FEDERAL COURT OF AUSTRALIA

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

MIGRATION - refugee - 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 for Palestinian Refugees in the Near East (UNRWA) - whether "at present receiving from (UNRWA) protection or assistance" within the meaning of Article 1(D) of the Refugees Convention - well-founded fear of persecution if returned to Syria - UNRWA unable to provide relevant protection - whether excluded from general application of Refugees Convention - drafting history of Convention - historical context of exclusion clause Article 1(D)

Migration Act 1958 (Cth)

Oseri v Oseri (1953) 8 PM 76; 17 ILR 111 (1950) cited

Hussein v Governor of Acre Prison (1952) 6 PD 897, 901 cited

Abou-Loughod v Minister for Immigration and Multicultural Affairs [2001] FCA 825

Robinson H, *Convention Relating to the Status of Refugees - Its History Contents and Interpretation*, New York (1953)

Hathaway JC*, The Law of Refugee Status*, Butterworths (1991)

Goodwin-Gill GS, *The Refugee in International Law*, 2nd Edition, Clarendon (1996)

Akram S, "*Palestine refugees - the longest-running humanitarian problem in today's world",* International Conference on Palestine Refugees, UNESCO, 26 and 27 April 2000

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS vOMAR BASHEER QUIADER

W272 OF 2001

FRENCH J

16 OCTOBER 2001

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W272 OF 2001

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS APPLICANT
AND:	OMAR BASHEER QUIADER RESPONDENT
JUDGE:	FRENCH J
DATE OF ORDER:	16 OCTOBER 2001
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant is to pay the respondent's costs of the application.

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

IN THE FEDERAL COURT OF AUSTRALIA	
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AND:	OMAR BASHEER QUIADER RESPONDENT

JUDGE:	FRENCH J
DATE:	16 OCTOBER 2001
PLACE:	PERTH

REASONS FOR JUDGMENT

Introduction

1 Omar Basheer Quiader is a stateless Palestinian who resides in Syria. He is aged 38 and is a physiotherapist's assistant. He is registered as a Palestinian refugee with the United Nations Relief and Works Agency for Palestinian Refugees in the Near East ("UNRWA"). On that basis he is entitled to reside in Syria. He has not received assistance from UNRWA since 1975. He left Syria illegally on 12 November 2000 using a false passport. His wife and children left separately on a Palestinian travel document held by the wife which included the children. After transit stops in Abu Dhabi and Kuala Lumpur they arrived in Indonesia. From Indonesia they travelled by boat to Australia where they arrived on 23 December 2000. On 9 January 2001, the respondent lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs. His wife and children were included in the application. That application was refused by a delegate of the Minister on 21 February 2001. On 28 February 2001, the respondent sought review of that decision by the Refugee Review Tribunal ("the Tribunal"). The Tribunal held a hearing on 31 May 2001. On 4 June 2001, the Tribunal decided that the matter should be remitted for reconsideration with a direction that the respondent is a person to whom Australia has obligations under the Refugees Convention.

2 The Minister for Immigration and Multicultural Affairs now seeks review of that decision in this Court. He contends that, as a person registered with UNRWA, the respondent is entitled to its protection and assistance and is therefore excluded from the application of the Refugees Convention by Art 1(D) of that Convention. The case raises a question about the interpretation of Art 1(D).

Factual Findings

3 The respondent was born in Damascus, Syria on 18 March 1963. He and his family have been recognised as Palestinian refugees and registered as such with UNRWA. The Tribunal was satisfied that Syria was his country of birth and former habitual residence. His parents were born in Palestine and held that nationality until they were forced to flee to Syria in 1948. The respondent and his brothers and sisters were all born in Syria. The family members continue to reside there except for one brother who went to Russia thirteen years ago and has never returned to Syria. The family received assistance from UNRWA until 1975. They were able to obtain Syrian government services including education, employment and health services as well as having the right to a Syrian-issued travel document.

4 The respondent claimed, that in 1982, while still a student he became involved in Palestinian politics. Palestinian students decided to try to organise a committee for Palestinians within the Institute at which he was studying. He was active in this group which was evidently part of the Fatah Arafat

organisation. After the Israeli invasion of Lebanon in 1983 he said there was trouble in the Alyarmuk camp where he and his family lived. Fatah split and an attack was made on Fatah Arafat demonstrators by the Syrian army, the Fatah Intifada and another organisation, the PPLF. He was arrested during the demonstration and detained for six months. He said he was set free thereafter because a relative of his mother's was in charge of security for the PPLF. As a result of his imprisonment he said he was dismissed from the Institute but was allowed to study externally and sat his final examinations in 1986.

5 The respondent said that from the age of six he had gone to Fatah training camps for military and ideological training. These were usually held in summer during the school holidays. He said he was involved with Fatah until 1987 when he did his military service with a Palestinian section of the Syrian army known as the PLA. From 1987 to 1989, he was a sergeant nurse in the PLA. He did not serve outside Syria. He claimed that as Fatah members were persecuted by Syrian governments he became very cautious and was not arrested again for any connection with Fatah.

6 In 1990, the respondent obtained employment with the Damascus Health Directorate as a technical assistant/physiotherapist. He said it was a good job and he had opportunities to obtain scholarships and work on interesting projects. In 1994, he was part of a team which worked for the World Health Organisation. During these years he was sometimes invited to go to other countries for seminars. He was unable, however, to obtain the relevant visas to enter countries such as Saudi Arabia and Egypt because he was a Palestinian. After 1997 his work for the World Health Organisation was over and he returned to work for the Health Directorate in Syria. He established two physiotherapy centres for specialist schools for the disabled.

7 Much of the funding for the work the respondent was doing came from Japan. In 1998 a scholarship became available for someone to go to Japan to receive training on equipment for the disabled. One of the criteria was that the person should be able to speak reasonable English. In the event he was selected to go. In July 1999, he had a new travel document and had bought new luggage and was ready to go when, ten days before his flight date, he found the scholarship had been awarded to someone else who was a Syrian. He was very angry and went to see the Director of the Health Department who told him he had no right to question the decision and that he was very lucky to have a job at all given that he was not a Syrian citizen. He claimed that the Director abused and insulted him in front of others and that he pushed the Director away and swore at him. The police were called and the Director, who was an official of the Ba'ath Party, made a written report that the respondent had insulted him, the Minister for Health, the President and the Ba'ath Party. Twenty witnesses signed the report. So, according to the respondent, the matter evolved from one of common assault to an alleged political crime.

8 The respondent said he was taken to a police station where he spent two days and then transferred to the Palestinian Intelligence Branch where he

was violently interrogated, tortured and detained for a month. He was transferred to the Political Security Prison in Al Fayhaa for a further period of nine months. He was not tortured during that time and when he left prison his worst problem was that his teeth had decayed. The food was bad and he had been unable to keep his teeth clean. He was released in July 2000 without ever having been charged. He said this was not uncommon in Syria. He had lost his job and had to sign an undertaking to stay away from the Director and the witnesses. He also had to report weekly to the Political Security Branch. In early August 2000, the respondent's brother, Mahmoud, was said to have been arrested after being accused of being a member of the Al Tahrir Party. His brother was a devout Muslim. He was released in late October after his father paid over one million lira to the officers. He was put on reporting conditions. The respondent decided to leave the country and obtained a false Jordanian passport. His wife's brother signed the document which gave her permission to leave Syria with the children. According to the respondent he would be severely punished if he were returned to Syria.

9 The Tribunal accepted that the respondent was arrested in 1983 and that his release from detention was due to a relative who falsely vouched for him as a member of the PFLP which is a group supported by the Syrian authorities. The Tribunal did not believe that he had remained a quietly active supporter of Fatah in later years. It was not satisfied that in a country such as Syria where there is a pervasive intelligence system he would have been able to have any significant contact with Fatah and keep his job. The Tribunal rejected the respondent's claim to be at risk of persecution by the Syrian authorities because of membership of Fatah.

10 The Tribunal accepted that the respondent's identity as a Palestinian was a most significant fact in the circumstances. Some 400,000 Palestinians had made their homes in Syria since the expulsion of Palestinians from their own land in 1948, 1967 and subsequent years. Although for the most part they have been given similar rights as citizens to government services, they come under surveillance because the Syrian government does not want them to become a State within a State. As a result there has been a very heavy Syrian hand on Palestinian politics in Syria and those Palestinians suspected of holding or acting on policies which differ from the official Syrian position have often found themselves in serious trouble. The respondent's six month detention in 1983 was consistent with this as was his claim that some of those arrested then have remained in prison for many years. The Tribunal was satisfied, however, that from the time of his release until the incident with the Director of Health, the respondent was not suspected by the Syrian authorities of anything untoward.

11 The Tribunal found it plausible that an arrest in 1983 could remain on record and be used against the respondent at a later time. Syria runs a very tight system of surveillance over its Palestinian residents and any political involvement previously is likely to be recorded and used. The Tribunal thought the description of the year in custody was convincing. It did not find that the respondent exaggerated his plight.

12 The Tribunal accepted that on his release the respondent found himself without his former employment and with no prospects of ever being employed again in that role. He considered himself to be under suspicion and was frightened of being taken into custody again. The Tribunal did not accept however that the denial of further government employment was persecutory in its effects. The respondent had worked part time for his father's business and was able to take up that source of employment and income again. He was not deprived of a right to make a living although he regarded this as a loss of status and as a prohibition on him continuing the worthwhile work in which he had been involved with the disabled.

13 As to the respondent's claim to have left Syria illegally, the Tribunal did not find it altogether satisfying but had no contrary evidence. It was satisfied that Syria would agree to take back the respondent and his family members. He had claimed to have left Syria illegally but had told the Tribunal his Syrian issued travel document was still with his family in Syria. His wife and children had left on validly issued documents. They have UNRWA registration cards and professional certificates which indicate their residency in Syria. There is overwhelming evidence, if the Syrian authorities require it, that the family is a Syrian-based family.

14 The question for the Tribunal was whether the respondent would be safe from persecution should he return to Syria? The Tribunal accepted that he had a relatively recent year long period of imprisonment to do with assaulting and insulting a senior Ba'ath official and insulting the Syrian President and State. He was on reporting conditions when he left the country. That fact could well be used against him and he could be taken into custody for failure to fulfil the conditions of his release. The Tribunal noted the submission that his claim for refugee status in Australia could be added to his record as another example of his disloyalty to Syria. If this were to be the case, then the possibility could not be ruled out that he could be taken into custody again.

15 The incident which led to his imprisonment resulted from the respondent's anger at his personal treatment by his department. The Tribunal was not satisfied that the reforms promised in Syria under the new President had yet been delivered and in the circumstances it was plausible that the State would take adverse action which could involve persecution against the respondent. It found his fear of persecution to be well-founded and found him to be a refugee.

16 The Tribunal decided that the respondent and his family were not excluded from consideration under the Refugees Convention by reason of their registration with UNRWA. It is convenient to set out the relevant part of the reasons for decision as follows:

"The Tribunal has considered whether the Applicant and his family are excluded from consideration under the Refugees Convention by the fact that they are registered with UNWRA (sic) and so ineligible under Article 1D. Opinions vary as to how this fifty year old exclusion clause works now that UNWRA (sic) quite clearly is unable to

fulfill one of its original functions which was to provide protection to Palestinian refugees. The Tribunal prefers the interpretation given in the UNHCR Handbook on Procedures and Criteria for determining Refugee Status (Geneva 1988) that

> With regard to refugees from Palestine, it will be noted that UNWRA (sic) operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention.

Clearly the Applicant is outside that geographical area and is not presently receiving assistance from UNWRA (sic). His evidence was that the family has had no practical assistance from UNWRA (sic) since 1975 and that is accepted by the Tribunal. The fact that the Applicant's wife worked for UNWRA (sic) up to the time she left Syria does not void this finding."

Grounds of Review

17 The grounds of review are as set out in the application filed on 3 July 2001 and are in the following terms:

"1. The decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the Tribunal.

Particulars

a) The Tribunal found that the respondent and his family were registered with the United Nations Relief and Works Agency (UNRWA).

b) It found that the respondent and his family were outside the geographical area where the UNRWA operates and is not presently receiving the protection or assistance of that agency and that he had not received practical assistance since 1975.

c) It considered that on the basis of this finding article 1D of the Convention had no application.

d) In so doing, the Tribunal has misunderstood the role and function of article 1D and, as a result, the ambit of Australia's protection obligations under the Convention.

e) The Tribunal erred in law in construing article 1D as having no operation when a person, who is entitled to the assistance of

protection of a relevant UN agency, is outside the usual geographical area where the agency operates.

f) The Tribunal should have considered whether Australia did not owe the respondent and his family a protection obligation because, by virtue of article 1D, the UNRWA was responsible for his protection.

g) The Tribunal should have considered whether the respondent and his family would have had obtained effective protection in any country in which the UNRWA does operate, in particular through the auspices of the UNRWA. (sic)

h) Its failure to consider these matters reveals that the Tribunal has misunderstood the extent of Australia's protection obligations under the Refugees Convention and the Migration Act 1958 (Cth) (the Act) or has misapplied the law to the facts of this case.

2. The Tribunal did not have jurisdiction to make the decision.

Particulars

The applicant refers to the particulars in ground 1.

3. The decision was not authorised by the Act or the Regulations.

Particulars

The applicant refers to the particulars in ground 1."

The Provisions of the Refugees Convention

18 Article 1(A) of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the 1967 Protocol reads:

"1(A) For the purposes of the present Convention, the term "refugee" shall apply to every person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the

status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) Owing to a 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

Article 1(D) 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."

The non-refoulment obligation is created by Art 33 which provides:

"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 to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Statutory Framework

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."

The primary obligation qualifying as a protection obligation arises out of Art 33 of the Refugees Convention which is set out above. It has two important elements:

1. It operates in respect of refugees.

2. It prohibits their expulsion or return to the frontiers of territories where their lives or freedoms would be threatened for a Convention reason.

The Issues for Determination

20 It was submitted by the Minister that the Tribunal erred in construing Art 1(D) as having no operation when a person, who is entitled to the assistance of a United Nations agency, is outside the geographical area in which the agency operates. It erred in not considering whether the respondent would have effective protection through the UNRWA in any country in which UNRWA operates. On the correct interpretation of Art 1(D) the Tribunal should have decided that the respondent was excluded from the Convention.

21 It was submitted for the respondent that Art 1(D) is a contingent inclusion clause for Palestinians who are presently receiving assistance from UNRWA. Once the assistance ceases they should be ipso facto included in the protective regime established by the Refugees Convention.

The Construction of Art 1(D)

22 Read literally, Art 1(D) operates to exclude the class of persons to which it applies from the application of the Convention. The first paragraph of the Article applies only to persons receiving alternative assistance "at present" a time which, read literally, refers to the time at which the Convention was made. It is not in dispute that the only agency contemplated by Art 1(D) is

UNRWA and the only persons to whom the exclusion applies are Palestinians. The content of the protection or assistance received from other agencies is not defined in the Article other than by reference to its source which is an organ or agency of the United Nations.

23 Nehemiah Robinson's Commentary on the Convention published in 1953 describes Art 1(D) as treating "of persons who fulfil the conditions prescribed for a person to be recognised as a "refugee" but who enjoy at present a special status under the United Nations"- Robinson, *Convention Relating to the Status of Refugees - Its History Contents and Interpretation* New York (1953). The article refers to Palestinian refugees receiving protection and assistance from UNRWA. Robinson commented that:

"The main reason for the exclusion of this group was the desire not to create overlapping competence (between the High Commissioner and the special agencies) as well as the special nature of the groups involved."

The exclusion, first proposed by the United States' representative, was promoted by the Arab States Lebanon, Egypt and Saudi Arabia. They argued that the existence of Palestinian refugees was a result of United Nations' action in relation to the creation of Israel. The representative for Lebanon said:

"The existence of the Palestine refugees…was the direct result of a decision taken by the United Nations itself with full knowledge of the consequences. The Palestine refugees were therefore a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility." - Azkoul of Lebanon, 5 UNGAOR at 358, 27 November 1950, cited in Hathaway, The Law of Refugee Status, Butterworths (1991) at 206

24 There was another strand of argument in support of the exclusion which derived from the desire of some Western countries to avoid claims to refugee status by Palestinians. France argued that:

"…the problems in their case were completely different from those of the refugees in Europe, and could not see how Contracting States could bind themselves to a text under the terms of which their obligations would be extended to include a new, large group of refugees…" Rochefort of France, U.N. Doc A/CONF. 2/SR.19 at 11; 26 November 1951 cited by Hathaway at 207

25 The exclusion effected by the first paragraph of Art 1(D) is mitigated by the second paragraph which was inserted at the instigation of the Arab states to provide for deferred inclusion for Palestinian refugees if the specialised relief operation in Palestine were to come to an end. Hathaway, however, takes a broad view of the exclusion:

"It is nonetheless clear from the drafting history that the shared intention of the Arab and Western states was to deny Palestinians access to the Convention-based regime so long as the United Nations continues to assist them in their own region." (at 208)

In Hathaway's view the exclusion clause applies to all Palestinians eligible to receive UNRWA assistance in their home region. In this regard he cites the opinion of Grahl-Madsen that Art 1(D) applies not only to individuals who were actually receiving protection or assistance from UNRWA on 28 July 1951 but also to those who became the concern of UNRWA at any later date, including those born after the signing of the Convention - Grahl-Madsen, *The Status of Refugees in International Law* p 265. So Hathaway says of Art 1(D):

"It does not exclude only those who remain in Palestine, but equally those who seek asylum abroad. (at 208)

26 Professor Goodwin-Gill characterises Art 1(D) differently, "…not so much an 'exclusion' clause, as a contingent inclusion clause, merely postponing the incorporation of Palestinian refugees" - Goodwin-Gill, *The Refugee in International Law*, 2nd Edition, Clarendon (1996) p 93. As he put it, the Article is not free from ambiguity. It conditions exclusion upon the continuing receipt of protection or assistance. On the other hand it conditions entitlement to the benefit of the Convention on the cessation of protection or assistance without the situation of such persons having been resolved - Goodwin-Gill at p 92.

27 The history underlying the Palestinian refugee situation in 1951 illuminates the object of Art 1(D). Reference to this is made in Goodwin-Gill's text. It is sufficient to set out its salient features here. From the time of the League of Nations until 15 May 1948, Palestine was a British mandate. Palestinian citizenship was regulated by a statutory instrument of the United Kingdom. It included acquisition by birth. However a Palestinian citizen was not a British subject - Palestinian Citizenship Order 1925, SR and O 1925, No 25. Palestinian citizenship which was an incident of the mandatory's authority did not survive the mandate. It terminated with the proclamation of the State of Israel. Israel itself had no nationality legislation until 1952. Israeli courts have held that with the termination of the Palestine mandate, former Palestine citizens lost their citizenship without acquiring any other - *Oseri v Oseri* (1953) 8 PM 76. In *Hussein v Governor of Acre Prison* (1952) 6 PD 897, 901, the Supreme Court of Israel held that Palestinian citizenship had come to an end and that former Palestine citizens had not become Israeli citizens. The 1952 Nationality Law of Israel confirmed the repeal of the Palestine Citizenship Orders retroactively to the day of the establishment of the State of Israel. It was declared to be the exclusive law on citizenship which was available by way of return, residence, birth and naturalisation. Former Palestinian citizens of Arab origin could be incorporated in the body of Israeli citizens provided they met certain conditions. Goodwin-Gill comments that the strict requirements so imposed meant that the majority of those displaced by the conflict in 1948 were effectively denied Israeli citizenship. Palestinian refugees were admitted to neighbouring countries. Arab countries of refuge have, with the exception of Jordan, rejected local integration and citizenship for all Palestinian Arabs.

28 It is significant that the protection and assistance whose availability is the condition of the exclusion under Art 1(D) is not coextensive in kind with the legal protection available under the general UNHCR regime. This may reflect the historical fact that Palestinians who left Israel in 1948, and subsequently, did not necessarily qualify as refugees under the Convention definition with respect to Israel. They may have been regarded as refugees in the wider generic sense of one who seeks refuge in a foreign country because of political troubles - Shorter Oxford English Dictionary. UNRWA provides education, health care, relief and social services to the 3.7 million persons registered with it in Jordan, Lebanon, the Syrian Arab Republic, the West Bank and the Gaza strip. Eligibility for UNRWA coverage is limited to persons:

"1. whose normal residence was Palestine during the period June 1, 1946 to May 15, 1948;

2. who lost both their homes and means of livelihood as a result of the 1948 conflict;

3. who took refuge in one of the countries or areas where UNRWA provides relief; and

4. who are direct descendants through the male line of persons fulfilling 1-3 above."

29 As Professor Susan Akram observes:

"UNRWA's mandate is solely one of providing assistance to refugees' basic daily needs by way of food, clothing and shelter. In contrast, UNHCR's mandate, in tandem with the provisions of the 1951 Refugee Convention, establishes a far more comprehensive scheme of protection for refugees qualifying under the Refugee Convention. This regime guarantees to refugees all the rights embodied in international conventions, and mandates the UNHCR to represent refugees, including intervening with states on refugees' behalf, to ensure such protections to them. Aside from the distinction between the mandates of UNRWA and UNHCR, the refugee definition applicable to Palestinians is different and far narrower under UNRWA Regulations than the Refugee Convention definition. Consistent with its assistance mandate, UNRWA applies a refugee definition that relates solely to persons from Palestine meeting certain criteria that are "in need" of such assistance." - Akram, "Palestine refugees - the longest-running humanitarian problem in today's world", International Conference on Palestine Refugees, UNESCO, 26 and 27 April 2000.

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".

31 Professor Hathaway comments that while not all Palestinian refugees meet the criteria of the Convention definition, their wholesale exclusion is inconsistent with a commitment to a truly universal protection system. In the case of Canada, Palestinian claims are assessed without differentiation of any kind. In my opinion that approach is supportable not just as a matter of policy which requires waiver of the exclusion under Art 1(D). In my opinion, Art 1(D) was never intended to apply to, and does not apply, to a case such as the present.

32 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 exit and enter, fell within the class of one "at present receiving" protection or assistance from UNRWA. That is to say, he had the immediate right to practical assistance. His Honour relied upon Hathaway's statement that Art 1(D) 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 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.

34 In my opinion the Tribunal did not err and the application should be dismissed.

Conclusion

35 For the preceding reasons the application is dismissed with costs.

I certify that the preceding thirty five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice French.

Associate:

Dated: 16 October 2001

Counsel for the Applicant:	Ms LB Price
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr MT Ritter
Solicitor for the Respondent:	Christie & Strbac
Date of Hearing:	6 September 2001
Date of Judgment:	16 October 2001