Case C-507/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 July 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

14 May 2019

Defendant, appellant in first appeal and appellant in the appeal on a point of law:

Federal Republic of Germany

Applicant, respondent in first appeal and respondent in the appeal on a point of law:

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Subject-matter of the main proceedings

Granting of *ipso facto* refugee status pursuant to the second sentence of Paragraph 3(3) of the Asylgesetz (Law on asylum; AsylG)

Subject-matter and legal basis of the reference

Interpretation of Article 12(1)(a) of Directive 2011/95; Article 267 TFEU

Questions referred

1. When assessing the question of whether, within the meaning of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, a stateless Palestinian is no longer granted protection or assistance of the UNRWA, is account to be taken from a geographical perspective solely of the respective field of operation (Gaza Strip, Jordan, Lebanon, Syria, West Bank) in which the stateless person had his

actual residence upon leaving the area of operations of the UNRWA (in this case: Syria), or also of further fields of operation belonging to the area of operations of the UNRWA?

2. If account is not solely to be taken of the field of operation upon leaving: Is account always to be taken, regardless of further conditions, of all the fields of operation of the area of operations? If not: Are further fields of operation only to be taken into consideration if the stateless person had a substantial (territorial) connection to that field of operation? Is a habitual residence — at the time of or prior to leaving — required for such a connection? Are further circumstances to be taken into consideration when examining a substantial (territorial) connection? If so: Which ones? Does it matter whether it is possible and reasonable for the stateless person to enter the relevant field of operation when leaving the UNRWA area of operations?

3. Is a stateless person who leaves the area of operations of the UNRWA because his personal safety is at serious risk in the field of operation of his actual residence, and it is impossible for the UNRWA to grant him protection or assistance there, entitled, within the meaning of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, *ipso facto* to the benefits of the Directive even if he previously went to that field of operation without his personal safety having been at serious risk in the field of operation of his former residence and without being able to expect, according to the circumstances at the time of the move, to experience protection or assistance by the UNRWA in the field of operation into which he moves and to return to the field of operation of his previous residence in the foreseeable future?

4. When assessing the question of whether a stateless person is not to be granted *ipso facto* refugee status because the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU ceased to apply once he left the area of operations of the UNRWA, is account to be taken solely of the field of operation of the last habitual residence? If not: Is consideration also, by analogy, to be given to the areas of which account is to be taken under No 2 for the time of leaving? If not: Which criteria are to be used to determine the areas which are to be taken into consideration at the time of the ruling on the application? Does the cessation of application of the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU require the (state or quasi-state) bodies in the relevant field of operation to be prepared to (re)admit the stateless person?

5. In the event that, in connection with the satisfaction or cessation of application of the conditions of the second sentence of Article 12(1)(a) of Directive 2011/95/EU, the field of operation of the (last) habitual residence is of significance: Which criteria are decisive for establishing habitual residence? Is lawful residence authorised by the country of residence required? If not: Is there at least a need for the conscious acceptance of the residence of the stateless person concerned by the responsible bodies of the field of operation? If so in this respect: Does the presence of the individual stateless person have to be specifically known

to the responsible bodies or is the conscious acceptance of residence as a member of a larger group of people sufficient? If not: Is actual residence for a relatively long period of time sufficient in itself?

Provisions of international law cited

Convention relating to the Status of Refugees of 28 July 1951 (Geneva Refugee Convention, 'GC'), Article 1(A) and (D), (E) and (F).

Provisions of EU law cited

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, Article 12(1)(a) sentence 1 (also 'exclusion clause') and sentence 2 (also 'inclusion clause'); Article 2(d) and (n).

Provisions of national law cited

Asylgesetz (Law on asylum; AsylG), Paragraphs 3 ('Granting of refugee status'), 27 ('Safety elsewhere from persecution'), 29 ('Inadmissible applications') and 77 ('Decision of the court').

Case-law of the Court of Justice cited

Judgment of 25 July 2018, *Alheto* (C-585/16, ECLI:EU:C:2018:584, paragraphs 7, 86, 92, 110 et seq., 127, 131 et seq. and 140);

Judgment of 19 December 2012, *El Kott and Others* (C-364/11, ECLI:EU:C:2012:826, paragraphs 49 to 51, 52, 54, 58 to 65, 75 to 77 and 81);

Judgment of 17 June 2010, *Bolbol* (C-31/09, ECLI:EU:C:2010:351, paragraphs 44 and 51).

Brief summary of the facts and procedure

1 The applicant, who was born in Damascus, is a stateless Palestinian. He is seeking the granting of *ipso facto* refugee status pursuant to the second sentence of Paragraph 3(3) AsylG. By his own account, he entered the territory of the Federal Republic in December 2015. At the beginning of February 2016, he made an application for asylum. In the course of his hearing, he stated that he had performed casual work in the Lebanon from October 2013 until 20 November 2015. As he had not obtained right of residence there and the Lebanese security

forces had begun to push 'them' back to Syria, he had returned there. Until his departure at the end of November 2015, he had been resident in Qudsaya (Syria). His family still lived there. He had left Syria because of the war. He feared that he would be arrested if he returned to Syria.

2 By decision of 29 August 2016, the Federal Office for Migration and Refugees granted the applicant subsidiary protection status. It otherwise refused his application for asylum.

3 By judgment of 24 November 2016, the Administrative Court obliged the defendant to grant the applicant refugee status. As reasoning, it stated that he was at risk of persecution within the meaning of Paragraph 3 AsylG.

4 In the appeal proceedings, the applicant filed the photocopy of proof of registration with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ('UNRWA') which had already been submitted to the Federal Office on the occasion of his hearing. According to the 'Family Registration Card', he was registered as a family member for Yarmouk (the camp in the southern part of Damascus).

5 By judgment of 18 December 2017, the Higher Administrative Court dismissed the defendant's appeal against the judgment of the Administrative Court. As reasoning, it stated that, as a stateless ethnic Palestinian, the applicant was a refugee within the meaning of the second sentence of Paragraph 3(3) AsylG. The protection of the UNRWA extended to the applicant. He also did not fall under the ground for exclusion of the lack of need for protection, as his protection by the UNRWA had ceased for reasons which had been beyond his control. His personal safety had been at serious risk when he exited Syria. Due to forces beyond his control, his departure was not to be regarded as voluntary. This was indicated by his being granted subsidiary protection. At the time of his departure, he had also been unable to avail himself of the protection of the UNRWA in other parts of the area of operations. Before the applicant exited Syria, Jordan and the Lebanon had already closed their borders to Palestinian refugees resident there.

6 As grounds for its appeal on a point of law, the defendant stated that it was to be clarified whether application of the second sentence of Article 12(1)(a) of Directive 2011/95 was excluded if a stateless Palestinian being protected or assisted by the UNRWA resided for a relatively long period of time in a field of operation of the UNRWA other than that in which he had formerly received the relief agency's services and did not seek the protection or assistance of the UNRWA in the field of operation of his current residence.

Brief summary of the basis for the reference

No inadmissibility of the applicant's asylum application because the 'first country of asylum' would be responsible

7 The applicant's asylum application is not inadmissible pursuant to point 4 of Paragraph 29(1) AsylG. That would only be the case if a country which is not a Member State of the European Union and is prepared to readmit the foreign national is considered to be another third country pursuant to Paragraph 27 AsylG. With these provisions of the AsylG, the German legislature implemented the concept of first country of asylum under Article 35 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. 'Another third country' within the meaning of point 4 of Paragraph 29(1) in conjunction with Paragraph 27 AsylG or 'first country of asylum' within the meaning of Article 35 of Directive 2013/32 can only be a country whose territory differs from the country of the habitual residence of the applicant.

8 The ground for inadmissibility under point 4 of Paragraph 29(1) AsylG is not persuasive: If the applicant's last habitual residence before leaving the area of operations of the UNRWA had been in the Lebanon, that country, as the country of habitual residence, would not be a third country. Syria could also not be considered as such a country as, even if the applicant had not been threatened with persecution in Syria, reasonable living conditions were not guaranteed there at the end of November 2015 due to the warlike conditions. If, in contrast, the applicant's last habitual residence had been in Syria, the Lebanon would be excluded as another third country or first country of asylum, as the applicant no longer resided in the Lebanon after his departure from Syria at the end of November 2015.

Merit of the asylum application if the applicant is to be granted ipso facto refugee status

9 The asylum application would be successful on the merits if a) the conditions of the first and second sentences of Article 1(D) of the Geneva Refugee Convention (GC), the first and second sentences of Article 12(1)(a) of Directive 2011/95 and the first and second sentences of Paragraph 3(3) AsylG implementing that Directive provision are satisfied and b) grounds for exclusion within the meaning of Article 1(E) and (F) GC, Article 12(1)(b) and Article 12(2) and (3) of Directive 2011/95 and Paragraph 3(2) AsylG implementing that Directive provision do not apply.

10 Pursuant to the first sentence of Article 1(D) GC, this Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in

accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention under the second sentence of Article 1(D) GC. The exclusion clause of the first sentence of Article 1(D) GC and the inclusion clause of the second sentence of Article 1(D) GC form a unit in the sense that the Geneva Convention only applies if the requirements of both paragraphs of the provision are met.

11 Pursuant to the first sentence of Article 12(1)(a) of Directive 2011/95, a third-country national or a stateless person is excluded from being a refugee if he or she falls within the scope of Article 1(D) GC, 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 under the second sentence of Article 12(1)(a) of Directive 2011/95.

12 There are no grounds for exclusion within the meaning of Article 12(1)(b) and Article 12(2) and (3) of Directive 2011/95 in relation to the applicant. He also satisfies the conditions of the exclusion clause of the first sentence of Article 12(1)(a) of that Directive.

13 The UNRWA is one of the organs and agencies of the United Nations referred to in the aforementioned provisions. The specific meaning of the alternative forms of care of ‘protection’ and ‘assistance’ is determined according to the activity of the UNRWA performed in the scope of its remit. It is decisive whether the person concerned belongs to the group of people in the care of the UNRWA in accordance with its mandate. That is at least the case for those persons who — like the applicant here — are (still) registered with the UNRWA as Palestinian refugees. This understanding corresponds to the sense and purpose of the exclusion clause, which is intended to guarantee that Palestinian refugees are looked after primarily by the UNRWA and not the Contracting States, particularly the Arab states.

14 The exclusion clause only covers those persons who actually call on the help of the UNRWA. The relevant provisions are to be narrowly interpreted. The ground for excluding a person from being recognised as a refugee covers not only persons who are currently availing themselves of assistance provided by UNRWA but also those who in fact availed themselves of such assistance shortly before submitting an application for asylum in a Member State.

15 The applicant availed himself of the protection or assistance of the UNRWA shortly before submitting his application for asylum as, according to his ‘Family Registration Card’, he was registered as a family member for Yarmouk (the camp in the southern part of Damascus).

16 The referring court is not able to assess whether the applicant satisfies the conditions of the inclusion clause of the second sentence of Article 12(1)(a) of Directive 2011/95 without clarification of the questions referred.

17 The inclusion clause serves to prevent gaps in protection. Accordingly, there is no further scope for the fundamental exclusion from being recognised as a Convention refugee in the European Union when an applicant for international protection in the Union no longer receives protection or assistance from the UNRWA. This is to be assumed where it becomes evident, based on an assessment, on an individual basis, of all the relevant evidence, that the personal safety of the stateless Palestinian concerned is at serious risk and that it is impossible for UNRWA, whose assistance was requested by that person, to guarantee that the living conditions of that individual would be compatible with its mission, and that person is forced to leave the UNRWA area of operations owing to circumstances beyond his control.

18 In the scope of the examination of whether such protection or assistance in the sense of the inclusion clause has ceased for any reason, the referring court is of the opinion that a distinction is to be made between the time of leaving the area of operations of the UNRWA and the time of relevance under the first sentence of Section 77(1) AsylG. It also makes a conceptual distinction between, on the one hand, the area of operations of the UNRWA (Area of Operations, see UNRWA, CERI VII.C.) as the entirety of the fields of operation and, on the other hand, the individual fields of operation (Fields of Operation, see UNRWA, CERI VII.E.).

19 With the question referred under point 1, the referring court would like to know whether, when assessing the satisfaction of the conditions of the inclusion clause at the time of leaving the area of operations of the UNRWA, from a geographical perspective, only the field of operation of the last actual residence of the stateless person concerned is relevant or whether further fields of operation are also to be included in the consideration in this respect.

20 In the opinion of the referring court, account is to be taken not solely of the respective field of operation in which the stateless person had his actual residence when he left the area of operations of the UNRWA, but also, depending on the overall circumstances of the individual case, of further fields of operation belonging to the area of operations of the UNRWA.

21 The questions referred under point 2 seek clarification as to the conditions under which further fields of operation are to be included in the examination of the satisfaction of the conditions of the inclusion clause if account is not generally to be taken of the entire area of operations.

22 In the opinion of the referring court, in addition to the field of operation of the last actual residence, consideration is to be given to those fields of operation to which the stateless person had a substantial connection before leaving the area of operations of the UNRWA.

23 A stateless Palestinian may only be referred to the guarantee of protection or assistance in a field of operation other than that of the last actual residence if he has such a substantial connection to that field. Such a connection may be based on having previously resided in that field, but also be linked to other circumstances such as close relatives residing there. It must also be possible and reasonable for the stateless Palestinian to enter that field of operation and reside therein. In this case, the authorisation of the entry is subject to the law of the respective field of operation.

24 However, the case-law of the Court of Justice could indicate that the entire area of operations is always of relevance, regardless of secured actual accessibility, because actual granting of protection or assistance in the area of operations of the UNRWA thereafter is sufficient and the concept of the area of operations — at least in the *Alheto* judgment (paragraphs 7 and 131 et seq.) — is used in the sense of the entire international area of operations. The referring court therefore questions whether its interpretation of the Directive is correct. In this connection, it is also to be clarified whether an at least current or former habitual residence in the further field of operation is a condition for a stateless Palestinian being able to call on the protection or assistance of the UNRWA there.

25 The question referred under point 3 serves for clarification as to whether the assumption of the satisfaction of the conditions of the inclusion clause is subject to restrictions in the case of location changes between the various fields of operation.

26 The case-law of the Court of Justice makes it clear that mere absence from UNRWA's area of operations or a voluntary decision to leave it is not to be regarded as cessation of protection or assistance (*El Kott and Others* judgment, paragraphs 49 et seq. and 59). In the opinion of the referring court, the question referred under point 3 is to be answered to the effect that the exclusion from being recognised as a refugee established in the first sentence of Article 12(1)(a) of Directive 2011/95 also applies to a stateless person who leaves the area of operations of the UNRWA because his personal safety is at serious risk in the field of operation of his actual residence and it is impossible for the UNRWA to grant him protection or assistance there if he moved to that field of operation without a compelling reason, even though his personal safety was not at serious risk in the field of operation of his former residence and he was also not able to expect, according to the circumstances at the time of the move, to experience protection or assistance by the UNRWA in the receiving field of operation and to return to the field of operation of his former residence in the foreseeable future.

27 The questions referred under point 4 are intended to clarify whether, when assessing the satisfaction of the conditions of the inclusion clause at the relevant time of decision (Paragraph 77 AsylG), from a geographical perspective, account is to be taken solely of the field of operation of the last habitual residence of the stateless person concerned or whether further fields of operation are to be included in the consideration in this respect.

28 For the granting of *ipso facto* refugee status under the second sentence of Article 12(1)(a) of Directive 2011/95, it is not sufficient that the person concerned was no longer granted the protection or assistance of the UNRWA when he left the area of operations. In addition, it must also be impossible for him, at the time of the last hearing or decision of the trial court that is relevant under Paragraph 77 AsylG, to return to the area of operations and again receive the protection or assistance of the UNRWA.

29 The referring court is inclined to assume that, when examining the continued application of the conditions of the inclusion clause, account is also to be taken, in addition to the field of operation of the last habitual residence, of those fields of operation to which the stateless person concerned has a substantial connection. Such a connection may possibly already be established through an actual, but not (yet) habitual residence. However, it may also be based on other circumstances such as close relatives residing in that field of operation. It must be possible and reasonable for the person concerned to take up residence there.

30 The questions referred under point 5 are intended to clarify the meaning of the concept of habitual residence, which may be of significance depending on the response to the other questions referred.

31 The referring court is inclined to take the view that, in this context too, the assumption of a (last) habitual residence solely requires that the stateless person has actually found the focal point of his life in the field of operation concerned, that is to say is not just temporarily staying there, and the competent authorities have not taken any removal measures against him. It is not necessary for the residence to also be lawful.

32 According to the national case-law, it is a condition for habitual residence that the person lives in the country concerned not just temporarily, but for an unforeseeable length of time and termination of the residence is therefore uncertain. The objective circumstances of the residence must indicate a certain continuity and regularity. The person must have the centre of his existence at the place of habitual residence. The referring court questions whether its definition of the country of habitual residence, taken from national law, also corresponds to the concept of habitual residence under EU law (see Article 2(d) and, in particular, (n) of Directive 2011/95) and the extent to which it then depends on the further aspects addressed in the questions referred.