convention, but the facts in his case showed that he was not a refugee. Thus Immigration Judge Forbes dismissed the appeal.

14.
As we have said, Judge Scobbie based his own conclusions on the credibility of the appellant’s account of his son and his dealings with Fatah al-Islam very firmly on those in the Forbes determination. It seems to us that he was entirely right to do so. The appellants’ claim to fear return to Lebanon is further undermined by his willingness to return to Lebanon if he could have access to the AVR scheme. There is no proper reason to suspect for an instant that the appellant is a person with a well-founded fear of persecution in Lebanon.

Article 1D as an Inclusionary Provision

15.

Immigration Judge Forbes decided that article 1D did not exclude the appellant from the protection of the Refugee Convention. He did not, however, consider whether that article might of itself offer protection to the appellant. There have been a considerable number of cases where Palestinian Arabs who have travelled to countries outside the Middle East have claimed that, on its terms, article 1D makes them Convention refugees because of the wording of its second sentence. At its boldest, the claim has been that a person who has left an UNRWA camp and travelled to (for example) the United Kingdom can say that the protection previously given to him by UNRWA "has ceased for any reason" and that he is "ipso facto entitled to the benefits" of the Refugee Convention. The unattractiveness of that argument based as it is on the benefits of the Convention accruing to an individual by his voluntary choice rather than from need, has been widely recognised; but the precise interpretation of article 1D has caused considerable difficulty at the highest levels.

16.
In El-Ali itself, the Court of Appeal endorsed the conclusion of the Immigration Appeal Tribunal that the phrase "at present" in the first sentence of article 1D meant "at the time the Convention enters into force", i.e. in 1951. It followed that the benefit of the second sentence, whatever it might be, could not be claimed by a person born since 1951, as both the appellants before the court were. The Court therefore did not need to decide what the meaning of the second sentence was. Laws LJ (with whom the rest of the Court agreed) did not, however, leave any real room for doubt about what his view would have been. His examination of the travaux préparatoires had led him clearly to the conclusion at [15] that those Palestinian Arabs who were displaced and fled from their homes on the declaration of the State of Israel on 15 May 1948 "were considered at all relevant stages to be refugees " and "were regarded, in and out of the United Nations, as belonging to a special category". They were therefore, although refugees, dealt with outside the Convention under the special protection not of the UNHCR but of UNRWA. The second sentence was, in Laws LJ's view, at [47] intended to have effect:

"on the happening of a particular overall event: the cessation of UNRWA assistance. [The drafters] did not contemplate that article 1D would apply piecemeal and haphazardly, its scope marked off by reference to the persons who at any given moment were or were not within the UNRWA territories receiving assistance…".

17.
This, with the greatest respect, is an entirely coherent view. Those who were covered by article 1D were (already) refugees; they were (in 1951) already receiving separate and special treatment apart from the UNHCR; if (and only if) UNRWA ceased to function, they would need to be considered under the general provisions of the Refugee Convention. As we have said, however, Laws LJ's views on the meaning of the second sentence were obiter: only the interpretation of the first sentence was required for the determination of the appeal.

18.
The scene now shifts to the Court of Justice of the European Union. That Court has, of course, no direct jurisdiction over the Refugee Convention: the European Union is not a party to the Convention (although all Member States are) and the great majority of States party to the Convention are not subject to the jurisdiction of the Court. But the Refugee Qualification Directive 2004/83/EC imposes on Member States as a matter of Community law, obligations equivalent or identical to those already applying under the Convention. Thus the Court acquires a jurisdiction to rule on the meaning, within the Community alone, of the wording of the Convention, including specifically article 1D, which appears in the Directive at article 12.1(a). There is, however, an important difference between the

treatment of other provisions of the Refugee Convention and this one. Whereas others are imported into Community law simply by using the words of the Convention in the Directive, article 12.1(a) retains a specific reference to the Convention:

“Article 12

Exclusion

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 Nations, these persons shall ipso facto be entitled to the benefits of this Directive;”

19.
The reference here to article 1D of the Convention has at least two consequences. One is that the Directive recognises that the exclusion is by reference not to its own terms but to those of another instrument, on the meaning of which there might be discussion or ruling on a scale wider than that of Europe alone. The other is that a ruling of the CJEU on this article of the Directive is a ruling not only on the meaning of the Directive but also on the meaning of article 1D of the Convention. Thus, whatever may be the autonomous meaning of article 1D (to use the language of Lord Steyn in SSHD v Adan [2001] Imm AR 253, 260-268), the Court’s view is itself a view on that autonomous meaning, and so appears to bind all national courts in Member states.

20.
The Court’s view was first sought in Bolbol v Bevándorlási és Állampolgársági Hivatal Case C-31/09), a reference by the Metropolitan Court of Budapest. The questions referred were as follows:-

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

1.
Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2.
Does cessation of the agency’s protection or assistance mean residence outside the agency’s area of operations, cessation of the agency and cessation of the possibility of receiving the agency’s protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3.
Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope ratione personae of the Directive?”

21.
In answering the first question the Court (Grand Chamber) specifically disapproved the decision in El-Ali :

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

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

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

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

22.
The Court went on to conclude that as Ms Bolbol had, on the facts, never availed herself of UNRWA assistance, she was not excluded by article 1D. That being the case, the Court needed to express no opinion on the other questions referred, and did not do so.

23.
Bolbol clearly overrules El-Ali ; and if the temporal interpretation adopted there cannot stand, it might well be wrong to attribute very much weight to the rest of Laws LJ’s views, which lose their claim to be part of a coherent whole. He, it will be remembered, had opined that the second sentence of article 1D applied only to the cessation of UNRWA’s activity, and had no other application to the cessation of assistance to an individual. That is a view that may need revision in the light of the decision that the first sentence does not mean what Laws LJ thought it did.

24.
In these circumstances, it is right to look at what the Advocate General (Sharpston) said in her opinion in Bolbol . After arguing that the temporal position taken in El-Ali was wrong and therefore writing against the background of the meaning of the first sentence of article 1D that was adopted by the Court she said this at paragraph 90, summarising her conclusions:

“90. The construction that I propose in dealing with each of the four points of interpretation involves reading the two sentences that together comprise Article 1D in a way that will generate the following set of outcomes:

(a)
a displaced Palestinian who is not receiving UNRWA protection or assistance is not excluded ratione personae from the scope of the Convention: he is therefore to be treated like any other applicant for refugee status and to be assessed under Article 1A (avoidance of overlap between UNRWA and the UNHCR; application of the principle of universal protection);

(b)

a displaced Palestinian who is receiving protection or assistance from UNRWA is excluded ratione personae from the scope of the Convention whilst he is in receipt of that protection or assistance (avoidance of overlap between UNRWA and the UNHCR);

(c)
a displaced Palestinian who was receiving protection or assistance from UNRWA but who, for whatever reason, can no longer obtain protection or assistance from UNRWA ceases to be excluded ratione personae from the scope of the Convention (application of the principle of universal protection); however, whether he is then ipso facto entitled to the benefits of the Convention or not depends on why he can no longer obtain such protection or assistance;

(d)
if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of external circumstances over which he had no control, he has an automatic right to refugee status (application of the principle of special treatment and consideration);

(e)
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 assessed on its merits under Article 1A (application of the principle of universal protection and fair treatment for all genuine refugees; proportionate interpretation of the extent of special treatment and consideration to be afforded to displaced Palestinians).

25.
That analysis does not have the authority of the Court but, it clearly deserves respect, particularly given the fate of El-Ali .

26.
Since judgment was given in Bolbol , there have been at least two other references of cases raising questions relating to article 1D of the Refugee Convention. The judgements may or may not provide all the necessary answers. For the appellant before us Mr Bryce suggested a reference in this case too, but we do not think that is necessary.

27.
The position is that the Secretary of State has been almost supine in her approach to the appellant's claim. It must have been clear from the beginning that the case was factually and legally complex. If there were any doubt at the beginning, there was none after November 2011, when in the presence of a Presenting Officer, Mr
Bryce obtained an adjournment of the hearing precisely because he had been recently instructed in a case which the Scottish Legal Aid Board recognised was suitable for an appearance by counsel. Despite that, the Secretary of State chose not to be represented at all at the substantive hearing, and when permission to appeal to the Upper Tribunal was granted, there was, so far as we can see, no response from the Secretary of State. There was no response to the Tribunal's invitation to make submissions on whether a hearing was required. At the hearing, the Presenting Officer confined his submissions to reliance on Laws LJ's obiter remarks in El-Ali on the meaning of the second sentence of article 1D, and frankly accepted that he was not able to deal in detail with developments in the law since that judgement was given. We do not criticise Mr Mullen. It does not, however, appear to us that the Secretary of State has shown very much anxiety to win this appeal at hearings.

28.

We have set out the principal facts above in referring to the earlier determinations. Mr Bryce's substantive written submissions were as follows:

"12. The application of the A-G's involuntary displacement test to the facts of the present appeal are straightforward. On Devaseelan principles the Appellant, while he maintains that his entire account has been truthful, is fixed with IJ Forbes' finding that his presence in Naher al-Bared camp was not for the reasons that he has stated. Nevertheless on those same principles the finding in IJ Forbes' determination that the Appellant was physically present when the camp was cleared must also stand. He did not return to his camp of Al-Bass. The destruction and evacuation of the camp in what must have been terrifying circumstances must constitute involuntary displacement. IJ Forbes at para 18 of his determination effectively makes a finding to that effect. It is nothing to the point that others who had actually been resident in the camp, which the Appellant had not, were displaced to other refugee camps. This Appellant was displaced out of the relevant geographical area.

13. Other circumstances which may also be relevant to a contention of involuntary displacement are that the Appellant's means of livelihood had been destroyed in Israeli bombing of southern Lebanon and his subsequent economic dependency on his sons who are no longer able to support him."

29.
It seems to us that those submissions have clear merit and are sufficient to bring to the appellant the benefits of the Refugee Convention. The analysis of the Advocate General, bolstered by the decision in Bolbol , show that the Immigration Judge was wrong to apply El-Ali , and to take the approach to the facts, that he did.

30.
We shall therefore re-make the decision and allow the appeal, which accordingly succeeds on Refugee Convention grounds. That is not to say precisely that the appellant is a refugee: he is entitled to the benefits of the Refugee Convention, including those prohibiting his removal.

31.
We recognise, however, that it is possible that the judgements of the CJEU on the references already made may show that our approach, and that of Advocate–General Sharpston, is mistaken. For that reason while allowing the appellant's appeal we extend time for any application to this Tribunal for permission to appeal to the Inner House so as to expire two weeks after publication of the CJEU's decision on the reference in C-364/11 (Abd El Karim and Mustafa). (For the avoidance of doubt, the previous sentence overrides any time limit stated in documents accompanying this determination when it is sent to the parties.)

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 26 October 2012