

Anonymised version

Translation

C-294/22 – 1

Case C-294/22

Request for a preliminary ruling

Date lodged:

3 May 2022

Referring court:

Conseil d'État (France)

Date of the decision to refer:

22 March 2022

Applicant:

Office français de protection des réfugiés et apatrides (OFPRA)

Defendant:

SW

[...] SW applied to the Cour nationale du droit d'asile (National Asylum Court, France) to annul the decision of 11 October 2019 by which the Director-General of the Office français de protection des réfugiés et apatrides (Office for the protection of refugees and stateless persons, France) (OFPRA) rejected his application for asylum and for recognition as a refugee or, otherwise, for subsidiary protection.

By Decision No 20016437, 20005472 of 9 December 2020, the National Asylum Court upheld his action and recognised him as a refugee.

On appeal [...], OFPRA applied to the Conseil d'État (Council of State, France) to:

- (1) set aside that decision;
- (2) refer the case back to the National Asylum Court.

OFPPRA claims that the National Asylum Court:

- provided an insufficient statement of reasons in its decision and erred in law by failing to examine whether the person concerned had been forced to leave the area of operations of the United Nations Relief and Works Agency for Palestine refugees in the Near East (UNRWA) because of threats to his safety;
- erred in law by finding that the fact that it was impossible for UNRWA to fund tertiary healthcare appropriate to the state of health of a Palestinian refugee is a ground for ending the effective protection of that agency, thereby entitling the refugee to claim the benefit of the Geneva Convention;
- erred in law and distorted the documents in the case file by finding that UNRWA had to be considered unable to perform its assistance mission, whereas paying for tertiary healthcare is not part of that mission and it was not established that the person concerned could not be given appropriate treatment in Lebanon.

[...]

Whereas:

1. It can be seen from documents in the case file before the trial court that SW, who is of Palestinian origin, born in 1976 [...] in Lebanon, lived in Lebanon until he left that country in February 2019 and arrived in France on 11 August 2019. By a decision of 11 October 2019, the Director-General of OFPPRA rejected his application to be recognised as a refugee. OFPPRA has appealed on a point of law against the decision of 9 December 2020 by which the National Asylum Court annulled that decision and recognised SW as a refugee.

2. First, under the first subparagraph of Article 1(A)(2) of the Geneva Convention relating to the status of refugees of 28 July 1951, the term ‘refugee’ is to apply to any person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it’. Article 1(D) of that convention nevertheless states that: ‘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.’

3. The United Nations Relief and Works Agency for Palestine refugees in the Near East (UNRWA) was created by United Nations General Assembly Resolution No 302 (IV) of 8 December 1949 in order to provide direct relief to ‘Palestine refugees’ present in any of the States or territories within its geographical area of operations, that is to say, Lebanon, Syria, Jordan, the West Bank and the Gaza Strip. According to United Nations General Assembly Resolution No 74/83 of 13 December 2019 on UNRWA, which extended its mandate until 30 June 2023, the agency’s operations are conducted for ‘the well-being, protection and human development of the Palestine refugees’ and seek to meet their ‘basic health, education and living needs’. It can be seen from the *Consolidated Eligibility and Registration Instructions* adopted by that agency in 2009 that those services are provided (i) to persons, registered with the agency, whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict, and their descendants and (ii) to the other eligible persons referred to in section III/ B of those Instructions, not registered by UNRWA, who request those services. In the light of the mission assigned to it, UNRWA must be regarded as a United Nations agency other than the United Nations High Commissioner for Refugees, which provides assistance to those persons within the meaning of the provisions referred to in paragraph 2.

4. The provisions cited in paragraph 2 show that the Geneva Convention of 28 July 1951 does not apply to a Palestinian refugee so long as that person is effectively entitled to the assistance or the protection of UNRWA as it is defined in the preceding paragraph.

5. Furthermore, according to Article 12(1) of 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: ‘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’.

6. In its judgment of 19 December 2012, *Abed El Kareem El Kott and Others*, C-364/11, EU:C:2012:826, the Court of Justice of the European Union held that the second sentence of Article 12(1)(a) of Council Directive 2004/83 of 29 April 2004, which is reproduced exactly in the provisions of Directive 2011/95/EU referred to above, ‘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’ and that ‘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.’ The Court added that ‘where the competent authorities of the Member State responsible for examining the application for asylum have established that the condition relating to the cessation of UNRWA protection or assistance is satisfied as regards the applicant, the fact that that person is *ipso facto* “entitled to the benefits of [the] directive” means that that Member State must recognise him as a refugee ... and that person must automatically be granted refugee status, provided always that he is not caught by Article 12(1)(b) or Article 12(2) and (3) of the directive’.

7. It is apparent from the statements contained in the contested decision that, in concluding that SW was automatically entitled to refugee status, the National Asylum Court considered it to have been established that it was impossible for UNRWA to provide him with sufficient access to tertiary healthcare, which relates to the most serious illnesses, and to the drug on which he depends to survive and, therefore, to guarantee him living conditions commensurate with its assistance mission, placing his personal safety at such serious risk that he was forced to leave Lebanon. OFPRA submits that the decision of the National Asylum Court was vitiated by errors of law because it failed to examine whether the person concerned was forced to leave UNRWA’s area of operations by threats to his safety; found that the fact that it was impossible for UNRWA to fund tertiary healthcare appropriate to the state of health of a Palestinian refugee is a ground for ending the effective protection of that agency, thereby entitling the refugee to claim the benefit of the Geneva Convention; and held that UNRWA should be considered to be unable to fulfil its assistance mission whereas paying for tertiary care forms only part of that mission.

8. The answer to be given to the grounds of appeal raised depends on whether, irrespective of the provisions of national law according to which, under certain circumstances, foreign nationals can be allowed to stay on account of their state of health, and which where necessary protect them from an expulsion order, Article 12(1)(a) of Directive 2011/95/EU must be interpreted as meaning that where a sick Palestinian refugee, after actually availing himself of UNRWA protection or assistance, leaves the State or territory in the area of operations of that agency in which he had his habitual residence because he cannot have sufficient access there to the care and treatment required by his state of health and because that failure to provide care and treatment presents a genuine risk to his life or physical integrity, there is reason to consider that his personal safety is at serious risk and that he is in a situation in which it is impossible for UNRWA to

guarantee that his living conditions will be commensurate with the mission entrusted to it. If the answer is in the affirmative, it is then necessary to determine the criteria for identifying such a situation, concerning for example the seriousness of the illness or the nature of the care needed.

9. The questions set out in paragraph 8 are decisive for resolution of the dispute to be resolved by the Council of State and present serious difficulties in interpreting EU law. It is therefore appropriate to make a reference to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union and to stay the proceedings on OFPRA's appeal pending a ruling on all those questions.

HEREBY DECIDES:

[...] Proceedings on the appeal brought by the Office français de protection des réfugiés et apatrides (Office for the protection of refugees and stateless persons, France) are stayed until the Court of Justice of the European Union rules on the following questions:

1. Irrespective of the provisions of national law according to which, under certain circumstances, foreign nationals can be allowed to stay on account of their state of health, and which where necessary protect them from an expulsion order, must Article 12(1)(a) of Directive 2011/95/EU be interpreted as meaning that where a sick Palestinian refugee, after actually availing himself of UNRWA protection or assistance, leaves the State or territory in the area of operations of that agency in which he had his habitual residence because he cannot have sufficient access there to the care and treatment required by his state of health and because that failure to provide care and treatment presents a genuine risk to his life or physical integrity, there is reason to consider that his personal safety is at serious risk and that he is in a situation in which it is impossible for UNRWA to guarantee that his living conditions will be commensurate with the mission entrusted to it?

2. If the answer is in the affirmative, what are the criteria for identifying such a situation, concerning for example the seriousness of the illness or the nature of the care needed?

[signatures] [...]