First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/07865/2019, PA/07864/2019

THE IMMIGRATION ACTS

Heard at Taylor House
On 14 February and 17 July 2020

Determination Promulgated

.....

Before

DR H H STOREY
SITTING AS A JUDGE OF THE FIRST TIER TRIBUNAL

Between

NB

AB

(ANONYMITY DIRECTION MAINTAINED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervenor

Representation:

For the Appellants: Mr Raza Hussain, QC (for remote hearing of 17 July 2020 of further submissions only), Ms G Capel, Counsel, instructed by Wilsons Solicitors LLP
For the Respondent: Ms R Main Home Office Presenting Officer

FINDINGS AND ORDER FOR PRELIMINARY REFERENCE TO THE CJEU

1.The order for preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU) made in respect of these appeals is to be found at paragraph 131 below.

2. The appellants, mother and son, are stateless Palestinians formerly resident in Lebanon. She is aged 40. They are in the UK with the first appellant's husband, KB, aged 48. Counting the second appellant, AB, the couple have five children: M, aged 14, AB aged 13, Y, aged 12, S, aged 5 and H, aged 7 months. All save H are UNRWA-registered Palestinian refugees. All save H were living in the Al Bass (sometimes spelt Al Buss) refugee camp in southern Lebanon until they left Lebanon in September 2015 and travelled to the U.S. on a visa. All save H came to the UK on 11 October 2015. All save for AB and H are dependants in the first appellant's appeal. She and AB appeal against the decision made by the respondent on 3 September 2019 to refuse to grant them asylum or humanitarian protection under paragraphs 336 and 339F of HC395 (as amended).

3. Of particular importance to the appellants' appeal is the medical condition of AB. He is a disabled child with severe and complex needs. He suffers from hydrocephalus; cerebral palsy affecting his trunk, legs and left arm, which means that he is not able to walk; scoliosis; severe learning difficulties; optic atrophy and nystagmus in both eyes (he is registered sight impaired); intermittent seizures (treated with emergency medication); and double incontinence.

Procedural history

4. Mr KB had applied for asylum in May 2016, with all but H (who was not yet born) as his dependants. His asylum claim was refused in November 2016 and his appeal was dismissed by Judge Traynor of the First-tier Tribunal on 2 October 2018. His application for onward appeal was unsuccessful. The basis of his asylum claim had been that he would be at risk on return from Hezbollah because he had employed Palestinian and Syrian people illegally and an arrest warrant had been issued against him. Like the respondent, Judge Traynor accepted that Mr KB and his family were Palestinians from Lebanon but did not find that he had given a credible account otherwise. In a witness statement of 5 June 2019 prepared for the present appeal, Mr KB admits that his claim to be at risk from Hezbollah was a fabrication. Judge Traynor found that the fact that the appellant had not sought asylum in the United States (U.S.), despite flying there with his family on a visa, indicated that his real motive was always to find affordable medical help for AB. Judge Traynor also considered whether the appellant was entitled to succeed on human rights grounds by virtue of his son's medical condition and concluded that the latter's health circumstances did not cross the **N v SSHD** [2005] UKHL 31 threshold and that there would be education targeted to his specific needs, healthcare and appropriate medication available for him in Lebanon. The judge found that in Lebanon AB had received medical support and treatment and it was in his best interests to remain with his

family who could continue to provide him with the necessary care and support. He also concluded that the appellant's circumstances could not succeed on Article 8 grounds, either under or outside the Immigration Rules.

5. The appellants' representatives had advised the appellants to make an asylum claim in their own right in March 2019. Prior to the refusal decision, the respondent responded to further representations stating that it was "accepted that there is discrimination in Lebanon against disabled Palestinians...", but did not consider that the appellants' circumstances, AB's in particular, constituted persecution or serious harm or ill treatment or disproportionate interference with their Article 8 rights.

6. I conducted an oral hearing of the appeal on 14th February 2020. At the end of the hearing I stated that I would make a direction designed to obtain further evidence from the Early Intervention Centre in Al Bass camp (see below paragraphs 64-73) and permit further submissions on it. That was sent to the parties the same day. After receiving further evidence and submissions, I sent a decision headed "Findings and Further Directions" dated 11 May 2020 in which I noted that in light of my findings of fact relating to the appellants [which were in identical form to those set out in this decision), there were several issues of interpretation that I did not consider *acte clair*. Having identified three draft questions which I proposed to refer to the Court of Justice of the European Union (CJEU), I invited the parties to make submissions as to their efficacy. I also informed them that I wish to have their views on my intention to join UNHCR as an intervening party. I received in response further written submissions from Mr Hussain, Ms Capel and Mr Toal on behalf of the appellants and Mr Main on behalf of the respondent. In light of these responses, I decided to hold a further hearing confined to argument regarding the possible questions for reference. This took place on 17 July 2020. It took the form of a remote hearing due to measures taken by the tribunal in response to the COVID 19 pandemic. On this occasion, Mr Raza Hussain QC represented the appellants, with the assistance of Counsel, Mr Ronan Toal and Ms Grace Capel and solicitor Ms Anita Vashist of Wilsons Solicitors. Mr Richard Main represented the respondent as he had done at the hearing. I wish to express my gratitude to the parties for their careful and well-presented submissions. I refer to them at relevant points below, but note here the important fact that both were in agreement to my joining UNHCR as an Intervener at the domestic stage of proceedings.

7. As a result of the further (remote) hearing on 17 July 2020 I have decided to make a preliminary reference to the CJEU under Article 267 TFEU. My reasons for so deciding are set out in **PARTS C** and **D** below. I have also decided to join UNHCR as an intervenor at this stage: see **PART E.**

8. What follows is divided into five parts: **A: RELEVANT LAW AND MATERIALS; B: ESTABLISHMENT OF THE FACTS; C: RELEVANT LEGAL ISSUES; D: QUESTIONS TO THE CJEU;** and **E: DIRECTION JOINING UNHCR AS INTERVENOR.**

A: RELEVANT LAW AND MATERIALS

Relevant UK and EU asylum law

9. The key provisions of UK law transposing 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 (the Qualification Directive or QD) are contained in The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the Immigration Rules (the 2006 Regulations).

10. By regulation 2 of the 2006 Regulations, "'refugee' means a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 does not apply". Regulation 7(1) provides that "[a] person is not a refugee, if he falls within the scope of Article 1 D, 1E or 1F of the Geneva Convention."

11. Article 1D of the 1951 Convention provides:

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

12. Paragraph 339AA of the Immigration Rules states that:

> "This paragraph applies where the Secretary of State is satisfied that the person should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006."

13. The corresponding provisions of the QD are well-known and are based closely on the 1951 Refugee Convention, Article 1D in particular. They have been retained word-for-word in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (the QD(recast)).

14. Article 12(1)(a) QD provides:

> "A third-country national or a stateless person is excluded from being a refugee if:
>
> a) he or she falls within the scope of Article 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, those persons shall *ipso facto* be entitled to the benefits of this Directive"

15. When the Refugee Convention was signed on 28 July 1951 there were two organs other than the UNHCR providing protection or assistance to Palestinian refugees: the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Association (UNRWA). The UNCCP ceased to play any role since the 1960s although it continues to exist nominally. Thus to all intents and purposes the only UN organ or agency presently falling within the scope of Article 1D is UNRWA. According to Albanese and Takkenberg, it has "gradually evolved into a large agency, engaging in a variety of humanitarian, development and protection activities".[1] UNRWA's "area of operations" covers the Gaza Strip, the West Bank (including east Jerusalem), Lebanon, Jordan and Syria.

16. In Case C-364/11 **El-Kott** at paragraph 76 the CJEU set out the conditions required in order to establish refugee status *ipso facto* as follows:

> "[A] person who is *ipso facto* entitled to the benefits of [the QD] is not necessarily required to show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive [now Article 2(d) QD (recast)], but must nevertheless submit ... an application for refugee status, which must be examined by the competent authorities of the Member State responsible. In carrying out that examination, those authorities must verify not only that the applicant actually sought assistance from UNRWA ..., and that the assistance has ceased but also that the applicant is not caught by any of the grounds for exclusion laid down in Article 12(1)(b) or (2) and (3) of the directive ."

17. Earlier, at paragraph 52, the court stated that the expression 'at present receiving protection or assistance' must therefore be interpreted as covering not only persons who are 'currently availing themselves' of assistance provided by UNRWA but also:

> "[persons] who [...] availed themselves of such assistance shortly before submitting an application for asylum in a Member State, provided, however, that that assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) [QD]."

18. According to the **El Kott** judgment, one of the objectives of Article 12(1)(a) QD is "to ensure that Palestinian refugees continue to receive protection by affording them effective protection or assistance [...]" . The application of Article 12(1)(a) must take account of the objective of Article 1D of the Refugee Convention, which is "to ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has

[1] F Albanese and L Takkenberg, *Palestinian Refugees in International Law*, O.U.P. 2nd ed 84.

been definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" .

50. In paragraphs 51 and 61 it is stated that in the light of that objective, the circumstances in which 'such protection or assistance has ceased for any reason' within the meaning of the second sentence of Article 12(1)(a) QD include:

- "events affecting UNRWA directly such as the abolition of UNRWA or an event which makes it generally impossible for UNRWA to carry out its mission"; and
- circumstances which are "beyond [the] control and independent of [the] volition [of the person concerned] which force him to leave the area in question and thus prevent him from receiving UNRWA assistance" .

19. At paragraph 63 the CJEU ruled that a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations under such circumstances if "his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency".

20. In C-585/16 **Alheto**, 25 July 2018, the CJEU underlined that the assessment of whether protection or assistance has ceased must be made in relation to UNRWA's area of operations as a whole, not just to the person's territory of habitual residence within that area. It ruled that protection or assistance cannot be regarded as having ceased, if the person is able to stay in that other part of UNRWA's area of operations "in safety, under dignified living conditions and without being at risk of being refouled to the territory of habitual residence for as long as he or she is unable to return there in safety [...]".

21. The German Federal Administrative Court has held that the "necessary living conditions commensurate with UNRWA's mission' include safety from persecution within the meaning of Article 9 QD (recast) and from serious harm within the meaning of Article 15 QD (recast) - not just the provision by UNRWA of food, schools or healthcare, which would otherwise have no practical value. The court held that this is also consistent with the Palestinian concerned being able to remain in UNRWA's area of operations "'in safety, under dignified living conditions'" [2].

22. In relation to health cases and whether vulnerability can impact on an assessment of qualification for international protection, the CJEU has ruled in C-353/16, **MP v Secretary of State for the Home Department,** at paragraph 57 that:

> "... it is for the national court to ascertain, in the light of all current and relevant information, in particular reports by international organisations and non-governmental human rights organisations, whether, in the present case, MP is likely, if returned to his country of origin, to face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the torture

[2] Federal Administrative Court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. para. 27.

he was subjected to by the authorities of that country. That will be the case, inter alia, if, in circumstances where, as in the main proceedings, a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals, of which MP forms part, to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities ."

Strasbourg case law

23. It is important, in view of the respective submissions made regarding the severe disability of the second appellant, to note here one particular decision of the ECtHR in the case of **SHH v UK**. This case[3] concerned an Afghan applicant who had been left seriously injured (amputated lower right leg and penis, and serious injury to his left leg and right hand) during a rocket launch in Afghanistan. The applicant claimed, inter alia, that he would be particularly vulnerable to violence and at increased risk of further injury of death in the ongoing armed conflict; and because he would face living conditions and discrimination there which would breach Article 3 of the ECHR, because there was no one available to care for him in Afghanistan.

24. The ECtHR considered that to establish ill treatment under Article 3 ECHR, the applicant had to meet an exceptionality threshold as applied in health cases such as **D v UK** and **N v United Kingdom**, rather than the lower threshold applied in cases such as **Sufi and Elmi v UK** where there were predominantly man-made causes. In rejecting his application the majority of the court relied, inter alia, on the absence in any of the background country reports of reference to disabled persons being at greater risk of violence, ill-treatment or attacks in Afghanistan.[4] The majority of the ECtHR Chamber took into account that even though the applicant's disability could not be described as a "naturally occurring illness", any future harm in relation to living conditions as a disabled person in Afghanistan would not emanate from deliberate ill-treatment from any party, but from a lack of resources and the fact that the applicant's disability did not require medical treatment. He had also failed to submit any evidence that he could not make contact with his two sisters living with their families in Afghanistan.

Article 1D materials

25. In the submissions made by the parties in the course of these appeals reference has been made to a wide range of materials including a number of academic commentaries, which I have taken into account. These include: Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn 2007 (O.U.P); M Qafisheh and V Azarov in A Zimmerman (ed)

[3] **SHH v United Kingdom**, app.no.6036/10, 29 January 2013.

[4] Ibid. paras 85-86.

The 1951 Convention and its 1967 Protocol: a Commentary; J Hathaway and M Foster, *The Law of Refugee Status*, 2nd edn.(C.U.P); and F Albanese and L Takkenberg, *Palestinian Refugees in International Law*, 2nd edn. (O.U.P), 2020 (to which I have already made reference at paragraph 15 above).

26. Among the materials produced or referred to in this appeal are several with particular importance to application of the CJEU interpretation of Article 1D.

UNHCR Guidelines

27. The UNHCR GUIDELINES ON INTERNATIONAL PROTECTION No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017 state, inter alia, that:

> "19. The application of the second paragraph of Article 1D is not, however, unlimited. Protection under the 1951 Convention does not extend to those applicants who, being outside an UNRWA area of operation, refuse to (re-)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience. That said, the reasons why one has left an UNRWA area of operation (for example, for work or study purposes, or for protection reasons) is not of itself determinative. What is pivotal is whether the protection or assistance of UNRWA has ceased owing to one or more of the "objective reasons" for leaving or preventing them from (re)availing themselves of UNRWA's protection or assistance as set out in paragraph 22 below (see also paragraph 26ff on sur place claims). If a person has no objective reasons for not (re)availing themselves of UNRWA's protection or assistance, then such protection or assistance cannot be regarded or construed as having ceased within the meaning of the second paragraph of Article 1D when a Palestinian refugee can safely enter the UNRWA area of operation.
>
> ...
>
> 24. The personal circumstances of the applicant are relevant to the determination of whether one of the objective reasons exists to justify the application of the second paragraph of Article 1D. Thus, each claim must be determined on its individual merits, enabling consideration of factors that are specific to the applicant. These personal circumstances may include age, sex, gender, sexual orientation and gender identity, health, disability, civil status, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, and any past experiences of serious harm and its psychological effects.
>
> ...
>
> 41. The assessment must consider whether, at the time the individual's claim is considered, he or she is unable to or unwilling to (re)avail himself or herself of the protection or assistance of UNRWA for a reason beyond his or her control. .."

28. The Home Office Asylum Policy Instruction on Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) **Version** 2.0, 09 May 2016 states at pp.9-10:

"Those previously in receipt of UNRWA assistance

A Palestinian eligible for UNRWA protection or assistance and previously registered with UNRWA, or (though not registered) in receipt of UNRWA protection or assistance, is not entitled to Convention refugee status simply by leaving the UNRWA areas of operation and claiming asylum elsewhere. To qualify automatically for refugee status under the second paragraph of Article 1D, individuals previously assisted by UNRWA must show, to a reasonable degree of likelihood, that the assistance or protection they previously received has ceased to be accessible for reasons beyond their control or independent of their volition.

The phrase 'ceased for any reason' in the second paragraph of Article 1D originally envisaged the termination of UNRWA as an agency or the discontinuation of its activities. However, the CJEU's ruling, in the case of Mostafa Abed El Karem El Kott and others (C-364/11) means that the cessation of UNRWA protection or assistance 'for any reason' also includes the situation in which a person ceased to receive assistance for a reason beyond their control or independent of their volition. In practice, the most likely situation in which the protection or assistance of UNRWA could not be accessed by an individual will be in one of the following circumstances:

-threats to life, physical integrity or security or freedom, or other serious protection related reasons, including:

- situations such as armed conflict or other situations of serious violence, unrest and insecurity, or events seriously disturbing public order

- more individualised threats or protection risks such as sexual and/or gender- based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, severe discrimination, or arbitrary arrest or detention

practical, legal and/or safety barriers, including:
- being unable to access UNRWA assistance because of long-term border closures, road blocks or closed transport routes
- absence of documentation to travel to, or transit, or to re-enter and reside, or where the authorities in the receiving country refuse their re-admission or the renewal of their travel documents
- serious dangers such as minefields, factional fighting, shifting war fronts, banditry or a real risk of other forms of violence or exploitation

29. The Home Office Country Policy and Information Note Lebanon: Palestinians Version 1.0 June 2018 states at 2.3.4:

> "2.3.4 Situations where UNRWA protection or assistance may cease beyond the person's control or independent of their volition may include the following circumstances:
>
> - where there is a threat to life, physical integrity or security or freedom, or other serious protection related reasons.
> - situations such as armed conflict or other situations of serious violence, unrest and insecurity, or events seriously disturbing public order.
> - more individualised threats or protection risks such as sexual and/or gender-based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, severe discrimination.
> - arbitrary arrest or detention"

30. The relevant entries at 2.6 read:

> "2.6 Assessment of risk Refugee camps
>
> 2.6.1 The vast majority of Palestinians reside within the 12 UNRWA refugee camps or in 'gatherings' - refugee communities outside of, but often alongside, the UNRWA refugee camps. The refugee camps are governed by Palestinian groups - the Palestinian Liberation Organisation and Hamas - which operate paralegal systems outside of the control or reach of the Lebanese authorities enforced by 'popular committees' and 'security committees'. The popular committees are a mechanism to resolve disputes between factions and individuals, as well as being a contact point for the Lebanese government. The security committees are used to maintain 'peace', with specific factions patrolling areas under their control. The Lebanese government does, however, regulate movement into and out of some of the camps (see Demography and Refugee camps).
>
> 2.6.2 Living conditions in camps are generally poor, overcrowded and, although generally stable, sometimes violent. However conditions vary within and between camps with those in the south generally poorer than those in the north, while camps in Beirut are more integrated into surroundings areas than those elsewhere."
>
> State treatment
>
> 2.6.3 Palestinians in Lebanon face generally discriminatory treatment by both the Lebanese state and non state actors, the degree and nature of which varies between the 'four' different groups and individual circumstances.
>
> 2.6.4 Since Palestinians are considered 'foreigners', yet lack nationality of another country, they face legal restrictions in accessing state services, such as medical treatment and education. Palestinian refugees are also barred from employment in many fields and face restrictions in buying property (although the law is enforced

'flexibly' and in practice they are, for example, able to buy land informally) (see Socio-economic situation). Instead, they largely depend on basic services - health, education and accommodation - provided by UNRWA. The assistance provided by UNRWA to PRS has been reduced in recent years, from about US$200 in 1975 to US$110 today, exacerbating their already poor socio-economic circumstances (see UNRWA).

2.6.5 Lebanese law does not specifically target Palestinians; however the impact of state restrictions has led to the Palestinian community facing socio-economic marginalisation: experiencing high levels of employment and poverty, and poor infrastructure and housing conditions generally. This is, however, partially offset by the support provided by UNRWA (see Socio- economic condition)."

31. This CPIN also summarises Tribunal country guidance at 2.6.7 and at 2.6.11 states that it is considered that this country guidance still reflects the position in Lebanon.

"2.6.7 In the case of KK, IH, HE (Palestinians - Lebanon - camps) Lebanon CG [2004] UKIAT 00293, heard 24 May 2004, promulgated 29 October 2004, the Immigration Appeal Tribunal considered whether poor living conditions in the refugee camps in Lebanon amounted to a breach of Article 3 of the ECHR and if there was a real risk of persecution under the Refugee Convention. The Tribunal summarised the country evidence as described by UNWRA:

> '... Palestinian refugees in Lebanon... do not have social and civil rights and have a very limited access to the government's public health or educational facilities, and no access to public or social services. The majority rely entirely on UNRWA as the sole provider of education, health and relief and social services. They are considered as foreigners and prohibited by law from working in some seventy-two trades and professions which has led to high levels of unemployment among the refugee population. It seems that popular committees in the camps representing the refugees regularly discuss these problems with the Lebanese government or with the UNRWA officials. As we say, UNRWA provides services and administers its own installations and has a camp services office in each camp which residents can visit to update records or raise issues about services with the camp services officer who will refer petitions etc. to the UNRWA administration in relevant areas. It is said that socio-economic conditions in the camps are generally poor. There is a high population density and there are cramped living conditions and an inadequate basic infrastructure as regards matters such as roads and sewers. As we have noted above, some two-thirds of registered refugees live in and around cities and towns.' (para 83)

2.6.8 The Tribunal went on to find that 'to the extent that there is a discriminatory denial of third category rights in Lebanon for the Palestinians, this does not amount to persecution under the Refugee Convention or breach of protected human rights under Article 3 of the ECHR [European Convention on Human Rights].' The

Tribunal also held that conditions in camps at that time did not amount to a breach of Article 3 of the ECHR (para 106).

2.6.9 In the country guidance case of **MM and FH (Stateless Palestinians, KK, IH, HE reaffirmed)**, heard 29 June 2007 and promulgated on 4 March 2008, the Asylum and Immigration Tribunal (AIT) observed that it had 'not been presented with any new or significant evidence that should cast doubt on the decision reached by the Tribunal in KK.' (para 126).

2.6.10 It went on to find that:

> i) 'The differential treatment of stateless Palestinians by the Lebanese authorities and the conditions in the camps does not reach the threshold to establish either persecution under the Geneva Convention, or serious harm under paragraph 339C of the Immigration Rules, or a breach of Articles 3 or 8 under the ECHR.
>
> ii) 'The differential treatment of Palestinians by the Lebanese authorities is not by reason of race but arises from their statelessness.
>
> iii) 'The decision in KK, IH, HE (Palestinians-Lebanon-camps) Jordan CG [2004] UKIAT 00293, is reaffirmed.' (Headnote)

2.6.11 The country situation since the promulgation of MM and FH in 2008 has not substantively changed. The available evidence considered in this note (see Bibliography for full list of sources) does not establish that there has been a significant and cogent change in the treatment of Palestinians by the government or in the conditions in refugee camps generally. Therefore the findings of the AIT in MM and FH continue to be generally applicable."

The UNRWA Disability Inclusion Guidelines

32. The materials produced by the parties refer, inter alia, to UN General Assembly resolutions relating to UNRWA and Palestinian refugees. UNRWA itself refers to these in a number of its publications. As regards disability, UNRWA itself has produced Disability Inclusion Guidelines.[5] Their introduction states:

> "The United Nations General Assembly, in setting out the UNRWA mandate, has repeatedly encouraged the Agency to continue to make progress towards addressing the needs, rights and protection of persons with disabilities in its operations, in accordance with the UN Convention on the Rights of Persons with Disabilities (CRPD).
>
> In recognition of the particular vulnerabilities experienced by persons with disabilities, UNRWA has committed to ensuring that all of its programming and

[5] Disability Inclusion Guidelines, UNRWA, 2017 www.unrwa.org/sites/default/files/content

services are inclusive and that persons with disabilities have equal opportunities to participate in and benefit from UNRWA assistance. In this regard, these Guidelines have been developed to inform the Agency's disability inclusion efforts."

33. At 1.2.4 this document refers to UNRWA's Disability Policy introduced in 2010.

Background country materials

34. I shall not attempt to summarise the background country evidence in the appellants' and respondent's bundles except to note in relation to recent events up to the date of oral hearing that, following the resignation of Prime Minister Harari in October 2019 there continue to be mass protests in Tyre, Saida and Beirut and the situation is unstable. The Lebanese government made severe funding cuts to the budget for social affairs in 2019, adversely affecting services for disabled people. In July 2019 the Lebanese government introduced employment restrictions negatively impacting on all non-Lebanese nationals including UNRWA registered Palestinian refugees.

B: ESTABLISHMENT OF THE FACTS

35. For the oral hearing of this appeal the appellants' representatives produced two Lever Arch files containing numerous documents. There was also a supplementary appeal bundle containing, inter alia, a report by Peter Horrocks, Independent Social Worker, dated 12 December 2019. In this report, Mr Horrocks focused on the circumstances of AB as recounted by his mother NB and her own mental health difficulties. Mr Horrocks said that in Lebanon AB was immobile and housebound most of the time and subject to abuse from the surrounding community, to which he reacted by shouting and screaming. He could not walk or crawl and slumped when sitting. The lack of specialist support in his life in Lebanon would have lifelong consequences. However, since he has settled in at the UK school (a secondary school in Bolton for students with severe and profound learning disabilities aged 11-19 years), he has improved dramatically. In addition to his schooling, he has a multi-agency support network which includes a consultant orthopaedic surgeon, consultant spinal surgeon, consultant paediatric neurologist, a neurosurgeon, a paediatric psychotherapist, a consultant paediatrician, a speech and language therapist, among others. He remains doubly incontinent. If the family had to return, AB would regress and it was likely his seizures would re-start. The whole family had suffered in Lebanon because of AB's developmental difficulties, his siblings facing abuse, discrimination and ridicule from friends and neighbours. The family atmosphere was sad and depressed. If they had to return, the mental health of the whole family would deteriorate.

36. Mr Horrocks considered that the first appellant suffered from depression in Lebanon and this in turn impacted on her husband and children. Now she has improved and is much happier, although still on medication for depression. This has also improved her husband's mental health. The other children have a significant degree of emotional vulnerability as a result of the family history linked to AB's condition, but now, in their new environment, feel positive about AB rather than ashamed of him.

37. At the oral hearing before me, the respondent produced two documents, one dated 1 February 2017 from Medical Aid for Palestinians (MAP) and headed "Disability projects in Lebanon: Giving Hope to Palestinian children" describing the help given to children with disabilities in south Lebanon by an Early Intervention Centre based in Al Bass camp, the other, also from MAP dated 20 December 2017, headed "Caring for the youngest generation of Palestinian refugees in Lebanon". The appellants' representatives produced a letter dated 6 February 2020 from the Class teacher, Carol Tennant, at AB's High School. Her letter describes the transformation in AB's condition from when he first came to the school to the present, he now being happy and settled. She states that AB has made excellent progress cognitively, physically and socially because of the facilities and specialist services that he has been able to access on a daily basis and observes that "any changes would be devastating to his educational, health and social well-being."

Oral Evidence

38. The first appellant, NB, gave evidence. She confirmed that the contents of her June 2019 witness statement was true. Asked why she and her family had flown from Lebanon to the U.S., she said that human traffickers has suggested this to her husband. The purpose was to help her son, AB, given his medical plight. She did not know that they were going to the UK until her husband informed her when they were in the U.S. that this was the advice given to him by agents. Asked if she knew that her husband had produced a false summons for the purposes of his own asylum claim, she said he did not inform her. He knew about her mental health problems.

39. Asked about her efforts to find educational help for AB when living in Al Bass refugee camp in southern Lebanon, she said that there were no facilities inside the camp. There was a school half an hour's journey away by car but it did not take Palestinians, only Lebanese. She had first tried to get AB into a special needs school when he was four or five years old, but not even a private school they had tried was prepared to take him once they learnt about his incontinence.

40. Asked where she had gone for help within the refugee camp, she said the people there were concerned with other issues, not family problems or disability. UNRWA had taken responsibility for educating her other children. But they only help normal children.

41. Asked whether AB had received abuse and harassment because of his disability within the camp, she said yes but also outside.

42. Mr Main asked whether she knew of the existence of the MAP Early Intervention Centre at Al Bass camp. She said she had heard of it. She and her husband had sought help from the charity called Al Soumad. You could only get help from one charity at a time. AB got help from a physio via Soumad two days a week either free or for a small amount of money. Asked why the MAP Early Intervention Centre could not help AB so that he could eventually work, she said there was no prospect of him ever working. He cannot even walk. He does not have the capacity. He could never stay quiet.

43. I next heard evidence from Mr KB. With reference to his witness statements of June 2019 and 22 January 2020, he accepted in reply to Mr Main that he had lied to the Home Office and the Tribunal about risk from Hezbollah. Asked if he had lied in describing himself as a businessman, he said he had been an entrepreneur earning around US$600 a month, most recently as a painter and decorator. He accepted that he had paid an agent US$10,000 to help leave the country. Most people in the camp were able to raise money through small businesses or borrowing.

44. Asked why he had quit Lebanon, he said his agent had been able to get a visa to the U.S.. That was the only route out. Once he got to the U.S., the key thing was to find a better place to get treatment for his son.

45. Asked by Mr Main if he had heard of the MAP Early Intervention Centre in Al Bass camp, he said yes. He had seen it, it was small with two or three rooms. They could not help with the specialist nature of his son's problems. Asked if they had ever assessed his son as unsuitable for their help, he said no; they helped little children, not children with complicated needs needing intensive care. He did not think they could help children with cerebral palsy. Mr Main put to him that the MAP article referred to children attending this centre with cerebral palsy. He said he accepted he had not produced any evidence to show that his son had been refused help by this centre or any other source.

46. Asked by me about what he had said in paragraph 84 of his witness statement about the private school (the Mosan Centre in Hosh district south Tyre) in saying they could assist his son even though Palestinian on a privately funded basis, he said that that was the case but once they were told that his son was using nappies, they had said no.

Submissions at the oral hearing

47. Mr Main for the respondent said he relied on the refusal decision. He asked that I treat the previous decision by Judge Traynor as a starting point pursuant to **Devaseelan** [2003 Imm AR 1] principles. Mr KB had since admitted that he had lied to the Home Office and the Tribunal and had obtained fraudulent documents. Despite the first appellant's oral evidence, I should find it not credible that she was unaware of his fraudulent use of documents. She had been a dependent in her husband's appeal. Judge Traynor had found Mr KB totally lacking in credibility.

48. Mr Main asked that I find significant that despite no mention of it in their own witness statements, both the husband and wife had admitted after questioning that they were aware of the Early Intervention Centre operating in Al Bass camp. They had provided no documentary evidence to show that this centre had said it could not help. The appellants could only avoid exclusion under Article 1D of the Refugee Convention if able to show that there were circumstances beyond their control compelling them to no longer avail themselves of the assistance and protection of UNRWA.

49. As regards Article 1A(2) of the Refugee Convention, Mr Main said the respondent accepted that the appellant and her family were able to show a Refugee Convention

reason, namely nationality, but not that they were at real risk of persecution. The severe disability of AB was a relevant consideration but the decision of the Upper Tribunal in **JA(child-risk of persecution)** Nigeria [2016] UKUT 00560 was of little assistance given the different facts of the appellant's case: in that case the (albino) child he had only ever lived in the UK and the material facts were quite different. The appellants had failed to establish their case that there was a lack of support and facilities for AB.

50. Mr Main submitted that it was not enough for the appellants to show that there were higher standards of health and education facilities in the UK. Whilst the respondent accepted that AB would be subject to discrimination by virtue of his disability as a stateless Palestinian refugee, this did not amount to the required level of persecution.

51. As regards Articles 2 and 3 of the ECHR, Mr Main submitted that the previous findings of the First tier Tribunal judge should still hold. There were cogent reasons for concluding that the appellants had failed to show that AB met the article 3 thresholds as defined in **N v SSHD** [2005] UKHL 31. As regards Article 8, the appellants could not succeed under the immigration rules and had failed to show very compelling circumstances outside the rules. That was so even taking into account the best interest of AB and the other children. The appellants and family would be returned as a family unit.

52. Ms Capel submitted that Mr KB's acceptance that he had fabricated part of his asylum claim did not mean that he was going back on his evidence as regards his employment of Palestinian and Syrian refugees. She submitted that I should reject Mr Main's submission that the first appellant was complicit in the lies told by Mr KB in relation to the arrest warrant (summons) and risk from Hezbollah. The first appellant did not attend her husband's First-tier Tribunal hearing. It was Mr KB who had handled the appeal. Her claim that she had poor mental health act made credible that he would not have told her of such matters.

53. As regards the respondent's apparent position that AB should be considered as a child who had received assistance whilst still in Lebanon, Ms Capel submitted that that was not a point taken previously. In any event, it was inconsistent with the evidence of Peter Horrocks who considered that the significant improvement in AB's medical circumstances indicated that he had not been receiving educational help in Lebanon. Furthermore, the background country information indicated that only 8% of disabled persons received assistance in Lebanon. Whilst there were a number of NGOs operating in southern Lebanon including in Al Bass camp, there were clearly huge unmet needs and heavy demands on their services and it was reasonable to assume that AB had never received assistance hitherto. There was no evidence of UNRWA assistance to severely disabled children. It was also unclear from the MAP articles how substantial the care given to disabled children was: was it five days a week; was it full-time during the day? On Mr KB's and the first appellant's account, their son had essentially received physio twice a week from another charity and that was all that the family had been able to access. She asked that I find the evidence of the first appellant and her husband in relation to the situation of AB when they lived in Lebanon to be entirely truthful.

54. As regards the Tribunal country guidance on Lebanon, she asked me to take account of the fact that the Upper Tribunal cases, **KK, IH, HE (Palestinians - Lebanon - camps)** Lebanon CG [2004] UKIAT 00293 (**KK et al**) and **MM and FH (Stateless Palestinians, KK, IH, HE reaffirmed)** [2008] UKAIT 00014 (**MM and FH**) were now over 15 years and 12 years old and that there had been a significant deterioration in country conditions since. Further, the appellants' case, unlike **KK et al** and **MM and FH** cases, concerns a severely disabled child. The appellants' case was based on cumulative discriminations.

55. In relation to the weight that I should attach to the decision of Judge Traynor, Ms Capel submitted that it was important to know that he had not dealt with the case of AB under the Refugee Convention. He had not engaged with the issue of whether or not there had been discriminatory denial of education and whether that amounted to a persecution.

56. Furthermore, Ms Capel pointed out, Judge Traynor had applied the **N v SSHD** threshold in relation to Article 3 whereas the appellants' was a case with a social dimension as well as a medical dimension. It was contrary to basic human rights to expect a child in the situation of AB to be home tutored.

57. She submitted that the respondent had already gone a considerable way to establishing the appellants' case by accepting that there was a Refugee Convention reason and also that there was discrimination against disabled Palestinians in Lebanon.

58. As regards Article 1D, the interpretation by the CJEU in **Mostafa Abed El Karem El Kott and others** (C-364/11) (hereafter El Kott) left open that severe discrimination could constitute a reason for been forced to leave the UNRWA territory. On the facts of the appellants' case, there had been severe discrimination.

59. Ms Capel submitted that both in relation to Article 1D and in relation to Article 1A(2) (if in play), it was important to consider the specific vulnerability of children when it came to assessment of whether there was persecutory harm. She referred, inter alia, to **ST (Sri Lanka)** [2013] UKUT 00292 (IAC), the UN Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). Applying these instruments, she submitted, discriminatory denial of education coupled with denial of healthcare to a disabled person could result in serious harm to a child. The case of **JA** was pertinent in establishing that denial of education could be persecutory. Ms Capel submitted that it would be wrong in this case to apply the **N v SSHD** threshold because the discrimination arose from the conduct of the Lebanese state and so the different(lower) threshold identified by the ECtHR in **Sufi and Elmi** (2012) 54 EHRR 9 and several other cases should have been applied.

60. Ms Capel pointed out that the situation in Lebanon had deteriorated in recent years and this was an important backdrop to establishing whether the threshold of persecution or ill treatment was reached in relation to a vulnerable child. The evidence regarding AB was that there had been complete absence of education and further there had been abuse and hostility directed towards both him and other members of the family by virtue of his severe disability. This had caused him to be isolated. There was a discriminatory denial of

the right to education. There were some legal protections in Lebanon for Palestinians, but these were very limited when compared with those available to citizens. It was entirely credible that the husband and wife had been unable to access any public education for AB and that they had not been able to obtain private education for him either.

61. If the family was required to return, she submitted, it would jeopardise the mental health of the entire family. There was limited access to tertiary care. The living conditions for Palestinians in refugee camps were appalling with untreated sewage and non-potable water among other problems. The circumstances of a refugee camp family having a son with severe disabilities had to be considered cumulatively; and when this was done they amounted to severe discrimination which was persecutory. Mr KB had only managed to raise money to leave Lebanon by sale of possessions. He does not have the means to provide for AB. The 2019 changes in Lebanese law applying employment restrictions to Palestinians meant Mr KB would not be able to operate his business as he had before. There were multiple breaches of the human rights of the child involved in this case. The parents had left Lebanon because of objective reasons outside their control. It was recognised by the Upper Tribunal that severe discrimination could constitute persecution. That was all more possible in the case of a child. The mental health of the mother was also adversely impacted by the situation of AB; the years of looking after him had taken their toll. Accordingly, the appellant and her family qualify for the inclusion (*ipso facto*) elements of Article 1D and also qualify (if needed) under Article 1A(2) of the Refugee Convention because they were at real risk of persecution for a Convention reason.

62. As regards Article 8 ECHR, Ms Capel submitted that it was the burden of Mr Horrock's report that AB's physical and moral integrity was in peril and that the family's circumstances were very compelling. The Horrocks's report indicated that the failure of the Lebanese state to provide education and health support for AB had caused him significant developmental harm and this was caused by discriminatory denial. Since coming to the UK, there had been a real change in AB's physical and social well being and his interaction with his siblings was now greatly improved. The mental health of the mother and the father were also both improved. All that would be jeopardised if they were required to return. The comments by Mr Horrocks and indeed by the headteacher's letter support the credibility of the first appellant's case that A had never received any educational or other support in Lebanon.

63. Ms Capel contended that the best interests of the child were an extremely important consideration in this case. There were not just the circumstances of AB but the other children as well and their predicament was closely tied to his. As regards the MAP evidence, Ms Capel said that in light of the wider background evidence it was credible that this organisation had not been able to assist the appellant, which is why they had gone to another charity although that other charity had only been able to provide very limited help through physiotherapy.

Further evidence regarding the MAP Early Intervention Centre, Al-Bass camp.

64. Having heard evidence from the first appellant and her husband and then submissions from both parties, I stated that I would reserve my decision but would make a direction that the parties use best endeavours to obtain from the MAP Early Intervention Centre in El Bass camp an answer to the following question: "Would their service be open to a Palestinian who was aged between 13 and 14 and had severe disability, including hydrocephalus (with a shunt), cerebral palsy and severe learning difficulties?" Both representatives undertook to liaise to ensure that an approach was made using the above-mentioned text.

65. I directed that the parties were to submit within specified time limits the response of this NGO, together with any further submissions regarding the significance of the response received. I emphasised to the parties that the contents of any further submissions regarding the significance of the response, if one was received, should be very brief and strictly limited to the information provided and should not amount to re-argumentation of the submissions already made by both parties.

66. In response, the appellants' representatives produced an email from a Mr Hisham El-Ali (hereafter HEA) dated 26 February stating that the Early Intervention Unit in El Bass camp:

> "provides services to Palestinians with disabilities with special focus on those aged between 0 and 6. As for children above this age, the focus is much less, but it is possible to provide the basic services with a smaller number of sessions with different specialisations and for periods that are not typical for them, especially those with severe disabilities. Given that the centre is under a local NGO, it is considered to have limited capabilities and cannot serve large numbers of children as it's linked to the necessary funding which is renewed annually for sustainability which also means the possibility of suspending services at any time."

67. On 27 February 2020 the appellants' representatives made further submissions. In these Ms Capel submitted that the response makes clear that the Early Intervention Centre primarily provides for children aged 0-6 and that the focus on children over 6 is "much less". For them the Centre is only able to provide basic services and the frequency and duration of sessions "are not typical for them, especially those with severe disabilities". She said it was accepted by the appellants that "limited assistance is provided to disabled children in the camp by non-governmental organisations, whose services are oversubscribed and difficult to access". However, what AB was able to access in terms of assistance was extremely limited, ineffective and heavily subject to resource constraints. "Crucially, she submitted, "nothing in HEA's response indicates that the Early Intervention Centre is involved in the provision of education to disabled children. Hence the response supports the appellants' case on Article 1D, Article 1A(2), Article 3 and Article 8".

68. On 3 March 2020 Mr Main sent submissions in which he stated that "[t]he generic email account, the lack of reference in the signature on the email to the El Bass camp or Early Intervention Centre, the lack of response in regard to role and job title as posed in

the originating email and the reference to the 'centre is under a local NGO' all place doubts on whether [he] is able to provide substantive answers to the questions posed.... ".

69. Mr Main also submitted that in any event the accompanying submissions from the appellants' representatives "cherry picked" from HEA's email whose substance was that this centre supports basic services for children above the age of 6 years although with less sessions and can cater for those with severe disabilities. Contrary to the evidence of the first appellant and her husband, there were clearly two services locally, the Early Intervention Centre and the Sour Community Disability Project, both within the Al Bass camp. He wrote that "[t]he lack of any reference to these organisations within their evidence, alongside their ability to manufacture a politically motivated asylum claim with false documentation shows that their evidence should not be relied upon". It was wholly inappropriate, he wrote, to seek to criticise HEA about his lack of comment on the provision of education to disabled children when he had clearly not been asked.

70. Mr Main submitted that again, in any event, the articles written by MAP together with this email showed that there was support on the ground and yet there was no evidence that either Mr KB or the first appellant had attempted to contact this centre or the Sour Community Disability Project (SCDP), which according to the MAP article dated 1 February 2017 was "close by" to the Early Intervention Unit.

71. In further points, Mr Main reiterated previous submissions raised about the applicable law.

72. In an email of 4 March, the appellants' representatives wrote seeking to clarify the relationship between HEA, the Early Intervention Centre, the SCPD and the PWHO and MAP.

73. They attached an article by MAP dated 11 April 2019 that reported on a "special educator" who "works ...at the Sour Community Disability Centre (SCDP)'s Early Intervention Unit, which is run by the Palestinian Women's Humanitarian Organisation (PWHO) in Al Buss refugee camp and supported by Medical Aid for Palestinians (MAP)." Their email also pointed out that HEA's signature confirmed that he is the "Disability Program Coordinator" at SCDP.

Findings relating to the appellants

74. Whilst there are formally only two appellants in this case, all but one other member of the family are dependants. It is common ground, that the outcome of the appeals turns principally on the situation of the second appellant, AB. If it can be shown that the reason why protection or assistance from UNRWA ceased was for reasons unconnected with his will, then the appellants stand to benefit from the inclusionary ("*ipso facto*") provisions of Article 1D/Article 12(1)(a) QD. Separately, they would be entitled to succeed in their appeals if able to show that they would face on return either persecutory or serious harm or a violation of Articles 3 or 8 of ECHR.

75. Whilst the respondent's refusal decision gives no conclusions on the matter, Mr Main did not dispute that the appellants' home area is as claimed, namely Al Bass refugee camp in Sour, in the south of Lebanon.

76. The respondent accepts that the appellants and the other family members are UNRWA-registered stateless Palestinian refugees who have all in the past (save for the youngest) received protection or assistance from UNRWA. In relation to Article 1D of the Refugee Convention/Article 12(1) of the Qualification Directive, the respondent, by reference to Home Office policy, accepts that the first appellant and her family would be entitled to succeed if able to show that they had ceased to obtain protection or assistance from UNRWA because they were forced to leave due to circumstances beyond their control.

The Early Intervention Centre, Al Bass camp

77. I deal first with the further evidence that I directed the parties to provide relating to the Early Intervention Centre. The question sent regarding this was "Is the Early Intervention Centre in Al-Bass refugee camp able to assist a 13-14 year old boy with severe disabilities including hydrocephalus, cerebral palsy and severe learning difficulties?" In light of the further email dated 4 March 2020 from the appellants' representatives and the attached article dated 11 April from MAP, I am satisfied that HEA was in a position to respond on behalf of the Early Intervention Centre to the question asked of it in my directions. It is clear that the Early Intervention Centre (or Unit) is part of the Sour Community Disability Project (SCDP) which in turn is run by the Palestinian Women's Humanitarian Organisation and funded by MAP and that HEA is the Disability Program Co-ordinator at the SCDP.

78. In terms of the contents of HEA's email, whilst it makes clear that the Early Intervention Centre's work is mainly with children aged up to 6 years old it also makes clear that it can also help older children - at least with basic services - although any such help is subject to limited capabilities.

79. It is also clear from HEA's reply and the MAP articles relating to it that both the SCDP and the Early Intervention Centre are situated within the Al Bass camp.

80. In the ordinary course of events, I would now proceed to make findings on both the general circumstances of UNRWA-registered stateless Palestinians in southern Lebanon and the particular circumstances of the appellants. However, in view of my conclusion set out below that it is necessary to adjourn this case in order to make a preliminary reference to the CJEU, it would be inappropriate for me to attempt findings relating to general circumstances at this stage. In respect of whether persons qualify for international protection either under Article 1A(2) of the Refugee Convention or under the humanitarian (subsidiary) protection regime also established by the QD, I am required to assess risk as at the date of hearing. As I am adjourning the case, I cannot prejudge what assessment would need to be made at the resumed hearing. In respect of the Article 1D inclusionary clause, it is at least possible to understand it as involving a purely historical

exercise of asking whether at the time the appellants left the UNRWA territories (in September 2015) they had ceased to receive the protection and assistance of UNRWA for a valid reason, but even if it is a purely historic exercise, I still cannot undertake it now because of two other points of law which I consider to be unclear: see paragraphs 92-95 below). And if it is not a purely historic exercise, there remains a need to make further findings of fact, once the law has been clarified.

81. However, I am able to make certain findings on the appellants' particular circumstances up to this point in time.

82. Turning then to the appellants' particular circumstances up to the present, I shall deal first with the independent social work report of Peter Horrocks.

The Horrocks report

83. I find this be a comprehensive report demonstrating a careful consideration of the family's welfare history and circumstances, both in Lebanon and the UK. Mr Main did not seek to challenge its methodology or contents. To a significant extent, Mr Horrocks bases his report on the first appellant's account to him, but, as I explain below, in relation to the circumstances of AB, with one significant caveat, I found that credible. There are no additional medical reports on the first appellant, but I attach significant weight to Mr Horrocks's assessment of her psychological problems - depression and suicidal ideation - problems arising from her having to deal with AB virtually on a 24 hour a day basis for 13 years. I also attach significant weight to his assessment that this had led to a deterioration in her relationship with her husband. His analysis of the circumstances of the other siblings when living in Lebanon facing abuse and ridicule on account of their disabled siblings, accords with the background country evidence. In broad terms, I find I can attach significant weight to his report. I was also able to observe the second appellant during the hearing and it is apparent that he is severely disabled and requires intensive care and supervision.

Mr KB

84. Judge Traynor found Mr KB to be a witness wholly lacking in credibility. However, the focus of the asylum claim in his appeal before Judge Traynor concerned his claim that he had been targeted by Hezbollah for employing Palestinians and Syrians illegally. The judge found that claim wholly lacking in credibility and found that the summons he had produced was a false document and that he had deliberately destroyed or withheld his passport and given an untruthful account of the circumstances under which he and his family had left Lebanon. Mr KB in his witness statements for this hearing has accepted that he lied in relation to all these matters. He insists, however, that he did not lie about employing Palestinians to help him in his painting and decorating business or about the circumstances of AB.

85. Like the first appellant, Mr KB continues to insist that AB was never able to access education in Lebanon and that the medical support and treatment he received there was

limited to surgical interventions save for two physiotherapy sessions a week arranged through one of the charities operating in the camp (Al Soumad).

86. Judge Traynor's adverse findings of fact on Mr KB's claimed difficulties with Hezbollah must clearly stand (Mr KB himself has conceded they were untrue). The finding that AB had received "appropriate" medical support and treatment in Lebanon over a number of years (see paragraphs 46, 53 and 54) must also stand, at least inasmuch as the first appellant and her husband themselves do not dispute that he did receive medical help. However, beyond that, the judge's findings on the precise circumstances of AB and the "appropriateness" of the medical support and treatment in Lebanon are of more limited assistance.

87. As regards the judge's findings on AB's education, Mr Main submitted that they amounted to a finding that he had received education in Lebanon. In my judgement, that reads too much into Judge Traynor's decision. His findings in relation to education were confined to the situation he considered would face AB on return: e.g. he referred to the following hypothetical situation: "...if the Appellant wishes for his son to gain the benefit of an education targeted to his specific needs, then he has not advanced any reason why this cannot be made available in Lebanon" (paragraph 54). On the issue of whether AB had received education whilst in Lebanon, therefore, I consider it would be unsafe to seek to infer anything from the judge's findings, which were not focussed on this issue. In any event, on the issue of whether the second appellant would receive educational support on return, that (at least in relation to the claim based on Article 1A(2) of the Refugee Convention and also under the QD provisions on subsidiary protection and Article 3 and 8 of the ECHR) is essentially a matter of forward-looking, not backward-looking, assessment and depends in large part on objective facts derivable from background country evidence.

88. As regards KB's evidence before me, I consider that he was evasive in relation to the issue of whether he knew about and/or had approached the MAP Early Intervention Centre for help. In his witness statements, he had made no mention of this centre, despite seeking to particularise all the attempts he had made to get educational help for AB. From the MAP documentation, the centre clearly has helped severely disabled Palestinian children, including two with cerebral palsy. From this documentation it clearly has education as one of its objectives: the 11 April 2019 MAP article on which the appellants' representatives relied, refer to "Lara, a Special Educator" who worked in this Centre. In his evidence before me, even allowing for working through the prism of translation, Mr KB accepted he had "seen" the Early Intervention Centre but failed to give direct answers as to whether he had sought help from it. His answers focussed on saying that the centre could not cater for his son because (variously) it did not have the capacity because of the many Palestinians in southern Lebanon; it was too small; and it only helped young children.

The first appellant

89. I was asked by Ms Capel to treat the first appellant as a vulnerable witness. Whilst there is no medical report on her mental health, she was assessed by Peter Horrocks (to

whose report I have attached significant weight) as suffering from depression. She was also considered by him to have struggled to cope with the demands of looking after AB alongside her other family responsibilities. I am satisfied that I should treat her as a vulnerable witness under the Joint Presidential Guidance Note, 2010. Ms Capel's request that I treat her so was not opposed by Mr Main.

90. Mr Main sought to argue that it lacked credibility that the first appellant was unaware of Mr KB's practising of deceit in respect of his original asylum claim.

91. In her evidence before me (even making allowances for her as a vulnerable witness) I found the first appellant even more evasive than Mr KB on the issue of whether the family had sought help from the MAP Early Intervention Centre. Initially she said that she had asked for help from people inside the camp concerned with such matters and received none and that there were no facilities for AB inside the camp. Then, when confronted by Mr Main with evidence of the existence of the MAP Early Learning Centre inside Al Bass camp, she sought to say that this centre could not help with him working as there was no prospect of him ever doing so.

92. Given, however, that she was not a witness in Mr KB's appeal - and had not been interviewed or made any statement in relation to his appeal - and keeping in mind that she is a vulnerable witness, I am prepared to accept that either she did not know, as she has consistently claimed, or if she did, only in the vaguest terms, about Mr KB's use of fraudulent documents. The core of her evidence was not concerned with the circumstances of Mr KB's asylum claim but with her and her family's difficulties arising from having to care for AB.

AB's access to education and assistance in Lebanon

93. This brings me to the issue of whether AB did in fact receive education whilst in Lebanon or could have. As already noted, I found both the first appellant and Mr KB evasive on the issue of approaches to the Early Intervention Centre. I agree with Mr Main that it counts against the first appellant's claim that neither she nor her husband have produced any documentary evidence to show that AB had been denied educational help from this centre or any other organisation catering for disabled children. In relation to public schools, I agree with Ms Capel that no such evidence was necessary since there is virtually no suggestion in the evidence that UNRWA schools cater for severely disabled children and indeed the MAP centre itself describes its role as to fill a gap. In relation to private schools, however, it would surely have been open to the appellants to obtain a letter or email from the Mosan Centre confirming that they had been approached by Mr KB about taking in his son but had decided they could not once they learned that he was incontinent. That said, he clearly did not go on to receive assistance from this school. As matters stand presently, I consider that the appellants have not established that the family was unable for good reasons to access sufficient education and assistance from NGOs such as the Early Intervention Centre.

Why no further findings are made at this stage

94. As already noted, Ms Capel advances the appellants' case on two fronts. She submits that they are entitled to succeed under the inclusionary provision of the exclusion clause in Article 1D of the Refugee Convention/Article 12(1)(a)QD and also under the corresponding provisions of Article 1A(2) of the Refugee Convention. For reasons already foreshadowed (relating to the need to undertake an assessment as at the date of hearing), I do not consider it would be appropriate to seek to make findings on either Article 1D/Article 12(1)(a) or refugee status under Article 1A(2) as my provisional view is that this case should be adjourned for the purposes of making a preliminary reference. For the same reason I do not consider it appropriate to seek to make findings on the question of humanitarian (subsidiary) protection or the appellants' circumstances under Articles 3 or 8 of the ECHR.

C: RELEVANT LEGAL ISSUES

95. It is necessary, therefore, to turn to the reason for my provisional decision to adjourn, which relates solely to Article 1D of the Refugee Convention / Article 12(1)(a) of the QD.

96. As the CJEU emphasised in paragraph 76 of **El Kott**, "a person who is *ipso facto* entitled to the benefits of Directive 2004/83 is not necessarily required to show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive". As underlined more recently by the Advocate General Mengozzi in his Opinion of 17 May 2018 in **Alheto**, at paragraph 399 and 45:

> "29. The position of Palestinians assisted by UNRWA who submit an application for asylum in a Member State is not comparable to that of other asylum applicants, who must prove that they have a well-founded fear of persecution in order to gain recognition of the status of 'refugee' within the meaning of Article 2(d) of Directive 2011/95. Their applications cannot therefore be examined, at least not initially, by reference to that provision, which reproduces Article 1A(2) of the Geneva Convention, but must be examined in the light of the criteria defined in Article 12(1)(a) of Directive 2011/95.
>
> ...
>
> 45. In this context, in order to obtain recognition as a refugee, it will not be necessary for the asylum applicant to prove a fear of persecution, within the meaning of Article 2(d) of Directive 2011/95, although proof of such a fear may bring him fully within the scope of the inclusion clause in the second sentence of Article 12(1)(a) of the directive. It will, for example, be sufficient for him to prove that there has been a hiatus in the protection or assistance offered by UNRWA, or that a situation of armed conflict prevails, or, more generally, that there is violence and a lack of security such as to render UNRWA's protection or assistance ineffective or inexistent, albeit that such situations, when relied on by an applicant who does not fall within the scope of Article 12(1)(a) of Directive 2011/95 are more likely to justify the grant of subsidiary protection status than the grant of refugee status."

97. It is not in dispute that the appellants fall within the personal scope of Article 1D in that they have in the past received protection or assistance from UNRWA. Accordingly, they are excluded from refugee protection unless they can establish that they ceased to obtain the protection or assistance of UNRWA for a reason beyond their control.

98. Central to Ms Capel's submissions in relation to Article 1D is the contention that the appellants are entitled to benefit from the "*ipso facto*" provision because their departure from Lebanon was justified by objective reasons beyond their control and independent of their volition, namely because "UNRWA is not able to fulfil the conditions of its mandate in respect of severely disabled children" and because AB faced (and still faces) "severe discrimination" on the grounds of his disability. Mr Main contends that the appellants cannot succeed on this basis because AB received sufficient assistance with his disability when he lived in Lebanon and would on return.

99. In seeking to decide the Article 1D issues, I am confronted with several legal difficulties.

The temporal issue

101. The first concerns the temporal issue. Both parties were in agreement with me that it is one on which a question should be referred to the CJEU. There is a lack of clarity as to whether the test concerned is a purely historic (or *ex tunc*) one of assessing the circumstances which have forced the person concerned to leave the UNRWA area of operations when he or she did or is a test that additionally or alternatively involves an *ex nunc* assessment. The wording of the second sentence of Article 12(1)(a) QD (and the second subparagraph of Article 1D), is in the past tense ('When such protection or assistance has ceased for any reason…'). That suggests a purely historic test. It is possible to read the CJEU in **El Kott** as endorsing such an approach. For example, in paragraph 59 the position taken would appear to be that to establish cessation of protection or assistance, all that an applicant has to be show is that he or she has "been forced to leave for reasons unconnected with that person's will", wording which seemingly focusses on the time of departure.

102. That would also appear to be the thrust of the multiple uses of the past tense (emphasis added) in the final sentence of paragraph 65 of *El Kott*. Paragraph 65 reads in full:

> "In the light of the foregoing considerations, the answer to Question 2 is that the second sentence of Article 12(1)(a) of Directive 2004/83 must be interpreted as meaning that the cessation of protection or assistance from organs or agencies of the United Nations other than the HCR 'for any reason' includes the situation in which a person who, after actually availing himself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition. It is for the competent national authorities of the Member State responsible for examining the asylum application made by such a person to ascertain, by carrying out an

> assessment of the application on an individual basis, whether that person *was forced to leave the area of operations* of such an organ or agency, which will be the case where that person's personal safety *was* at serious risk and it *was* impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency."

103. There are similar passages indicating a backward-looking assessment in paragraphs 61, 63 and 64.

104. In terms of object and purpose, it might also be said that to treat assessment of cessation as a purely historic matter would comport best with the understanding that Palestinian refugees are already refugees. As such, it should suffice for them to simply establish cessation for objective reasons at the time of leaving without also having to show something relating to their present, post-departure, circumstances.

105. However, it is also possible to construe Article 12(1)(a) as interpreted by the CJEU in *El Kott* as applying an *ex nunc* test. It is possibly significant that in the first sentence of paragraph 65 of *El Kott* the CJEU uses the present tense "ceases" ("...includes the situation in which a person who, after actually availing himself of such protection or assistance, *ceases* to receive it for a reason beyond his control and independent of his volition."(emphasis added)). There are similar uses of the present tense in paragraphs 61, 63 and 64 (especially its reference to Article 4(3) which requires assessment as at the date of decision).

106. In terms of object and purpose, it is possible to argue that not to apply an *ex nunc* test would create a protection gap since it would mean that persons who had left the area of operations voluntarily but would presently face denial of protection or assistance would face exclusion. In her Opinion in *El Kott*, Advocate General Sharpston clearly considered that such persons could fall within Article 12(1)(a)'s inclusionary provision. She observed that:

> "... it is quite conceivable, as has been pointed out to the Court, that a person in receipt of UNRWA assistance may voluntarily leave the UNRWA area on a temporary basis - for example, in order to visit a relative elsewhere - while fully intending to return and genuinely believing that he will be able to do so, but finds that in fact his re-entry into the territory in which he received assistance is blocked. Such a person should, in my view, be considered as prevented from receiving UNRWA assistance for a reason beyond his control or independent of his volition."

Her position is consistent with the aforementioned UNHCR Guidelines at paragraph 22(g) to (i). (It might also be argued that an *ex nunc* requirement is implicit in the structure of the QD in that the cessation clauses are framed at Article 11(1) so as to apply to all refugees and Article 11(1)(e)-(f) require refugee status to cease if there is no longer a well-founded fear of persecution: see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 **Aydin Salahadin Abdulla and Others**, paragraphs 66, 69.)

107. The main academic studies of Article 1D reflect a similar lack of clarity as to whether the test is a purely historic one or also an *ex nunc* test or some admixture.

108. The significant of this issue for the instant case will be evident. If the relevant provision in the second sentence of Article 12(1)(a) must be read in binary fashion as either an *ex tunc* or an *ex nunc* test, then depending on which is the correct reading, the issue of cessation of the appellants' protection or assistance must be assessed either by reference to September 2015 (the date the appellants left Lebanon) or as at the date of the next hearing.

109. There is also the issue of how, if it is not a question of one or the other but a mixture of both, they must be understood to intertwine. If it were considered that the relevant provision categorically required both an *ex tunc* test and an *ex nunc* test, that could be seen to result in Palestinian refugees being treated more harshly than Article 1A(2) refugees, the latter who only need to establish an *ex nunc* test: see Joined Cases C-199/12 to C-201/12, **X,Y and Z**, paragraphs 63 and 72. Alternatively, the two might be combined in a less onerous way. One possible way was advanced by Mr Hussain in written further submissions in the following terms:

> "It may be that the two approaches that run together in *El Kott* can be reconciled by an analogical application of the cessation clause in the Directive (Article 1C is expressed only to apply to Article 1A; Article 11 Qualification Directive is not so limited in its application: see *El Kott* at §77). Thus if an applicant can show a qualifying reason as to why he left UNRWA area of operations, the evidential burden falls on the State to show that protection and assistance is now available."

110. This seems to me a further point on which clarification is needed.

<u>The issue of whether the discrimination must be intentionally inflicted by UNRWA</u>

111. The second issue that is unclear concerns the quality of the protection or assistance afforded by UNRWA.

112. Ms Capel has submitted that in southern Lebanon the *Lebanese authorities* discriminate against stateless Palestinians in various areas of life, including education, employment, social services and treatment of the disabled. The respondent's position is broadly similar although Mr Main does not accept that there is severe discrimination. However, even assuming I accept that to be the case, I cannot determine these appeals by sole reference to the actions of the Lebanese authorities. I have to focus on the actions of *UNRWA*. UNRWA, as we have seen, is an organ of the U.N. that occupies an intermediary position between the Lebanese authorities and UNRWA-registered stateless Palestinians. Whatever may be the policy in practice of the *Lebanese* authorities, it is far from clear that *UNRWA* pursues a policy of intentional deprivation (by acts or omissions) of assistance to disabled persons. Were I to approach the issue of cessation of protection or assistance from UNRWA on the same basis as would have to be done under the Refugee Convention and under the humanitarian (subsidiary protection regime), I would have to be satisfied that there had been intentional infliction of harm or intentional deprivation of assistance on the

part of UNRWA: see the reasoning of the CJEU in relation to refugee and subsidiary protection in **M'Bodj** and **MP** as elaborated above at paragraph 22. But it is also arguable that the "protection and assistance" afforded by UNRWA, which is not a state, should be regarded differently.

113. In the appellants' further submissions Mr Hussain argued that this issue was acte clair since whether UNRWA had intentionally deprived (or would intentionally deprive) the appellants of protection or assistance or not was irrelevant, because Article 12(1)(a) was concerned with the cessation or protection or assistance "for any reason". Mr Main disagreed. Mr Hussain's written submissions on this point stated that: " [t]he enquiry is as to the state of affairs (has protection or assistance ceased?) not the reason for it, as far as UNRWA is concerned." With reference to paragraph 65 of **El Kott**, he submitted that it is irrelevant whether or not the reason why the person is at "serious risk" or it was "impossible ... to guarantee ... living conditions" was that UNRWA was intentionally inflicting harm or depriving the individual of assistance. "There is no warrant for grafting onto the test in **El Kott** an additional requirement as regards the reasons why protection or assistance have ceased." I am not persuaded by this submission. Whilst it is clear from **El Kott** that the reasons why protection or assistance has ceased are irrelevant, there remains an issue about what protection or assistance comprises. For the CJEU there is clearly an issue of effectiveness. Thus at paragraph 60 it observes that its interpretation:

> "...is consistent with the objective of Article 12(1)(a) of Directive 2004/83, which is inter alia to ensure that Palestinian refugees continue to receive protection by affording them *effective* protection or assistance and not simply by guaranteeing the existence of a body or agency whose task is to provide such assistance or protection, as is also apparent from a reading of paragraph 20 of United Nations General Assembly resolution No 302 (IV) in conjunction with resolution No 2252 (ES-V)."(emphasis added).

114. There is also the significance of what the CJEU states at paragraph 65:

> "It is for the competent national authorities of the Member State responsible for examining the asylum application made by such a person to ascertain, by carrying out an assessment of the application on an individual basis, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency."

115. In this paragraph the CJEU clearly sees it as relevant to consider the effectiveness of 'protection or assistance' in terms of whether UNRWA is able to guarantee living conditions commensurate with its mission. On one view, at least, UNRWA could be said to be providing effective protection or assistance to the appellants by making efforts to implement the guarantees of dignified living conditions so long as any shortcomings were not intentional.

116. Mr Hussain submitted that if I was not persuaded that the issue of intentional deprivation of harm was irrelevant in the Article 1D context, then I should at least amend my draft question on this issue so as to identify that the role of UNRWA could not be considered in isolation and reference was made to "the state in which it operates". Mr Main submitted that since Article 12(1)(a) refers only to organs and agencies of the UN, it was unnecessary to ask any additional question about the role of the state.

117. Having concluded that a question on this issue is necessary, I am persuaded to add a further clause to it so as to seek guidance from the CJEU on the relevance of the state-based territorial framework in which UNRWA conducts its area of operations. If there is therefore a relevant issue as to the quality of UNRWA's protection or assistance, it is one that may require consideration not just of UNRWA's operations in isolation but how it is able to operate within the wider framework of the state concerned (in this case, that being Lebanon). That would appear to be the position of UNRWA itself, who, in the aforementioned Disability Inclusion Guidelines, notes at 1.1.3 that:

> "While the primary responsibility to respect, protect and fulfil the rights of persons with disabilities under the CRPD lies with States that have ratified the Convention, UNRWA can also contribute to the protection of the rights of Palestine refugees with disabilities by ensuring that all Agency programmes and services are delivered in accordance with international human rights standards."

118. It is also the position of UNHCR whose aforementioned Guidelines state at 22(j) that:

> "Although Article 1D focuses on the cessation of the protection or assistance of UNRWA, the situation in the State in whose jurisdiction UNRWA is operating will not only be relevant, but may be determinative of the need for 1951 Convention protection. For example, the host State or authorities - not UNRWA - will control whether a Palestinian refugee will be permitted to (re)enter their territory and (re)establish him/herself there, including whether he or she is able to obtain the necessary legal documentation establishing a right to stay in the State or territory. The risk facing the applicant may emanate, for example, from the authorities directly. These assessments are to be based on reliable and up-to-date information, and special care needs to be exercised where the situation is fluid or unclear."

119. What is stated in these same Guidelines at paragraph 22(e) regarding threats of "severe discrimination" would also appear to have in contemplation threats by the state authorities.

<u>The role of civil society actors in assessing the effectiveness of UNRWA protection and assistance</u>

120. The third difficulty arises from another aspect of the CJEU in **El Kott** and **Alheto** viewing a key criterion, in assessing whether protection and assistance on the part of UNRWA has ceased, to be that of "effectiveness"/"ineffectiveness". It is unclear whether, when assessing this matter, I am entitled to take account of the protective functions

performed by civil society actors. On the evidence before me, there are clearly a myriad of civil society actors working in the camps in southern Lebanon, including international actors like UNICEF; regional blocs such as the European Union; and, NGOS like the Palestine Red Crescent Society, Anera (Palestine Refugee Aid Organisation) and, of particular importance in this case, the Early Intervention Centre which is part of Sour Community Disability Project (SCDP) which in turn is run by the Palestinian Women's Humanitarian Organisation and is funded by Medical Aid for Palestinians (MAP). The UN General Assembly Resolution 302 (IV), 8 December 1949 at paragraph 18:

> "Urges the United Nations Children's Emergency Fund, the International Refugee Organisation, the World Health Organisation, the United Nations Educational, Scientific agencies and private groups and organisations, in consultation with the Director of the [UNRWA] for Palestinian refugees in the Near East, to furnish assistance within the framework of the programme [referred to in paragraph 3].

121. If the referring tribunal considers that the protective functions of such civil society actors are relevant to whether UNRWA as an actor of protection is effective, it is possible it may decide that the appellants cannot succeed in showing that there has been or would be a cessation of protection and assistance for objective reasons.

122. On the other hand, if the referring tribunal decided that their role was *irrelevant* to the effectiveness of UNRWA protection and assistance, it may well conclude that such protection and assistance, in the appellants' case, is ineffective (especially in light of the fact that Mr Main's submissions have centred on the existence of NGO sources of help in the Al Bass camp).

123. Both parties were in agreement that this issue was a pertinent one on which to make a reference.

124. In the course of the appellants' written further submissions, amplified by Mr Hussain at the hearing on 17 July 2020, it was urged that I consider referring two further questions, which he termed "the UNCCP submission" and the "Article 7 QD submission" respectively.

The UNCCP submission

125. The gravamen of the UNCCP submission was that it was necessary to have the Court address the anterior question of whether or not UNRWA on its own can be said to provide protection or assistance, given that foundationally it was the UNCCP that was accorded protection obligations whereas UNRWA was only accorded assistance obligations and given that UNCCP for a long time has been in demise. The question proposed was 'Does the cessation of protection by UNCCP mean that the Palestinian refugees are *ipso facto* entitled to the benefits of this Directive?" In developing this submission considerable weight was placed on the conclusions of the Australian Federal Court in **Minister for Immigration and Multicultural Affairs** v **WABQ** [2002] FCAFC 329 (hereafter **WABQ**).

126.I do not propose to set out the arguments advanced by Mr Hussain in support of this submission in any detail except to note that they were well-formulated. I accept that applying EU law principles, it is not fatal to this submission that the appellants' representatives did not raise in in the grounds of appeal or at the original hearing or that the CJEU case law on Article 12(1)(a) QD has hitherto been based on the premise that UNRWA provides protection or assistance and that an applicant can fall within the inclusion provision unless able to show there were objective reasons for that protection or assistance ceasing. However, I consider it decisive that the academic literature, based in turn on analysis of case law around the world, makes clear two things in particular. First, that UNCCP only ever had limited protection responsibilities, essentially limited to facilitation of "the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation".[6]

127. Second, that the General Assembly originally included among UNRWA's obligations the furtherance of "conditions of peace and security" and since the 1960s, with UNCCP's demise, has invested UNRWA with considerable protection obligations. Thus Qafisheh and Azarov[7] quote from the report by Mr Goulding, commissioned by the Secretary-General in 1988 his observation that "UNWA has the leading role and provides a wide variety of assistance and protection" with regard to registered refugees. Thus Albanese and Takkenberg state that:

> "UNRWA, created as a temporary organization and expected to provide relief and works programmes that would not be long-term, in the absence of a resolution to the conflict (and of UNCCP) has gradually evolved into a large agency, engaging in a variety of humanitarian, development and protection activities." [8]

In a UN General Assembly resolution of as recent vintage as 7 December 2018 (73/92) it is stated at point 3 that the Assembly:

> "'3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services, including emergency assistance, for the well-being, *protection* and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees;" (emphasis added)

128. Additionally I note that there is wide support in the academic literature for the view that the terms 'protection' and 'assistance' are to be understood as synonymous. (I would further note that the Australian case prayed in aid by Mr Hussain - **WABQ** - offers no

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[6] UN General Assembly Resolution 194(III) of 11th December 1948, paragraph 11. See also UNRWA's own UNRWA, *Consolidated Eligibility and Registration Instructions*, 1 January 2009, which at p.1 states that UNRWA's current mandate is: "to provide relief, humanitarian, human development and protection services to Palestine Refugees and other persons of concern in its Area of Operations" .

[7] Qafisheh and Azarov, 558.

[8] Albanese and Takkenberg, 84.

basis for its assumption that the UNCCP ever had a wide protection role and its approach to Article 1D is sharply at odds with that taken by the CJEU in **Bolbol, El Kott** and **Alheto** in more than one key respect (e.g. as regards the interpretation of *'ipso facto'* and as regards the need for an individuated approach)).

The Article 7 submission

129. With reference to his written further submissions, Mr Hussain contended that applying a dynamic interpretation, Article 7 of the QD should now be taken to define the meaning of protection within Article 1D of the 1951 Convention (Article 12(1)(a) QD). He considered this to be the right approach because one of the purposes of the Qualification Directive is to introduce common criteria for recognizing applicants for refugee status within the meaning of Article 1 of the 1951 Convention; because Article 1 includes Article 1D; and because (in his words) "protection is one of the concepts which is to be given a common meaning by the Qualification Directive." He pointed out that Article 12(1) of the Qualification Directive falls within Chapter III, 'Qualification for being a refugee'. Chapter II of the Qualification Directive is entitled 'Assessment of Applications for International Protection' and it includes Article 7 'Actors of protection'. Mr Main did not accept the need for any reference on this matter.

130. Having considered the arguments, I am not persuaded that any reference is needed on the Article 7 issue. When the Qualification Directive was concluded in 2004, the drafters clearly considered that there remained two distinct types of protection in play in assessment of whether persons qualify as a refugee. Whereas for the purposes of assessing whether a person was a refugee within the meaning of Article 1A(2) of the 1951 Convention and Article 2(c) of the QD, it had to be established that there were actors of protection as defined in Article 7(1), the protection at issue in Article 12(1)(a) was by definition 'protection or assistance *'from organs or agencies of the United Nations"* (emphasis added). Whilst it is arguable that some of the requirements of Article 7(2) relating to effectiveness, the non-temporary nature and the accessibility of protection may have an analogical bearing on the meaning of protection in Article 12(1)(a), it is simply not arguable that the definition of 'actor' in Article 7(1) (which requires such an actor to be either a state or a quasi-state entity) can have any purchase in relation to organs or agencies of the United Nations.

D: QUESTIONS TO THE CJEU

131. Given that I consider the law in relation to the meaning of the words in Article 12(1)(a) of the QD - "[w]hen such protection or assistance has ceased for any reason...." - to be not acte clair in the three aforementioned respects, I propose to ask the CJEU the following questions:

In assessing whether there has been a cessation of protection or assistance from UNRWA within the meaning of the second sentence of Article 12(1)(a) of the QD to an UNRWA-registered stateless Palestinian in respect of the assistance afforded to disabled persons:

1. Is the assessment purely an historic exercise of considering the circumstances which are said to have forced an applicant to leave the UNRWA area of operations when he did, or is it also an *ex nunc*, forward-looking assessment of whether the applicant can avail himself of such protection or assistance presently?

2. If the answer to Question 1 is that assessment includes a forward-looking assessment, is it legitimate to rely analogically on the cessation clause in Article 11, so that where historically the applicant can show a qualifying reason as to why he or she left the UNRWA area, the evidential burden falls upon the Member State to show that such reason no longer holds?

3. In order for there to be justifiable objective reasons for the departure of such a person related to UNRW's provision of protection or assistance, is it necessary to establish intentional infliction of harm or deprivation of assistance (by act or omission) on the part of UNRWA or the state in which it operates?

4. Is it relevant to take into account the assistance provided to such persons by civil society actors such as NGOs?

E. DIRECTION JOINING UNHCR AS INTERVENOR

132. As noted earlier, in my decision of 11 May 2020, the parties were asked to indicate whether they were agreeable to UNHCR being joined at this stage of the proceedings. Both parties stated their agreement. One consequence of this is that when the reference is lodged in Luxembourg, UNHCR will have standing as an intervening party.

Direction Regarding Anonymity

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed H H Storey

Date: 29 July 2020

Sitting as a Judge of the First-tier Tribunal