FEDERAL COURT OF AUSTRALIA

Al-Khateeb v Minister for Immigration and Multicultural Affairs [2002] FCA 7

MIGRATION – refusal of protection visa – application for review of decision of Refugee Review Tribunal – stateless Palestinian resident in Syria – registered with the United Nations Relief and Works Agency – whether "at present receiving … protection or assistance" from UNRWA within the meaning of Article 1(D) of the Refugees Convention – whether exclusion worked by first paragraph of Article 1(D) continues to apply to an applicant outside the area of protection provided by UNRWA – whether the circumstances described in the second paragraph of Article 1(D) give rise to the person concerned automatically qualifying as a refugee regardless of whether he or she has a well-founded fear of persecution.

Migration Act 1958 (Cth), s 36(2), (3), (4)

Migration Regulations, reg. 2.03, Schedule 2 Items, 785, 866

Minister for Immigration and Multicultural Affairs v Quiader [2001] FCA 1458 followed

Abou Loughod v Minister for Immigration and Multicultural Affairs [2001] FCA 825 not followed

Baker v Minister for Immigration and Multicultural Affairs [2001] FCA 1605 referred to

Kouraim v *Minister for Immigration & Multicultural Affairs* [2001] FCA 1824 cited

Jaber v Minister for Immigration & Multicultural Affairs [2001] FCA 1878 referred to

Minister for Immigration and Multicultural Affairs v Savvin [2000] FCA 478 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 applied

Goodwin-Gill “The Refugee in International Law” (2 ed), 92

Grahl-Madsen “The Status of Refugees in International Law” 1966 Vol 1, 141

Hathaway “The Law of Refugee Status”, 208

MARWAN MOHAMAD AL-KHATEEB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W 398 of 2001

CARR J

11 JANUARY 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 398 OF 2001

BETWEEN:	MARWAN MOHAMAD AL-KHATEEB Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	CARR J

DATE OF ORDER:	11 JANUARY 2002
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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BETWEEN:	MARWAN MOHAMAD AL-KHATEEB Applicant
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JUDGE:	CARR J

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PLACE:	PERTH

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an application for an order of review of a decision of the Refugee Review Tribunal, made on 23 August 2001, by which the Tribunal affirmed the decision of a delegate of the respondent not to grant a protection visa to the applicant. The applicant is a stateless Palestinian registered with the United Nations Relief Works Association (UNRWA). He was born in Syria and has lived there nearly all his life. He arrived in Australia on 24 August 2000. On 14 December 2000 the applicant lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs under the *Migration Act 1958* (Cth)("the Act"). On 21 March 2001 a delegate of the respondent refused to grant a protection visa and on 26 March 2001 the applicant applied for review of that decision.

the applicant's claims and the Tribunal's decision

2 The applicant's claims, in summary, were as follows:

- He had joined the Democratic Front for the Liberation of Palestine ("DFLP") in June 1982; this was a faction within the Palestine Liberation Organisation ("PLO"). He was attracted to the group because of his left-wing ideology.

- He was smuggled to Lebanon where he did political training and became a wireless operator. He remained with the group until August 1985 when he returned to Syria to complete his military service.

- In 1983 (i.e. while the applicant was in Lebanon) there was conflict between the PLO factions led by Yasser Arafat and Abu Mousa. Abu Mousa had the support of the Syrian government and succeeded in forcing Yasser Arafat's faction out of Lebanon. The Syrian authorities arrested a number of Arafat supporters at this time.

- Shortly after returning to Syria in 1985 the applicant was arrested and charged with involvement with Arafat's faction of the PLO.

- He was detained for six months at the intelligence section during which he was tortured. He eventually confessed to belonging to the Arafat faction, even though this was not true.

- He remained in prison in Syria until January 1991 when he was released after receiving a pardon from the Syrian President.

- He then went to work at his father's driving school, but was detained again between June and September 1993, June and September 1995 and May and August 1998 because he was still believed to be an Arafat supporter.

- If he tried to avoid being detained, his wife was taken and mistreated, so he had to surrender. Every time he was detained, his family paid a bribe to secure his release.

- On release from detention in August 1998 he joined the Popular Front for the Liberation of Palestine ("PFLP"), a group which did not support Arafat, but which had the support of the Syrian Government. He did this because he thought that it would bring an end to his problems with the Syrian authorities and because he supported the PFLP's ideology.

- Through his connections with the PFLP he became a reporter for the PFLP's newspaper *Al Hadaf.*

- He was responsible for reporting the opinions of Palestinians living in a section of the camp where he lived.

- In January 1999 he was arrested and accused of provoking public opinion against the Syrian Government. He was released in October 1999 after his family paid bribes.

- After his release from detention he resumed working for *Al Hadaf* in an administrative position and remained in that position until December 1999, after which he was unemployed until his departure from Syria in July 2000.

- One of the conditions of his release from detention was that he should become an informer and provide information on the PLO. He never did this. The authorities frequently came to his home to arrest him, but he was

never there. On one occasion they detained his wife for 15 days, but she was released when he promised to tell the authorities where he was.

- Some time after his release from detention, the person who had previously arranged such releases in exchange for bribes said that he could not help him any further because of the charge of provoking the public to oppose the government. That person advised the applicant to leave Syria and agreed to arrange the relevant permission in exchange for the payment of more bribes.

- When asked by the Tribunal whether he was claiming that he would be persecuted in Syria because of his Palestinian nationality, the applicant responded that the main reason he had faced problems in Syria was because he was a Palestinian.

3 There were two main aspects of the Tribunal's decision. The first related to Article 1(D) of the Refugees Convention. Article 1(D) is in the following terms:

"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."

4 The Tribunal found that the applicant was registered with UNRWA. His registration card was in evidence before the Tribunal and also in these proceedings. It is stated to be a registration card issued by "United Nations Relief and Works Agency for Palestine Refugees in the Near East". It states the "field" to be "Syria", was issued in both the names of the applicant's father and of the applicant in September 1983, and gives his origin (presumably his father's origin – eligibility for UNRWA coverage is extended to direct descendants through the male line of a person fulfilling the three primary requirements of such eligibility – see the discussion in *Minister for Immigration and Multicultural Affairs v Quiader* [2001] FCA 148 at 28) as Haifa. The card also carries the statement "the person named on this card is a Palestine refugee registered with UNRWA".

5 The Tribunal found that UNRWA does not have a mandate to protect Palestinian refugees in Syria or anywhere else; that responsibility was left to the countries where Palestinians took refuge after 1948.

6 Earlier in its reasons the Tribunal noted that UNRWA registered Palestinians, resident in Syria, had nearly the same status as Syrian

nationals. They are free to live anywhere in Syria and have equal rights in areas of education, employment, trade and health. They may own or lease businesses and commercial properties. However, unlike Syrian nationals, they cannot own more than one residential property and they cannot own arable land. They may belong to one of the legally permitted political parties, but cannot vote or stand as candidates for the Syrian Parliament or the Presidency. Palestinians resident in Syria are entitled to obtain a travel document which allows them to travel abroad and return without a re-entry permit. As with Syrian nationals, the travel document can be changed or re-issued by any Syrian representative office abroad. These, so the Tribunal noted, are rights granted to Palestinians under Syrian law.

7 In that section of its reasons which was headed "Reasons for Decision" the Tribunal observed that Palestinians who are seen to oppose the Syrian regime have been illegally detained and ill-treated in Syria in the past. It found that there was nothing in the evidence before it to suggest that UNRWA had been willing or able to provide protection to Palestinians who found themselves in that situation, nor did the evidence suggest that UNRWA would be willing or able to provide protection to such people in future. In those circumstances it stated its belief that it could not be said that Palestinians registered with UNRWA and residing in Syria have the protection of a UN body.

8 The Tribunal then turned to consider whether the applicant was at present receiving assistance from UNRWA within the meaning of Article 1(D) of the Convention. It had earlier noted that the applicant had not received any material assistance from UNRWA in recent years. The Tribunal found that the applicant and his family were not currently registered with UNRWA's special hardship program. However, it found on the evidence before it, that he and his family were entitled to assistance under that program should they require it although, as it also noted, inadequate funding could affect the level of benefit which they would receive. Furthermore, so the Tribunal found, the applicant's family was entitled to UNRWA medical assistance and his son was entitled to attend an UNRWA school.

9 The Tribunal also found that "In an indirect sense" registration with UNRWA gave Palestinians the right to reside in Syria where they have many of the rights of Syrian nationals. Palestinians who are not registered with UNRWA or who are registered with UNRWA elsewhere do not have the right to reside in Syria. In those circumstances, the Tribunal held that the applicant was "… currently receiving assistance from UNRWA in the sense envisaged in *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2001] FCA 825. Accordingly, the Tribunal held that the applicant was excluded under Article 1(D) from coverage under the Convention. The Tribunal rejected a submission from the applicant's adviser that Heerey J's observations in *Abou-Loughod* were *obiter dicta*.

10 The second aspect of the Tribunal's reasons for decision related to the applicant's claim that he could not be excluded under Article 1(D) because he had a well-founded fear of persecution at the hands of the Syrian

authorities. The Tribunal stated that this was not a relevant consideration when determining whether or not a person was excluded under Article 1(D). But it went on to consider whether the applicant had a well-founded fear of persecution in Syria for a Convention reason. It held that he did not have such a well-founded fear.

11 The Tribunal did not believe that the applicant was imprisoned from 1985 until 1991 because he was believed to have been a supporter of Yasser Arafat in Lebanon in the early 1980s. It relied on independent country information for that conclusion. It went further and said that even if it was wrong in that conclusion, it did not believe that the applicant's imprisonment from 1985 to 1991 because he was suspected of supporting Yasser Arafat would cause him serious problems if he returned to Syria now. Again it referred to independent country information for that conclusion. This country information was to the effect that pro-Arafat Palestinians who were released from prison in the early 1990s and still resided in Syria did not face problems with the Syrian authorities unless they continued to engage openly in activities not approved of by the Syrian authorities.

12 The Tribunal refused to accept that the applicant had had any involvement in politics after 1991 or that he had any problems with the Syrian authorities for political reasons after 1991. It found the applicant's claims that he was detained as a suspected Arafat supporter in 1993, 1995 and 1998 "implausible". In reaching that conclusion it relied upon evidence before it that the Syrian authorities were generally aware of the affiliations and activities of Palestinians in Syria and that there were pro-Arafat Palestinians in that country. Such persons, so the Tribunal found, do not face serious problems provided they are not politically active.

13 The Tribunal referred to the applicant's evidence that he had no involvement in politics between 1991 and 1998. The Tribunal rejected the applicant's evidence that he joined the PFLP and became a reporter on the newspaper *Al Hadaf* and it gave its reasons for doing so. Again the Tribunal drew upon independent evidence about the PFLP and developments within that organisation. It found that Mr Abdulla, called as a witness by the applicant, was not a credible witness. The Tribunal stated that it was not satisfied that the applicant ever belonged to the PFLP or that he had ever worked for *Al Hadaf.* It made quite a strong credibility finding in that regard, based to some extent on the production of what the applicant claimed was a "press card".

14 The Tribunal said that it did not believe that the applicant was detained by Syrian authorities between January and October 1999 for political reasons. It referred to a summons allegedly sent to the applicant on 15 May 1999 by the Syrian intelligence services. It did not accept that this summons was issued either because the applicant had been detained as a Yasser Arafat supporter or because he was a PFLP member. It stated its belief that the summons was either a fraudulent document or that it was issued to the applicant for some reason which he had not disclosed because it did not

support his claim that he was of interest to the Syrian authorities for political reasons.

15 The Tribunal then turned to the applicant's *sur place* claims based on letters which he had written to the Israeli Embassy. The Tribunal said it did not believe that the applicant feared that those letters would become known to the Syrian authorities and cause him to be seen as someone who holds political views not acceptable to the Syrian authorities and thus would face serious harm amounting to persecution. The Tribunal said that it believed that the applicant made this claim because it had expressed strong doubts about the claims which he made regarding the problems which he faced in Syria, and wanted to bolster his chances of obtaining a protection visa. It gave its reasons for that conclusion. One of those reasons was that it considered that if the applicant had genuinely feared that those letters would cause him serious problems if he returned to Syria, he would have raised the matter earlier with his adviser or the Tribunal. It noted that his adviser was aware that the letters had been sent to the Israeli Embassy. The Tribunal concluded this portion of its reasons in the following terms:

"After considering all of the relevant evidence, I am not satisfied that Mr Al Khateeb was of interest to the Syrian authorities for political reasons at the time of his departure from Syria in July 2000, nor that he has a well-founded fear of persecution for a Convention reason in Syria."

grounds of the application

16 The applicant does not appear to have received legal advice in drawing his application. Paragraph 4 of that document was in exactly the following terms:

"The applicant is aggrieved by the Tribunal's decision because I can't returend to Syria because I contact the Israeli embassy and tribunal doesn't take it as sirouse, [which I took to be "serious"] and I will be executed if I return to Syria."

17 The relevant portion of the application concluded:

"The ground(s) of this application is/are that the submission will follow".

18 The applicant was not legally represented at the hearing before me, but had forwarded to the Court a three page submission in Arabic together with a one page submission in English, another document in English which appeared to be in the form of a press release, and photocopies of two letters, dated 31 August 2001 and 10 September 2001 respectively, from the Embassy of Israel at Canberra addressed to the applicant. An interpreter translated the three page written submissions to the Court. In my view, nothing in those documents suggested that the Tribunal had fallen into jurisdictional error or disclosed any other grounds of review.

19 The respondent, in written submissions filed on his behalf, informed the Court that an argument in the applicant's interest might arise under Article 1(D) of the Convention. The submission stated that this step was taken to assist the Court because the applicant was a stateless Palestinian with UNRWA registration in Syria appearing without legal representation and knowledge of Australian refugee law. The respondent and his advisers deserve to be commended for taking this course.

20 The text of Article 1(D) is set out at paragraph 3 above.

21 The respondent's submission drew my attention to a construction of clause 2 of Article 1(D) which was suggested by Grahl-Madsen in "The Status of Refugees in International Law" at 141-142 and 264-265 (and acknowledged by other writers). That construction was that, for the purposes of clause 2, cessation of UNRWA protection or assistance may result from the departure of a person from UNRWA's area of operation, with the effect that Palestinians who are outside that area and no longer have protection or assistance are automatically entitled to Convention protection whether or not they qualify as a refugee with a well-founded fear of persecution. According to this construction, this was said to be the intent of the wording *"ipso facto"* in that clause.

A REVIEW OF SOME RECENT AUSTRALIAN AUTHORITIES ON ARTICLE 1(D) OF THE CONVENTION

22 The applicant in *Abou-Loughod* was in a very similar situation to the applicant in this case. Mr Abou-Loughod was a stateless Palestinian who was born in Syria and had resided there all his life save for periods spent in Lebanon, Libya and Sudan. The Tribunal had accepted that Mr Abou-Loughod and his family were registered with UNRWA. It had noted that even if the applicant did not currently have protection from UNRWA (not being in Syria), he could regain such protection as he had regained it on previous occasions. The Tribunal held that Mr Abou-Loughod retained a current entitlement to the protection of UNRWA which could be realised should he return to Syria. As in the present matter, the Tribunal went on to consider whether Mr Abou-Loughod had a well-founded fear of persecution in Syria for a Convention reason and concluded that he did not.

23 Heerey J at [13] and [14] said this:

"In my opinion, the construction the Tribunal put on article 1(D) is correct, notwithstanding that earlier decisions of the Tribunal have taken a different view. Given the findings of fact that the applicant can obtain UNRWA documents and return to Syria where he would enjoy the rights that have been mentioned, it is correct to say that he is "at present receiving" protection or assistance from UNRWA, in the sense that he has the immediate right to practical assistance in the ways I have mentioned. This is the view of Professor James C Hathaway in "The Law of Refugee Status", Butterworths, Toronto, 1991 at page 208 where, speaking of article 1(D) the learned author says:

"It does not exclude only those who remain in Palestine, but equally those who seek asylum abroad."

Given that the Convention as a whole is concerned with people who are outside their own country, that seems to me the natural meaning to be given to the provision."

24 In *Quiader* the respondent was another stateless Palestinian who resided in Syria. He too was registered with the UNRWA, but had not received assistance from it since 1975. When his application for a protection visa was refused by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"), the respondent sought review by the Refugee Review Tribunal.

25 The Tribunal found that Mr Quiader had a well-founded fear of persecution and was thus a refugee. It decided also that he was not excluded from consideration under the Convention by reason of registration with UNRWA. It accepted an interpretation of Article 1(D) contained in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1988) to the effect that a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned in the Article and may be considered for determination of his refugee status under the criteria of the 1951 Convention.

26 On the facts, the Tribunal held that the applicant was clearly outside the relevant geographical area and was not presently receiving assistance from UNRWA.

27 The Tribunal decided that the matter should be remitted for reconsideration with a direction that the respondent was a person to whom Australia had protection obligations under the Refugees Convention.

28 The Minister sought review of that decision in this Court. The Minister contended that the respondent, as a person registered with UNRWA, was entitled to its protection and assistance and was therefore excluded from the application of the Refugees Convention by Article 1(D).

29 The Minister in his application for review of that decision contended that the Tribunal had erred in law in so construing Article 1(D) i.e. in its construction that that Article had no operation where a person, who is entitled to the protection or assistance of a relevant UN agency, was outside the usual geographical area where the agency operated.

30 The respondent, (Mr Quiader), not only supported the Tribunal's construction, but went one step further. The respondent submitted that Article 1(D) was a contingent inclusion clause for Palestinians who had been receiving protection or assistance from UNWRA when such protection had ceased for any reason, including absence from the relevant UNWRA

area. Once the assistance ceased, so it was put, such persons should be *ipso facto* included in the protective regime established by the Convention.

31 French J reviewed those parts of the travaux preparatoires leading to the adoption of the Convention which were relevant to Article 1(D), as discussed by leading commentators including Nehemia Robinson, Hathaway, Grahl-Madsen and Professor Goodwin-Gill. His Honour at paragraphs [30] and [33] said this:

"[30] In my opinion Art 1(D) should be read, having regard to its historical context, as referring to those who are or may be regarded, in a generic sense, as refugees viz-a-viz Israel. There is nothing in the travaux preparatoires, discussed by the leading text writers, nor in the historical background, to support the view that the exclusion would extend to Palestinians who were at risk of persecution for a Convention reason if returned to their home region, albeit it was a region within the territorial competence of UNRWA. The Tribunal, it should be noted, has found as a matter of fact that "… UNWRA (sic) quite clearly is unable to fulfill one of its original functions which was to provide protection to Palestinian refugees."

. . .

[33] In my opinion, Art 1(D) does not apply, to exclude from the protection of the Convention, a Palestinian, entitled to protection and assistance from UNRWA, who is nevertheless at risk of persecution if returned to his home region notwithstanding that it is within the territorial competence of UNRWA. It is not necessary for present purposes to consider the full range of circumstances in which the exclusion under Art 1(D) does not apply to Palestinian refugees. I am inclined to the view that the interpretation given in the UNHCR Handbook and quoted by the Tribunal is consistent with the approach which I have taken in this case. However, further consideration of that may await another day."

32 At [32] French J said this in relation to the decision in *Abou-Loughod:*

"I was referred to the decision of Heerey J in Abou Loughod v Minister for Immigration and Multicultural Affairs [2001] FCA 825. His Honour in an ex tempore judgment, took the view that the applicant, who could obtain UNRWA documents and return to Syria and there enjoy the rights of a Syrian national including the freedom to exist and enter, fell within the class of one "at present receiving" protection or assistance from the UNRWA. That is to say, he had the immediate right to practical assistance. His Honour relied upon Hathaway's statement that Art 1D does not exclude only those who remained in Palestine but equally those who sought asylum abroad. In that case it is to be noted there was no claim of persecution directed to the applicant by the Syrian government. The claim of persecution related to the Palestinian front for the Liberation of Palestine to which the applicant had belonged. He had fought with the front but had left it and he feared retribution. The Tribunal had been of the view that his history indicated that he did not face a real chance of persecution at the hands of that body. The situation with which his Honour was concerned in that case was significantly different from the factual situation which applies here."

33 In *Baker v Minister for Immigration and Multicultural Affairs* [2001] FCA 1605 the applicant was another stateless Palestinian who had resided in Syria since birth. The Tribunal found that Mr Baker did not face a real chance of persecution for any of the reasons advanced by him and that he had not become a refugee *sur place.*

34 As in this case, counsel for the respondent brought to the attention of the Court (R D Nicholson J) the reasons for judgment of French J in *Quiader.*

35 The respondent in *Baker* contended that *Quiader* was readily distinguishable because the Tribunal had found as a fact that Mr Baker did not face any well-founded fear of persecution if returned to Syria. R D Nicholson J at [17] accepted the respondent's submissions.

THE RESPONDENT'S SUBMISSIONS ON THIS POINT

36 The respondent in the present matter contended that the interpretation of Clause 2 of Article 1(D) advanced by Grahl-Madsen was not correct. The respondent submitted that a person who, for any reason, ceases to be entitled to the protection of assistance of UNRWA must still satisfy Article 1(A) before being entitled to the benefits of the Convention. The respondent made the following further submissions:

(a) That the interpretation of Article 1(D) in Abou Loughod was correct. An UNRWA registered Palestinian who has a continuing entitlement to the protection or assistance of UNRWA is therefore excluded from the protection of the Convention by Article 1(D). This, so it was put, was the case whether or not the person was in the area of operation of UNRWA. The issue was whether he or she had an **entitlement** to such protection or assistance; and

(b) that the interpretation of Article 1(D) in Quiader was incorrect and an appeal was pending. Further, the reasoning in Quaider would not assist the applicant in the present case because the Tribunal found that he did not have a well-founded fear of persecution.

THE Statutory framework

37 The following description of the relevant statutory framework is taken from the judgment of French J in *Quiader* at [19]:

"The grant of protection visas falls within the general statutory framework for the grant of visas for non-citizens and is dealt with in Division III of Part 2 of the Migration Act 1958 (Cth). There is a general power in the Minister to grant a non-citizen permission, to be known as a visa, to travel to and enter Australia and/or to remain in

Australia (s 29). Classes of visas are provided for in the Act and also prescribed under the Regulations (s 31). Criteria for specified classes of visas may be prescribed in the Regulations (s 31(3)). Where an application is made for a visa it is to be considered by the Minister (s 47). If satisfied that the prescribed criteria and other conditions have been met, the Minister is to grant the visa. If not so satisfied, the Minister is to refuse the grant (s 65). Protection visas are provided for under s 36 of the Act. It is a criterion for the grant of a protection visa that the applicant be a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol (s 36(2)). The criterion is replicated in Schedule 2 of the Migration Regulations which, pursuant to reg 2.03, sets out criteria for the grant of various classes of visa. Item 785 of Schedule 2 deals with temporary protection visas and Item 866 with protection visas. Both include as a criterion that:

> "…the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention"."

38 Section 36(3) and (40 of the act provide as follows:

"(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country."

my reasoning

39 I have recently had to consider the interpretation of Article 1(D) in *Kouraim* v *Minister for Immigration & Multicultural Affairs* [2001] FCA 1824 and *Jaber v Minister for Immigration & Multicultural Affairs* [2001] FCA 1878. I still adhere to the views which I expressed in those cases. So that the present reasons may be read as free-standing, I shall set out below the relevant paragraphs (some of them modified and re-arranged for present purposes) from *Jaber.*

40 It is clear that there are conflicting interpretations of Article 1(D) among some of the learned commentators.

41 I think that I should set out briefly what I consider to be the correct approach to be taken in Australia to the construction of Article 1(D).

42 Article 31(1) of the Vienna Convention on the Law of Treaties ("the Vienna Convention") provides:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

43 Katz J pointed out in *Minister for Immigration and Multicultural Affairs v Savvin* [2000] FCA 478at [90] that the Vienna Convention is not applicable to the construction of the Refugees Convention because Article 4 of the Vienna Convention renders that Convention applicable only to treaties which are concluded by States after the entry into force of the Vienna Convention. The Vienna Convention entered into force as late as 27 January 1980 while the Refugees Convention entered into force on 22 April 1954 and the Refugees Protocol of 1967 entered into force generally on 4 October 1967 and with regard to Australia particularly on 13 December 1973.

44 But Gummow J explained in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 277 that the rules of interpretation stated in the Vienna Convention reflect customary international law. His Honour said this:

“Regard primarily is to be had to the ordinary meaning of the terms used therein [the Convention and Protocol], albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results. However, as McHugh J demonstrates by the analysis of the subject in his reasons for judgment, with which I agree, it is important to appreciate the primacy to be given to the text of the treaty.”

45 Brennan CJ at 230-231 made the following observation:

“It a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.

In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.”

46 Dawson J at 240 agreed that technical principles of common law construction are to be disregarded in construing the text of a treaty. McHugh J considered the correct approach to construction at 251-256.

47 I shall now endeavour to apply to Article 1(D) the approach to construction which was explained in *Applicant A.* I should say that I have had regard generally to the references to the preparatory work made by some of the commentators in forming my views of the proper construction of Article 1(D).

48 I would construe the Article as follows.

49 First, in my view, Article 1(D) should not be read as referring only to persons who, as at or about 1951, were receiving the relevant protection or assistance. It should be read as applying to persons who are at present (i.e. currently) actually receiving from the relevant United Nations organs or agencies protection and assistance. [I set out below my reasons for reading "or" as "and" in the relevant phrase.] I have not overlooked the observations made by some of the commentators, drawing on the preparatory work for the Convention and in particular Article 1(D), who take a different view.

50 It is not necessary for me to decide whether there is now only one relevant United Nations organ or agency, namely UNRWA. Nor is it necessary for me to decide whether Article 1(D) applies only to Palestinians. That is because the applicant is a Palestinian registered with UNRWA.

51 I think that the reference to "or" in the phrase "protection or assistance" in the first paragraph of Article 1(D) should be read as "and", so that merely receiving such assistance as UNRWA might be able to provide would not give rise to exclusion under the first paragraph if UNRWA did not also provide protection from persecution in the relevant country. Such a construction of the word "or" would be permissible even in an Australian statutory context – see D C Pearce and R S Geddes "Statutory Interpretation in Australia" (4 ed) para 2.15 at p 38 and the cases there cited. It would be contrary to the purpose of the Convention, in my opinion, to exclude from the benefits of the Convention those persons who were at real risk of persecution (i.e. not given protection), simply because they might receive (or even were receiving) some form of assistance from the relevant United Nations organ or agency. I think that the Tribunal in this matter erred in adopting such a construction.

52 I do not think that the words "at present receiving" should be construed as meaning "at present entitled to receive", even though the relevant person may not be within the area of UNRWA's operations. To the extent that this opinion differs from the views expressed by Heerey J in *Abou Loughod*, I respectfully differ from those views, to the degree which entitles me not to follow them. It is possible that *Abou Loughod* is distinguishable on the facts of this case in the same manner as French J distinguished it in *Quiader*. In applying *Abou Loughod* to the facts of this matter, once again I think the Tribunal erred in law.

53 I respectfully agree with French J's construction of the first clause of Article 1(D) as expressed at [33] in *Quiader* (see paragraph 31 above). As will be seen below, I think that the converse applies, i.e. if that there is no real chance of an applicant being at risk of persecution if returned to his or her country, there is nothing in Article 1(D) which prevents his return to that country. I now turn to the second paragraph of Article 1(D).

54 There are learned commentators who take the view that the second paragraph of Article 1(D) of the Convention operates as what is sometimes referred to as a contingent inclusion clause.

55 Professor Goodwin-Gill in "The Refugee in International Law" (2 ed) expresses such an opinion at 92:

"Palestinian refugees who leave UNRWA's area of operations, being without protection and no longer in receipt of assistance, would seem to fall by that fact alone within the Convention, whether or not they qualify independently as refugees with a well-founded fear of persecution."

56 That view is expressed more forcibly and at greater length in a joint brief prepared by Associate Professor Susan M Akram and Professor Goodwin-Gill and submitted, on a date which does not appear from that document, to the United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Falls Church, Virginia.

57 Grahl-Madsen in "The Status of Refugees in International Law" 1966, Vol 1 p 141 observed:

"The words 'ipso facto' in the second paragraph of Article 1D suggest that no new screening is required for the persons concerned to become entitled to the benefits of the Convention.

This view, which implies that upon cessation of UNRWA assistance and/or protection the persons concerned will become a kind of 'statutory refugees', seems to be shared by GUILLEMINET, 162 f."

58 Professor Hathaway in "The Law of Refugee Status" in a footnote (footnote 116) to p 208 sets out an opposite view, quoting from the UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status" as follows:

"[A] refugee from Palestine who finds himself outside [the UNRWA operational] area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention."

59 Curiously, Hathaway quotes Grahl-Madsen and Goodwin-Gill as being in accord with that observation.

60 In my opinion, the second paragraph of Article 1(D) is to be construed as providing that when a person who has been receiving protection and assistance from a relevant United Nations organ or agency, but has ceased for any reason to receive such protection and assistance (and his or her position had not been definitely settled in accordance with the relevant General Assembly resolutions) then such person will be entitled to the benefits of the Convention.

61 Australia's relevant protection obligation is the non-refoulment obligation created by Article 33 which reads as follows:

"1. No Contracting State shall expel or return ("refouler") **a refugee** in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. **The benefit** of the present provision may not, however, be claimed by **a refugee** whom there are reasonable grounds for regarding as a danger…". [Emphasis added]

62 I regard as significant the use of the word "refugee" in each of the sub-paragraphs of Article 33 and the use of the word "benefit" in sub-paragraph 2.

63 The reference to "refugee", in my view, picks up and requires the application of the definition of that term in Article 1A(2). In short, I do not think that the second paragraph of Article 1(D) operates automatically to confer refugee status on the applicant.

64 If it is accepted that the Convention is designed to provide protection only to those who truly require it (as I think it is – see for example Hathaway at p 205), then it would be contrary to that purpose to give automatic refugee status to persons, such as the applicant, who have been found not to have a well-founded fear of persecution. They would be depriving more deserving and, in that sense, more genuine refugees of their place in the queue. The international resources for care of refugees are limited. It is more consistent, in my opinion, to construe the Convention in a manner which will not result in a waste of those resources.

65 This construction, as I see it, sits comfortably with the relatively recent (16 December 1999) amendments to s 36 of the Act and, in particular, with sections 36(3) and (4), the text of which I have set out above.

66 In summary, my conclusions in relation to the application of Article 1(D) to the applicant in this matter are as follows:-

1. If he ever had both protection and assistance from UNRWA (and the Tribunal's findings suggest that he never had the former) then that protection and assistance has ceased because he is no longer within UNRWA's area of operations.

2. He did not automatically, by reason of such cessation, become entitled to protection obligations under the Convention; that entitlement does not arise unless he falls within the definition of “refugee” in Article 1(A) of the Convention.

3. As the Tribunal found as a fact that the applicant does not have a well-founded fear of persecution for a Convention reason in Syria, he does not fall within that definition.

4. In view of that finding and because the applicant has the right to re-enter and reside in Syria, section 36(3) operates by excluding any protection obligations, on Australia’s part, from arising.

67 Proper as it was for the respondent to raise this point, I do not think that there is anything in it which assists the applicant.

68 The next issue is whether the Tribunal erred in law or fell into jurisdictional error in its assessment of whether the applicant was a refugee.

69 I have scrutinised the papers and the Tribunal’s reasons. In the first part of its reasons the Tribunal set out the relevant law correctly and, in my view, there is nothing later in its reasons to suggest that it did not apply the law as earlier recited.

70 The essential basis for the Tribunal’s decision was simply that it did not believe the applicant. This can be seen from pp 22 to 27 of its reasons which I have summarised above at [11] to [15] above.

71 Finally, the Tribunal dealt with the applicant’s *sur place* claim. In my opinion, its reasons for rejecting that claim do not reveal legal or jurisdictional error.

72 In my view, the Tribunal’s findings were open to it, and there was sufficient evidence and material to justify its conclusion that it was not satisfied that the applicant was a person to whom Australia has protection obligations under the Refugees Convention.

73 In my opinion, the Tribunal made no reviewable error whether error of law or jurisdictional error.

Conclusion

74 For the foregoing reasons, the application will be dismissed with costs.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Carr.

A/g Associate:

Dated: 11 January 2002

The Applicant appeared for himself:	
Counsel for the Respondent:	Ms L B Price
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 December 2001
Date of Judgment:	11 January 2002