FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Multicultural Affairs v WABQ [2002] FCAFC 329

MIGRATION – appeal from decision of single Judge – applicant stateless Palestinian resident in Syria and registered with United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) – whether applicant excluded from the general operation of the Convention relating to the Status of Refugees by Article 1(D) – construction of Article 1(D) – reference to historical background and international interpretations of Article 1(D) – Tribunal made incorrect findings of historical facts concerning UNRWA and the situation in Palestine – whether Court bound to accept Tribunal's findings – matter remitted to Tribunal for further consideration.

WORDS & PHRASES – "persons receiving" – "at present" – "receiving" – "protection or assistance" - "protection or assistance ceased" – "ipso facto".

Migration Act 1958 (Cth)s 476

Convention relating to the Status of Refugees 1951 Art 1(A)(2), 1(D)

Applicant A v Minister for Immigration and Ethic Affairs (1996-7) 190 CLR 225 cited

Morrison v Peacock [2002] HCA 44 applied

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

Kouraim v Minister for Immigration and Multicultural Affairs [2001] FCA 1824 considered

Jaber v Minister for Immigration and Multicultural Affairs [2001] FCA 1878 considered

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

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 considered

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 cited

Re Maurice's Application; Ex parte Attorney-General for the Northern Territory (1987) 18 FCR 163 cited

Hathaway, "*The Law of Refugee Status*", 1991

Goodwin-Gill, "*The Refugee in International Law"* 2nd ed.1996

Akram & Goodwin-Gill, *"Brief Amicus Curiae"*

Grahl-Madsen, "*The Status of Refugees in International Law",* Volume 1,1966

Takkenberg, *"The Status of Palestinian Refugees in International Law",* 1998

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v WABQ

W 516 OF 2001

HILL, MOORE & TAMBERLIN JJ

8 NOVEMBER 2002

SYDNEY (HEARD IN PERTH)

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	W 516 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	WABQ RESPONDENT

JUDGES:	HILL, MOORE AND TAMBERLIN JJ
DATE OF ORDER:	8 NOVEMBER 2002
WHERE MADE:	SYDNEY (HEARD IN PERTH)

THE COURT ORDERS THAT:

1. The appeal be allowed;

2. The orders of the primary judge be set aside;

3. The decision of the Tribunal be set aside;

4. The matter be remitted to the Tribunal for further consideration in accordance with law;

5. The matter be remitted to the Tribunal as previously constituted for the respondent's application for review;

6. The respondent should pay the costs of the appeal and at first instance;

7. The respondent should have a Costs Certificate pursuant to s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth).

8. Liberty to apply.

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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BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	WABQ RESPONDENT

JUDGES:	HILL, MOORE AND TAMBERLIN JJ
DATE:	8 NOVEMBER 2002
PLACE:	SYDNEY (HEARD IN PERTH)

REASONS FOR JUDGMENT

HILL J:

1 Before the Court is an appeal by the Minister for Immigration and Multicultural Affairs ("the Minister") from a decision of a single Judge of this Court (French J) affirming a decision of the Refugee Review Tribunal to set aside the decision of the Minister or delegate of the Minister refusing to grant to the Respondent a protection visa. The appeal raises an important question of construction of Article 1(D) of the 1951 Convention relating to the Status of Refugees as affected by the 1967 Protocol relating to the Status of Refugees (compendiously referred to here as "the Convention"). That article concerns the status of Palestinian refugees. The Respondent is a stateless

Palestinian. To avoid confusion I propose to refer to the Respondent hereafter as "the applicant".

2 The appeal is a troubling one. Not the least difficult aspect of the appeal is the fact that the Tribunal has made at least one finding of fact concerning the situation in Palestine at the time the Convention was first signed in 1951 that is simply incorrect. I would not blame the Tribunal for this. It seems quite likely that the Tribunal was provided with inadequate assistance in that the material placed before it on the situation in Palestine was, it would seem, meagre. This Court on the appeal required the legal advisers of the parties to produce to it all relevant material including, although not limited to, the traveaux preparatoires and relevant legal writings. It took a considerable amount of time and effort to obtain these materials and I would like to express my gratitude to counsel and the advisors to the parties for the assistance given to the Court. It should be put on record that counsel for the applicant appeared pro bono and devoted much time to the preparation of detailed submissions as did counsel for the Minister. The Court and indeed the community owe a considerable debt to those who, without payment, give of their time and knowledge to argue cases that are often of considerable complexity. Too frequently the assistance given to the Court by pro bono counsel is overlooked.

3 In the result the Court has had the advantage of reading material which throws considerable light upon the proper construction of Article 1(D). Indeed, as will be seen, it is not possible to understand Article 1(D) without an understanding of the circumstances which existed in 1951. But the appeal throws up the question whether the Court has power in judicial review proceedings to deal adequately with the questions posed for decision where the Tribunal has made findings of background facts which are wrong.

4 I shall discuss in more detail later whether the Court has, in circumstances such as the present, the ability to consider the questions which arise in the present case by reference to the true facts rather than facts which have been stated by the Tribunal, but which are wrong. What this points up, however, is the difficulty that arises where a Tribunal not being a court in the constitutional sense is empowered to make findings of fact which may be in controversy between the parties and which findings of fact are final and conclusive. There is a real question (it was not argued here, so I refrain from commenting upon it) whether a Tribunal which is empowered to settle factual controversies between the State and a subject exercises the judicial power of the Commonwealth.

5 It should be remarked that the Tribunal's decision was given before the amendments to the *Migration Act 1958* (Cth) in October 2001 took effect. In consequence the Court does not have to consider the impact those amendments would have if the Tribunal's decision had been a privative clause decision which was final and conclusive. Rather the jurisdiction of the Court is judicial review, limited to a consideration of the grounds set out in s 476 of the *Migration Act 1958*.

6 The present appeal was heard by this full Court in the course of a week in which four other appeals each involving the interpretation of Article 1(D) were heard. The facts in the other cases do, however, differ from those in the present appeal. I propose to deliver separate judgments in each of the other appeals. However in so doing I will not repeat the discussion on the interpretation of Article 1(D) contained in the present reasons, but merely refer back to the present reasons for decision.

The Relevant Provisions of the Convention

7 It is a criterion for the grant to an applicant of a protection visa that the applicant be a person to whom Australia has protection obligations. Generally, it may be said that Australia will have protection obligations to a person who is a "refugee" within the meaning of the Convention. The Tribunal found, and that finding is not attacked, that the applicant was a person who came within the definition of the term "refugee" in Article 1(A)(2) of the Convention. Relevantly, Article 1(A) of the Convention provides:

"1A. For the purposes of the present Convention, the term 'refugee' shall apply to any 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 as a result of such events, 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."

8 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 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."

The factual findings of the Tribunal

9 The applicant was born in Damascus, Syria, on 18 March 1963. He and his family had been recognised as Palestinian Refugees and registered as such with UNRWA (The United Nations Relief and Works Agency for Palestinian Refugees in the Near East) to which reference in some detail will later be made. His parents had been born in Palestine and held Palestinian nationality until they were forced to flee to Syria in 1948. The family received assistance from UNRWA until 1975.

10 The Applicant claimed that he had become involved in Palestinian politics when a student. He claimed that he had been persecuted in Syria on account of his political opinions. He ultimately left Syria illegally and came to Australia. The detail of what happened in Syria is not presently relevant. It suffices to say that the Tribunal was satisfied that the applicant had a well-founded fear of persecution so as to satisfy the definition of "refugee" in Article 1(A)(2) of the Convention. The Tribunal also found that the applicant and his family were not excluded from consideration under the Convention by reasons of Article 1(D). It is that latter finding which is at the heart of the present appeal. The Tribunal's reasons for concluding that Article 1(D) did not preclude the respondent being given the protection available to other persons who were encompassed by the definition of "refugee" is to be found in the following extract from the Tribunal's reasons:

"The Tribunalhas (sic) 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 (sic). Opinions vary as to how this fifty year old exclusion clause works now that UNWRA (sic) quite clearly is unable to fulfil 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."

11 It will be noted that in the passage quoted the Tribunal found (and prima facie at least the findings are findings of fact) first that UNRWA was an agency which had an original function of providing protection (and inferentially assistance) to Palestinian refugees and secondly that the applicant, at least, no longer received assistance from it. The second of these findings is clearly correct. However, as we will see, UNRWA never had a function of providing protection to Palestinians. It did, however, have a function of providing assistance. That is a significant matter to which I will return.

12 The Minister then appealed to the Court. The learned primary Judge held that Article 1(D) should be read as referring to those who were, in a generic sense, refugees viz a viz Israel. The Article did not, in his Honour's view, extend to Palestinians who were at risk of persecution for a Convention reason if returned to their home region, in this case, Syria, whether or not that region was within the territorial competence of UNRWA. His Honour noted that the Tribunal had found that UNRWA was quite clearly unable to fulfil one of its original functions of providing protection. His Honour expressed the view, consistent with the view put by Professor Hathaway that the wholesale exclusion of all Palestinian refugees was inconsistent with a commitment to a truly universal protection system for refugees. Article 1(D) was not, in his Honour's view, intended to and did not apply to a case such as the case before him. His Honour dismissed the Minister's application to the Court

13 The Minister then appealed to the full Court.

The applicable principles of interpretation.

14 There is no dispute as to the applicable principles to be adopted in interpreting the Convention and those rules apply, notwithstanding that the Convention relevantly is incorporated into the *Migration Act*, being domestic legislation. These are set out in the judgment of McHugh J in *Applicant A v Minister for Immigration and Ethic Affairs* (1996-7) 190 CLR 225 at 239-

240. As his Honour there points out and by reference to Article 31 of the Vienna Convention on the Law of Treaties 1969 which sets out the general rule, the starting point is the text of the treaty. Article 31 declares:

"(1) 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 the light of its objects and purpose.

…"

15 The effect of Article 31 was recently stated by the full Court of the High Court, Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, in *Morrison v Peacock* [2002] HCA 44 at [16] to be:

"that, although primacy must be given to the written text of the … Convention, the context, objects and purpose of the treaty must also be considered. The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However, treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation."

16 Hence, technical principles of common law construction are to be disregarded. Rather interpretation is to proceed on broad principles of general acceptation (see per Lord Wilberforce in *Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152). Context, object and purpose will all be relevant. A literal construction which would defeat the object and purpose of the Treaty is to be eschewed. In cases such as the present the context may need recourse to be had to the history which led up to the ratification of the Treaty and its coming into effect. And, it may be added, if any provision of a Treaty arose as a result of compromise, it was Article 1(D) of the Convention.

17 It is accepted that in the interpretation of Treaties regard may be had to the traveaux preparatoires – including the debates of delegates charged with the drafting of a Treaty. They are what Article 32 of the Vienna Convention describes as "supplementary means of interpretation".

The construction of Article 1(D)

18 Almost every element of Article 1(D) is pregnant with ambiguity. So much is apparent, not only from the different views which have been expressed by Judges of this Court at first instance, but also from the different approaches that have been adopted in Courts or Tribunals around the world. These different international approaches are summarised in the amicus curiae brief with which we have been provided and which was prepared by Associate Professor Akram of the Boston University School of Law and Professor Goodwin-Gill, Professor of International Refugee Law and Rubin Director of Research at Wolfson College of the University of Oxford in connection with an appeal before the Board of Immigration Appeals in Falls Church, Virginia. There is also a useful discussion of some of the international

material by Takkenberg in "*The Status of Palestinian Refugees in International Law"*, Clarendon Press, 1998. The divergent views in Australia are sufficiently illustrated by judgments in this country, including that of the learned primary Judge in the present case.

19 An interpretation of the Article different to that taken by the learned primary Judge was favoured by Heerey J in *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2001] FCA 825. In that case his Honour held that Article 1(D) applied to present day Palestinians so long as they were entitled to protection and assistance from UNRWA, whether or not actually receiving those benefits. Further the Article excluded not only those living in Palestine but those who had left and who sought asylum abroad. His Honour's decision was appealed from but the Court on appeal did not find it necessary to consider the correctness of his Honour's interpretation of Article 1(D).

20 Carr J in three decisions, *Kouraim v Minister for Immigration and Multicultural Affairs* [2001] FCA 1824, *Jaber v Minister for Immigration and Multicultural Affairs* [2001] FCA 1878 and *Al-Khateeb v Minister for Immigration and Multicultural Affairs* [2002] FCA 7 adopted a different interpretation. His Honour made the following points:

1. The words "*are at present receiving"* referred to persons currently receiving and did not refer back to the date of signing the Convention or its coming into operation.
2. The word "or" in the phrase "protection or assistance" should be read as "and" so that a Palestinian receiving assistance but not protection would not be excluded from the Convention by Article 1(D).
3. The word "receiving" should, as Heerey J had held, be construed to mean, "entitled to receive".
4. The second paragraph of Article 1(D) should be construed so that so long as a person had ceased to receive the protection and assistance of UNRWA, even by the act of removing himself or herself from the Middle East and seeking asylum in Australia that person would be entitled to qualify as a refugee under the Convention.
5. That the words "*ipso facto"* did not have the consequence that a person falling within the second paragraph of Article 1(D) automatically qualified as a refugee under the Convention and so was a person to whom Australia owed protection obligations. Rather the Article should be construed as meaning that the person thereafter was entitled to be considered under the Convention for protection and, provided that he or she qualified as a refugee, was a person to whom Australia owed protection obligations.

The historical background to Article 1(D)

21 It is not possible to construe Article 1(D) without reference to what may be referred to as "the Palestinian question", the approach of the United Nations to it and the debates at the time the Convention was being formulated.

22 The establishment of the State of Israel in 1948 and with it the cessation of the British Mandate on Palestine, operated to bring dislocation to the Arab Palestinians. At first an outbreak of civil and guerrilla warfare brought with it a flight from the countryside and villages. Later there began an organised expulsion of Arab communities. Count Folke Bernadotte, the United Nations Mediator, reported that almost the whole of the Arab population fled or was expelled from the area under Jewish occupation so that the demographic face of Palestine was changed forever. Arab villages and towns were destroyed. Arab lands were settled by Jewish farmers or kibbutzim. The former inhabitants were prevented from returning and denied citizenship retrospectively from the day of the establishment of the State of Israel.

23 The General Assembly of the United Nations had reacted to the situation by appointing in May 1948 a Mediator (Resolution 186 (S-2)) in an endeavour to find a peaceful solution to the Palestinian problem. The mediator was empowered to arrange for services necessary to the safety and well being of the population of Palestine. He was assassinated. However, his or his successor's recommendations led to the formation in December 1948 of a Conciliation Committee (United Nations Conciliation Committee for Palestine – UNCCP) by resolution of the General Assembly (Resolution 194(III)). That Committee, which was to consist of three member States had a number of functions, which included negotiations with a view to a final settlement of the problem, the protection of Holy Places and access to them, United Nations control of parts of Jerusalem, free access to Jerusalem by road, rail or air to all Palestinian inhabitants, the demilitarisation of Jerusalem at the earliest date, the formulation of proposals for a special international status for Jerusalem, the facilitation of economic development of the area, including arrangements for access to ports, airfields, transportation and communication facilities, assistance to refugees who wished to return home with compensation for those choosing not to and the resettlement and economic and social rehabilitation of refugees. In the broadest sense it may be said that UNCCP provided protection to Palestinian Refugees, at least in the significant areas of repatriation, resettlement and the proposal for the demilitarisation of and international status for Jerusalem. The fact that the Charter of UNCCP required that the agency provide compensation to those not wishing to resettle could be said, also, to be a form of assistance.

24 Paragraph 11 of the 1948 Resolution, specified that those refugees who wished to return to their homes and live in peace should be permitted to do so at the earliest possible time. As noted above, those choosing not to were to be entitled to compensation from the governments responsible. To this end the Commission was to maintain close relations with the Director of the United Nations Relief for Palestinian Refugees and other appropriate agencies of the United Nations.

25 In December 1950 the General Assembly by Resolution 394(V) inter alia directed UNCCP to continue consultations concerning measure for the protection of the rights, property and interest of the Palestinian Refugees. The Progress Report of UNCCP to the General Assembly of the United Nations dated 2 September 1950 gives a general summary of the work engaged in to

that date. Certainly as the name of the Commission would suggest one of its functions was an attempt to conciliate between the parties to find a final solution to the Palestinian problem. In this, as we now know, the Commission was unsuccessful. On the question of refugees the Commission promoted discussions with both Israel and the Arab States as well as representatives of the refugees concerning, inter alia, what steps might be taken to safeguard their rights and property. The Commission also proposed the signing of a declaration by relevant states dealing with the refugee problem; reserving a final solution. In this it was likewise unsuccessful. It set up an Economic Survey Mission charged with examining the economic situation in the countries which had been affected by the hostilities. That committee, among other things, recommended the creation of what became UNRWA. The two bodies were directed to consult and appear to have worked together closely.

26 The General Assembly received the 1950 progress report and directed the Commission, inter alia to continue consultations with the relevant parties to the dispute regarding measures for the protection of the rights, property and interests of the refugees.

27 UNCCP appears to have reported thereafter annually to the General Assembly. However, it seems that by 1964 it had become inactive. Notwithstanding its inactivity UNCCP was never formally abolished. It continues to this day to report annually on its lack of progress. However, on any view of the matter any attempt by UNCCP at providing protection to Palestinian refugees had clearly ceased by 1964.

28 Also in November 1948 the General Assembly set up a special relief fund involving the Red Cross and other non-governmental agencies under the name United Nations Relief for Palestine Refugees (UNDRP) to provide humanitarian relief for Palestinian Refugees. This relief fund replaced an earlier Disaster Relief programme. UNDRP carried out relief operations, such as the provision of emergency shelters and improvised schooling until August 1949. It does not appear to have continued thereafter.

29 In December 8, 1949 the General Assembly established the United Nations Relief and Works Agency for Palestinian Refugees in the Near East, UNRWA at the suggestion of UNCCP. Its mandate as set out in Resolution 302(IV) was essentially one of providing assistance to Palestinian refugees by providing direct relief and by establishing a works program to be recommended by the Economic Survey Mission. Contrary to what was suggested by the learned primary Judge in his reasons for decision in the present appeal, at no time was UNRWA charged with providing protection to Palestinian Refugees. If any agency was charged with providing protection it was UNCCP.

30 The Resolution establishing UNRWA did not define the persons eligible for the benefits which UNRWA was to provide. Indeed it seems that at no time did the General Assembly of the United Nations do so. The body itself produced a definition which it included in reports to the General Assembly and, to the extent that no comment appears to have been made by the General

Assembly concerning that definition it may be said that it was tacitly approved. As presently constituted UNRWA defines those eligible for aid to be 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.

31 A lack of funds was a problem for UNRWA just as it was for UNCCP. In 1949 it was feared that the funds available to UNWRA might not last through the winter. The report of the Economic Survey Mission of that year indeed recommended a stringent cut in relief. Nevertheless UNRWA continued to operate and indeed still operates today. In a bulletin issued on 17 February 2000 the Secretary General of the United Nations noted that UNWRA provided relief and works programmes to more than 3.6 million Refugees through headquarters in Gaza and Amman and field offices located in the West Bank, the Gaza Strip, Jordan, Lebanon and Syria. The latest report available to the Court which bears the date 25 September 2001 contained a complaint that funding had been inadequate since 1950 but nevertheless demonstrates that UNWRA still operates quite extensive programmes of assistance to Palestinian refugees.

32 Also in December 1949 by Resolution 319A(IV) the General Assembly of the United Nations moved to establish the United Nations High Commissioner for Refugees (UNHCR). The text of the UNHCR statute was adopted approximately six months earlier than the 1951 Convention relating to Refugees. UNHCR was authorised, inter alia, to provide for the protection of refugees and displaced persons falling under its competence, to improve the situation of refugees and distribute among private or official agencies assistance and funds received for the purpose. Paragraph 7 of the UNHCR statute in its present form provides:

"the competence of the High Commissioner … shall not extend to a person:

…

(c) Who continues to receive from other organs or agencies of the United Nations protection or assistance…"

33 Hence, a person who was in actual receipt of assistance from UNWRA would be outside the jurisdictional competence of UNHCR and it would not matter that that person had at some earlier time received protection but that protection had ceased.

The development of a Convention on refugees

34 The first United Nations resolution concerning the status of refugees was adopted in 1946, although it was not until 1951 that the final draft of a Convention on the status of refugees was ready for ratification.

35 The Economic and Social Council of the United Nations appointed on 8 August 1949 (Resolution 248B (IX)) an ad hoc committee on Statelessness and Related Problems to consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and a Convention concerning stateless persons and if considered desirable to draft a text for such conventions. That committee met on 16 January 1950 and drew up a draft convention on refugees which was submitted to the Council at its eleventh session. The Council also considered and adopted a draft statute for UNHCR. As already noted the draft UNHCR statute provided that the persons falling within the competence of UNHCR were to be the persons defined in Article 1 of the Convention relating to the Status of Refugees as approved by the General Assembly.

36 The work of drafting the Convention on refugees and the UNHCR statute continued throughout 1951. They were debated together, although the UNHCR Statute was adopted some months earlier than the Convention. Ultimately the Convention relating to the status of refugees was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951 although it did not come into force until 21 April 1954 following ratification.

37 Among the many matters considered in the process of drafting the Convention was the question who was to fall within the general definition of refugee. It is not surprising that the article which defined the term “refugee” occupied more time in debate than any other Article.

38 The draft which had been prepared for debate limited the concept of “refugee” to persons who became such as a result of events occurring before 1 January 1951. It was not until the subsequent Protocol of 1967 that the limitation to pre-January 1951 events was removed. Another limitation which was discussed, but not ultimately adopted was that the definition of refugee be confined to persons who were “in Europe”. The words “in Europe” were deleted at the very last minute despite arguments to the contrary from France.

39 The French representative also argued that the United Nations High Commissioner for Refugees should likewise not be automatically involved in dealing with refugees outside Europe, a result which would follow if the term refugee were given a wide definition and the definition contained no geographical limit. He pointed to the fact that there were already two bodies (presumably UNCCP and UNRWA) which had been set up to deal with relief questions and conciliation or, in other words, that the United Nations had already delegated its powers to deal with the Palestinian problem to agencies other than UNHCR. Some several days latter a joint Arab delegation proposed the addition of a paragraph C to the UNHCR statute as follows:

"The mandate of the High Commissioner's Office shall not extend to categories of refugees at present placed under the competence of other organs or agencies of the United Nations."

40 The explanation for this limitation was said to be that while the situation of refugees generally was one in respect of which the United Nations had only a moral responsibility, that situation being derived as a result of acts taken contrary to the principles of the United Nations, the situation of Palestinian refugees had been brought about directly by decisions of the United Nations itself. Hence the United Nations should take direct responsibility for the Palestinian refugees, rather than that the responsibility should be placed at the feet of the world community. However, another explanation was given by the representative of Saudi Arabia, namely that if UNHCR were to take over responsibility of Palestinian refugees as well as all other refugees the Palestinian refugees would become "submerged and would be relegated to a position of minor importance." For the Arab world the only solution to the Palestinian problem was repatriation. The treatment of Palestinian refugees in the same way as all other refugees would effectively be to renounce repatriation as the solution.

41 In consequence the Arab delegation insisted that Palestinian refugees should continue to be given a "separate and special status" until a proper settlement was reached between the Arabs and Israel.

42 Ultimately the working group prepared two draft definitions, the one for the UNHCR statute and the other for the draft refugee Convention. For whatever reason there was a slight difference in language, although it is difficult to see how that difference could be significant. The exclusion from the jurisdictional competence of UNHCR was framed in terms of the persons who "continue to receive protection or assistance" from United Nations agencies. The exclusion from the definition of "refugee" in the draft convention was framed in terms of persons "at present in receipt of protection or assistance".

43 The draft article, which was ultimately to be numbered Article 1(D) was thus at this stage in the following terms:

"This Convention shall not apply to persons who are at present receiving from other organs or agencies of the United Nations protection or assistance"

44 Particularly active in the debate concerning the applicability of the Convention to Palestinian refugees were France on the one hand and Egypt, the latter representing the Arab nations, on the other. Egypt pointed out the necessity that the Article provide for what was to happen if the protection or assistance of which it spoke ceased without there having been a resolution of the Palestinian problem. It suggested the addition of a new sub-paragraph in virtually identical terms to the present second paragraph of Article 1(D), save that whereas the present paragraph provides that "these persons shall ipso

facto be entitled to the benefit**s** of this Convention" (emphasis added) the proposed amendment read "they shall ipso facto be entitled to the benefit of this Convention". The change from singular to plural appears to have been the work of a style committee and again it is difficult to see how the change had any significant effect on the meaning to be given to the paragraph.

45 The Commission of the Churches on International Affairs, a non-governmental organisation made the suggestion that it would be unfair if persons who were "at present" (which the Commission read as meaning as at the date of ratification) receiving assistance or protection from what might be a temporary agency were permanently excluded from consideration under the Treaty when their status as refugees might continue. The exclusion should, it said, only be coincidental with the period of assistance and protection. More importantly, the Commission suggested that material assistance was not of itself a guarantee of protection and that the draft should, accordingly be amended to read "assistance and protection" rather than "assistance or protection". The recommendation was not, however, accepted. It is possible to deduce from the fact that the recommendation was not accepted that the use of the alternative "or" was deliberate and that the conjunctive "and" was not what the draft intended. It is also possible to deduce from the suggestion that it was the understanding of the Commission, at least, that there were, or at least were expected to be at the time of ratification United Nations Agencies which provided both assistance and protection. Since UNRWA only ever provided assistance and not protection it can readily be inferred that the Commission had in mind UNCCP as the agency which provided some protection. The fact that no other representative made any comment may, likewise, lead to the conclusion that other delegates than the representative of the Commission took a similar view.

46 Action initiated by Egypt at the Fifth Session of the General Assembly resulted in Arab Refugees from Palestine being excluded from the mandate of the High Commissioner for Refugees. The explanation for the exclusion appears to be the same as the explanation for the exclusion of Palestinian refugees at least temporarily from the draft Convention.

47 But it was not merely the Arab States who resisted the inclusion of Palestinian Refugees into the Treaty. A French representative is quoted as having said:

"…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."

48 The American representative warned that the inclusion of Palestinians in the Treaty would reduce the number of European States which would sign the Convention.

49 In the result the compromise was that Palestinian Refugees were to be left as the responsibility of the United Nations.

50 However, at this stage in the Convention debates the draft clause meant that there was a permanent exclusion from the Treaty of Palestinian refugees being referred to as *"persons who are at present receiving from other organs or agencies of the United Nations protection or assistance."* The permanency of the exclusion of Palestinian refugees from the Convention was pointed out by the Egyptian delegate. He noted that the consequence of adopting the draft in that form would be Palestinians would be left completely without aid or protection if the United Nations Agency were to cease operations. He proposed an amendment, the effect of which was noted by the French delegate to be *"to make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function would* automatically *come within the scope of the Convention."* It may be noted that the delegate did not refer to a single agency, but referred to agencies in the plural.

51 One other matter that comes out of the Convention debates and may have some significance is the question of the arrangement of Articles 1(A) to 1(E). After Article 1(A) had been adopted in its Second Reading a number of delegates, including the representatives of Israel and the United Kingdom as well as the President of the Conference raised the question whether the various paragraphs of Article 1 followed in a logical order. It was suggested that Article 1C which deals with the Convention ceasing to apply in a particular case should logically have followed the exclusionary provisions, that is to say, Article 1(D) and Article 1E rather than that the cessation provision precede the exclusionary provision. This debate at least suggested that those who raised the matter saw Article 1(D) not as providing a separate test of qualification as a refugee and thus replacing, in the case to which it applied, Article 1(A) but as a carving out of an exception to the case which would fall into Article 1(A). The suggestion was not adopted. In any event it may be said against the suggestion that it would be inappropriate to refer to Article 1(D) as merely exclusionary when that exclusion was only temporary.

The Views of Commentators on the Interpretation of Article 1(D)

52 It is not surprising that learned commentators have taken different views on the various problems which Article 1(D) reveals.

53 Grahl-Madsen deals with Article 1(D) in Part 65 of Volume 1 of his work "*The Status of Refugees in International Law"* 1966 at pp 140-142. He notes that at the time the Convention was signed there were two organs or agencies of the United Nations other than UNHCR which provided assistance or protection to international refugees being the International Refugee Organisation (IRO) and UNRWA and says that these were the two organs or agencies which those who drafted the Convention had in mind. He notes that it was then a well-known fact that IRO was likely to have ceased to exist by the time the Convention came into force. He makes no reference to UNCCP in this or any other context. In fact IRO did cease to exist before ratification of the Convention.

54 The learned author's discussion centres on the question whether the words "ipso facto" as appearing in the second paragraph had the effect that no further screening was required with the consequence that when the second paragraph applied, those affected by it, were automatically to be granted the protection under the Convention afforded to refugees. The alternate view was that those affected by it had to satisfy the criteria applicable to all refugees under the definition in Article 1(A)(2). He cites other authors as supporting the first view, which it would seem, he also shared.

55 Hathaway in his work "The Law of Refugee Status" 1991 deals only briefly with Article 1(D) at pp 205-209. He suggests at p 207 that the relevant date signified by the words "at present" should be taken to be the date of entry into force of the Convention, citing in support of this view a statement of the English representative Mr Hoare. However, he appears to accept the view of Grahl-Madsen that Article 1(D) extended as well to exclude from the Convention, but subject to the operation of the second paragraph, all persons who were born after the Convention came into effect and who came within the mandate of UNRWA. The learned author appears to consider that the only United Nations organ or agency relevant to the discussion of Article 1(D) was UNRWA, although he notes that it did not provide protection, with the result that Palestinians, because they were excluded from the benefits of the Convention, became the only people at the time who received no protection at all. The discussion appears to accept that the exclusion from the Convention continued, whether or not a person who had been within the mandate of UNRWA had applied for asylum elsewhere. That is to say it is Hathaway's view the words "cease to be entitled" did not have the consequence that a person who had been receiving assistance ceased to do so if that person, for whatever reasons, left the zone in which UNRWA operated. However, the learned author cites to the contrary both Grahl-Madsen and Goodwin-Gill. Finally, it may be noted that it is unclear whether Professor Hathaway regards the situation to be that once the second paragraph of Article 1(D) was triggered the person automatically was to be treated as a refugee, or is of the view that the person merely became eligible for consideration as such.

56 The Handbook of the UNHCR, Geneva, 1992 suggests that it is the date of application of the Article to a particular case which is the relevant date suggested by the words "at present". The Handbook rejects the view that voluntary departure from the area of protection or assistance triggers the application of the second paragraph of Article 1(D). It takes the view, however, that Palestinian refugees not receiving assistance or protection do not automatically become refugees, but rather that they then have to satisfy the test of refugee status in Article 1(D) (ie they must go through a screening process).

57 Professor Goodwin-Gill deals only briefly with Article 1(D) in the second edition of his work "*The Refugee in International Law"* 1996 in Chapter 3. He appears to consider only UNRWA as the relevant United Nations Organisation. He says that no international agency was charged with providing protection, although he does add, that UNCCP had been entrusted with elements of protection. He notes, and is the only commentator who does

so, that Article 1(D) on the one hand premises exclusion from the Convention upon the continuing receipt of either assistance or protection while premising entitlement to benefits under the Convention as being the cessation of protection *or* assistance. On his interpretation Palestinian refugees who left the UNRWA area of operations, being no longer in receipt of assistance would, by that fact alone fall within the Convention. However, he notes that such an interpretation was resisted by States despite what he suggests is the clear intent of its terms.

58 The view which Professor Goodwin-Gill propounds in his book is expanded upon in his amicus curiae brief, written with Associate Professor Akram, to which reference was earlier made. In that document, which is clearly an advocacy document, he expresses the view that the first paragraph of Article 1(D) refers to the class of persons who came within the Palestinian mandate of UNRWA, that is to say, all Palestinians who became refugees as a result of the 1948 war and their descendants. Inferentially, by including descendants and accepting that the Article refers to a class of persons Professor Goodwin-Gill can not be accepting the view that the words "at present" relate to a specific point of time, whether that be the time of signing or the time the Convention came into effect. He suggests that the word "or" as it appears in the second paragraph makes it clear that those persons who are not receiving either protection or assistance are to receive the protection of the Treaty. Further he expresses the view that the second paragraph of the Article comes into operation not only if UNRWA ceases to function but also if a particular Palestinian leaves the area where assistance is provided by UNRWA of his or her own volition. Finally he asserts that the effect of the words "ipso facto" is that the person automatically becomes without further screening a refugee and so entitled to the benefits of the treaty.

59 Takkenberg, who was formerly an officer of UNRWA, is the author of a work *"The Status of Palestinian Refugees in International Law"* which, as its name suggest, is concerned wholly with the Palestinian refugee question and which contains a chapter on the 1951 Convention and its interpretation (Chapter III). He suggests there that Article 1(D) refers to the class of persons falling under the mandate of UNRWA, and that it is irrelevant that a particular person actually receives assistance from that organisation. Although he deals in the work with the history of the Convention and both UNCCP and UNRWA he appears to consider that UNCCP is not relevant to Article 1(D). He does not explain why. He takes the view that the Second Paragraph of the Article would be triggered where a Palestinian under the mandate of UNRWA voluntarily leaves the area where the mandate operates, although only where the Palestinian is then unable to return. Otherwise he is of the view that mere voluntary departure would not trigger the second paragraph of the Article. It is hard to see how this distinction can be made on the language of the Article.

International Interpretations

60 There is a useful summary of the way the Palestinian refugee problem is dealt with in other countries in the amicus curiae brief of which Professor Goodwin-Gill was a co-author from which, in the main, the following

observations have been taken. There is also a summary of the situation in Mr Takkenberg's book.

61 First, it is significant to note that neither in the United States of America or in Canada where the substantive parts of the Convention have been enacted as municipal law, was Article 1(D) made part of the law to be applied. This may imply either that these countries regarded the operation of Article 1(D) as spent or that they wished to enact legislation which would give protection to Palestinian refugees and thus to treat Palestinian Refugees in the same way as refugees from other countries. It is impossible to discover the reason.

62 It would appear that Austria and Switzerland also consider requests for refugee status from Palestinians under the tests of Article 1(A) of the Convention.

63 As Professor Goodwin-Gill in the amicus curiae brief notes there have been a number of states which have interpreted the second paragraph of Article 1(D) as only operating if UNRWA ceased to function without resolution of the Palestinian problem. He refers to a decision of the highest administrative court of the Netherlands (Afdeling Rechtspraak, Raad van State of 6 August 1987) which had decided that a Palestinian refugee who had left UNRWA's mandate area was not ipso facto entitled to the benefit of the Convention. He refers also to a decision of the Refugee Status Appeals Authority in New Zealand (Refugee Appeal No 1/92 Re SA – 30 April 1992) to the same effect.

64 Reference is also made to a decision of the Australian Refugee Review Tribunal (BV96/04744 of 12 February 1997) which had reviewed a decision of what is said to be the Refugee Status Appeals Authority which had held that the ipso facto provision only applied where UNRWA assistance had ceased to operate at all. However, it seems that the Tribunal found that Article 1(D) did not exclude the grant of refugee status to a Palestinian who had voluntarily left an area of UNRWA assistance so long as that person met the test in Article 1(A)(2).

65 Professor Goodwin-Gill reports that in Denmark it had been held that the first paragraph of Article 1(D) only applied to Palestinian refugees who lived in UNRWA's mandate area. For Palestinians elsewhere UNRWA's assistance was treated as having ceased and hence those persons could seek to qualify as refugees under Article 1(A)(2). However, it is said that this interpretation changed in 1990.

66 Reference is made also to a decision of the German Federal Administrative Court of 4 June 1991, which is referred to also by Takkenberg. The Tribunal said, as translated by Takkenberg at p 111:

"In particular, considerations with regard to a specific refugee problem extant at the time when the 1951 Convention was drafted as well as those considerations related to its envisioned solution, do not change the fact, however, that article 1D of the 1951

Convention in accordance with its terms and in the light of its object and purpose intends to assure any individual Palestinian refugee of aid, as long as a permanent settlement in accordance with the resolutions of the United Nations has not materialized, either in the form of protection or assistance from the organ or agency of the United Nations assigned with this task, or by enjoying the benefits laid down in the 1951 Convention from the states parties. In view of the humanitarian objective of the Convention, protection or assistance may, therefore, have ceased for the purpose of article 1D in respect of an individual whilst the organ or agency of the United Nations continues to provide protection or assistance to the category of persons to whom that individual belongs, either collectively or in the state of his former habitual residence…"

67 However it seems that in 1992 in a decision of 21 January 1992 published in InfAus1R 7/92 the same Court took an opposite view and held that the protection or assistance from UNRWA had not ceased when the applicant had voluntarily left the area of UNRWA mandate, whether or not permitted to return.

The Interpretation of Article 1(D) which I favour.

68 It is clear both from the review of the text writers and from the case law, such as it is, which is summarised above, that opinions differ substantially as to the correct interpretation of Article 1(D). It is not without some diffidence that I state the conclusions to which I have come. In doing so I put aside, for the moment, the problem that the Tribunal in the present case found, clearly erroneously, that UNWRA was the United Nations Agency which provided both protection and assistance.

69 I propose to approach the question by setting out my conclusions in turn on each of the difficult expressions used in the Article.

1. "*persons receiving".* There are two possible interpretations. The first is that the Article is referring to individual persons, that is to say the Article looks at each potential person and asks if he or she is actually receiving assistance or protection. The alternative construction is that the Article is looking at a class of persons and that it speaks of the class of persons receiving assistance or protection. In my view the latter is the correct construction. It is not, in applying Article 1(D) relevant to consider whether a particular person is actually receiving assistance or protection. It suffices only to know whether that person is within the class of persons to which the first paragraph of the Article applies, that is to say the class of persons who are at present receiving assistance or protection from an organ or agency of the United Nations.

2. *"at present".* Again there are two possible interpretations. The first is that the Article speaks as at the time the Convention was signed or perhaps when it was ratified and came into operation. Nothing turns upon any difference between these two dates. The second is that the Article is intended to be ambulatory so that it speaks at the present time. There are two reasons which suggest that the former construction is correct. First the language of the

Article suggests that it is speaking as at the time the Convention comes into operation. But more importantly, any other construction would have the consequence that if, in some other part of the world, the United Nations were to set up agencies providing assistance or protection those persons who then received protection or assistance would be excluded from the Convention. I think the history of the Convention makes it clear that Article 1(D) was intended to apply to a particular situation, namely that of the Palestinian refugee. It was not intended to operate automatically in some other situation not foreseeable where questions of United Nations responsibility and the political dynamic might be quite different. Further, clearly Article 1(D) was seen to be a temporary measure, operating to exclude Palestinian refugees from the Convention until a permanent solution to the Palestinian question was achieved. It is hardly likely that the delegates to the Convention ever contemplated that an international solution to the Palestinian problem would be so intractable.

I am of the view, however, that the Article was not intended to fix the class of persons as those who as at the relevant day when the Convention became operative were living. The words do no more than describe a class or community of persons. So long as such a class of persons continued to exist the provisions of Article 1(D) would continue to have operation.

3. *"receiving".* Again there are two possible views. The one, adopted by Heerey J in *Abou*-Loughod (supra) is to construe the word "receiving" as meaning "entitled to receive". The other is to construe the word "receiving" as meaning "in receipt". Once it is accepted that it is a class of persons which is being considered, where not every member of the class will actually be receiving either assistance or protection, the difference between the two views is not really significant. However, I am of the view that the word "receiving" should be read in its ordinary grammatical sense and not as meaning "entitled to receive."

4. *"protection or assistance".* There is a question whether the word "or" should, as Heerey J suggested, be construed as "and" or whether it really is intended to express a true alternative. As I have earlier pointed out in these reasons the Convention debates support, at least to some extent, the use of the word "or" as deliberate if only because a proposal to amend the clause by changing "or" to "and" was not adopted. In my view the Article should be construed as it reads, namely that assistance and protection are alternatives.

The question whether the word "or" was intended to refer to true alternatives is tied up with the question whether at the time the Convention was debated, or at least at the time it was ratified there was one or more agencies of the United Nations which provided both protection and assistance. As the earlier

discussion makes clear at the time the Convention was being drafted there were three agencies which need to be considered. First, there was IRO which was, while the Convention was being debated, expected shortly to go out of existence and which had, by the time the debates concluded, ceased to exist. Secondly, there was UNRWA which clearly provided assistance and which still provides assistance to Palestinians. UNRWA never provided protection to anyone, nor did its Charter authorise it to do so. Thirdly, there was UNCCP. That agency's Charter mandated it to seek a solution to the Palestinian problem through conciliation but also mandated it to provide an element of protection to Palestinians.

What is not easy to deduce from the UNCCP reports, prior to its slide into inactivity, is whether it ever actually embarked upon that part of its mandate expressly referred to as "protection". It may be that the reason text book writers have generally omitted reference to UNCCP is that they formed the view that it never embarked upon a protection function with the consequence that there was never a class of persons who received protection from it. Not only is UNCCP not referred to by text writers discussing Article 1(D) as providing protection, but also such case law on the Article as there has been in Germany and New Zealand discussed by Takkenberg in his Third Chapter at pp 93-4 (Germany) and at p 101 fn 62 (New Zealand) likewise omits reference to it and proceeds on the basis that the only relevant United Nations Agency is UNWRA which provided assistance. I think it is clear that those who framed the Convention intended the reference to protection to be a reference to UNCCP. What is not so clear is whether it was thought that such activities as UNCCP in fact performed were sufficient to constitute the provision of protection or whether, as is also a possibility, the use of the alternative "or" covered the situation which would arise if there was at the time of ratification no agency providing protection.

I do not think that this question, which clearly involves an issue of fact is a matter upon which this Court can rule in proceedings for judicial review. I shall return to that matter later.

5. The second paragraph: *"protection or assistance ceased*". The difficulty with construing the words "protection or assistance ceased" is linked with the discussion above as to whether any agency in fact provided assistance at the time the Convention was ratified. If no agency provided protection at the time of ratification of the Treaty, then not only would the alternative of protection or assistance be understandable, but it would also follow that there would be no agency which had provided protection but which ceased to do so. On this view of the matter, the benefits of the Convention would not be available to Palestinians unless either there was a final solution to the Palestinian problem or UNWRA ceased to provide assistance. The applicant would then fail. If on the other hand, UNCCP did provide protection at the time of ratification of the Treaty and UNWRA provided assistance as it did, then equally the alternatives of protection or assistance would make sense. If, for whatever reason other

than a final solution to the Palestinian problem, either UNCCP ceased to provide protection or UNWRA ceased to provide assistance so that no agency did, then the benefits of the Convention would thereafter apply to Palestinians. On this view of the matter the applicant, who satisfied the definition of "refugee" under Article 1(A)(2) would be entitled to succeed.

In other words, it is critical to a resolution of the present case to know whether UNCCP did or did not provide protection.

Other matters arising from the second paragraph of Article 1(D) are easier to solve. It is clear, I think, that like the first paragraph, the second paragraph is concerned not with individuals, but with the class of individuals. This is important because a construction which required the question of cessation of protection or assistance to be tested on an individual to individual basis would permit the argument to be made that the benefits of the Convention would become available to an individual once that individual moved from the area of operations of the relevant United Nations agency. In my view that argument cannot be made. The question posed by the second paragraph is, in my opinion, whether the relevant protection or assistance ceased in respect of the class of persons referred to in the first paragraph, not whether it ceased in respect of a particular individual.

In coming to this conclusion I have the misfortune to disagree with Professor Goodwin-Gill. There are a number of reasons for doing so. First, I think it is highly unlikely that the delegates to the Convention would have accepted the view that a Palestinian could bring himself or herself within the Convention simply by leaving the area of operation of UNWRA (assuming that to be the only relevant Agency and assistance the only relevant relief with which the Article is concerned). The European delegates seem to have been greatly concerned that there would be a flood of Palestinian refugees presenting themselves at their borders and seeking admission. Secondly, as a matter of language an agency can not properly be said to have ceased providing assistance merely because a person to whom its mandate originally extended voluntarily put himself or herself outside its sphere of operations. To adopt the language of Takkenberg at p 112, the aim of Article 1(D) was clearly not to provide a Palestinian refugee the option either to enjoy the special United Nations assistance referred to or to enjoy the benefits of the Convention. It is immaterial in the present case that Takkenberg distinguishes the case where the refugee voluntarily leaves the area of operations of UNRWA and applies for refugee status in a third country such as Australia, from the class of case where the person has voluntarily left UNRWA's area of operation and is unable to return to that area of operation because he or she is caught up in subsequent political developments.

In my view the assistance available from whatever the relevant agency may be can not be said to have ceased just because a person has voluntarily removed himself or herself from the areas where the agency operates.

6. "*ipso facto".* Again there are two arguments which can be put on the meaning of the words "ipso facto". However, whichever view may be accepted, that view does not affect the present applicant, since on either view he would be successful, so long as the second paragraph otherwise applied to him. One view is that once there has been a cessation of assistance or protection the Palestinian seeking protection will, without more, be a refugee and thus entitled to the benefits of the Convention. The alternative view, is that once there is the necessary cessation of assistance or protection the exclusion of the Palestinian from consideration under the Convention will cease and the Palestinian may then, and for the first time, fall within the Convention and can then be the subject of consideration or screening to test whether he or she is a refugee.

The historical material is, with respect to Takkenberg and Professor Goodwin-Gill, both of whom take the former view, quite ambiguous on the question. It is clear from the history of the Convention that the first paragraph of Article 1(D) operated to exclude temporarily Palestinian Refugees from the Convention. It may even be fair to adopt the word "suspension" in this connection in so far as it can be said that the benefits of the Treaty have been suspended while aid or protection was available from United Nations Agencies and there was no final solution to the Palestinian problem. However, it does not necessarily follow that the Palestinian automatically is a refugee.

It can be accepted that the Latin "ipso facto" conveys the meaning "by the very fact". That is the meaning attributed to it in the Shorter Oxford English Dictionary, 3rd edition. But the question is rather what, by the very fact of protection or assistance ceasing, is contemplated to happen. The answer which the second paragraph gives to the question is that the person becomes entitled to "the benefits" of the Convention. It is not that the person is deemed to be a refugee. The benefits of the Convention are those benefits, such as the non-expulsion provisions of Article 32 and the non-refoulement provisions of Article 33. But those benefits are available only to those persons who are refugees. They are not available to anyone else.

It may be said that one would reach this conclusion anyway as a matter of policy. Not all persons who were even in 1951 within the mandate of assistance to be provided by UNRWA would have had a well-founded fear of persecution for convention reasons, the criterion which was accepted by the Convention as marking out persons to be refugees. No doubt almost all would have been economically badly off. But not all would qualify as refugees as that word would have been understood by those drafting the Convention.

Does the Court have jurisdiction to find facts concerning UNCCP and UNWRA.

70 It can be accepted as trite law that in proceedings for judicial review the Court conducting the review is bound by the factual findings of the Tribunal, except, at least, where the making of the findings represented an error of law, for example where the fact finding was perverse. A wrong finding of fact is not an error of law: *Waterford v Commonwealth* (1987) 163 CLR 54 per Brennan J at 77; *R v District Court; Ex parte White* (1966) 116 CLR 644 per Menzies J at 654. Where the application is for judicial review of a decision of the Refugee Review Tribunal the only grounds of review are those set out in s 476 of the Act, with the consequence that s 476(e) restricts a review where there is an error of law only to such errors as involve either an incorrect interpretation of the applicable law, or an incorrect application of the law to the facts as found by the person who made the decision.

71 There is authority in the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 that an appeal court may look itself at factual matters where they are part of the general background necessary to the construction of an Act, that is to say, part of the factual matrix which needs to be considered in construing a statute. The case concerned the ability of the House of Lords to look at a report of a committee established to report on the law concerning reciprocal enforcement of foreign judgments as a prelude to the passing of the *Foreign Judgments (Reciprocal Enforcement) Act 1933*. It was held that the Court could do so for the report was evidence of the general factual and legal situation forming the background to the legislation, that is to say, the state of the law as it was believed to be. The actual decision in that case has been followed in Australia by the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 and in this Court in *Re Maurice's Application; Ex parte Attorney-General for the Northern Territory* (1987) 18 FCR 163 at 171 where Beaumont J commented that there was nothing novel in a Court considering the "matrix of facts" in construing a statute.

72 I do not doubt that it is open to this court in construing the Convention to have regard, for example, to the historical events which gave rise to the Palestinian refugee crisis or, for that matter, to evidence showing the existence of agencies of the United Nations which at or around the time the Convention was drafted and ratified provided protection or assistance to Palestinians. The problem is how far the Court may go in this regard. I think that it is clear that the question whether a particular agency of the United Nations had ceased to provide protection or assistance would not fall within the narrow class of case where this Court might look at surrounding circumstances. That is a factual matter for the Tribunal to decide. But equally I think it is a factual matter for the Tribunal to determine whether there ever was an agency of the United Nations which provided protection. As I have pointed out on more than one occasion in these reasons, it is clear from a perusal of the materials we have been given that UNWRA never provided protection to Palestinians. There was clearly no material before the Tribunal which suggested it did. But as presently advised this Court is bound to accept the Tribunal's finding, notwithstanding that the finding does not accord with the real facts as they are understood throughout the world. However, I agree with Moore J that in not considering whether any other agency of the United

Nations provided protection the Tribunal erred in law since it may well have been the case that UNCCP did at some time provide protection and that it ceased to do so at a later time.

73 I am therefore in agreement with Tamberlin and Moore J that the matter should be remitted to the Tribunal for further consideration. I agree that the matter should be heard by the same Tribunal member as heard the original application for review. In that rehearing the Tribunal will have the advantage of considering the large amount of materials available to us or otherwise available through the United Nations. The Tribunal will then be able to consider whether UNCCP or any other agency (and nothing suggests that there was any other agency) provided protection to Palestinians at the time the Convention was entered into and whether if it did that protection ceased to be provided. If the Tribunal is of the view that UNCCP did provide protection to Palestinians at that time but has since ceased to provide protection then it would follow from the Tribunal's findings that the applicant would be entitled to a protection visa.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill.

Associate:

Dated: 8 November 2002

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY	W 516 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	WABQ RESPONDENT

JUDGES:	HILL, MOORE & TAMBERLIN JJ
DATE:	8 NOVEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

74 I have had the benefit of reading a draft of the judgment of Tamberlin J. I generally agree with his Honour's reasons though I would wish to add a few observations of my own. I gratefully adopt his Honour's summary of the findings made by the Refugee Review Tribunal ("the Tribunal"), the reasons for judgment of the learned primary judge and his account of certain events leading to the adoption of Article 1(D) of the Convention Relating to the Status of Refugees 1951 done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees 1967 done at New York on 31 January 1967 (I shall refer to those two instruments together as the "Convention"). It is therefore unnecessary to repeat his Honour's summary except where it is necessary to explain my conclusions. I can move straight to the issues raised in this appeal.

75 It is convenient first to set out Article 1(D) of the Convention which reads:

"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."

76 The critical passage from the Tribunal's reasons in which the operation of this provision was considered reads:

"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."

77 This passage contains a finding that the respondent had been resident in an area in which an organ or agency of the United Nations, the United Nations Relief and Works Agency for Palestinian Refugees in the Near East ("UNRWA"), was not able to provide protection. So much is apparent from the latter part of the second sentence. There is also apparently a finding that an original function of UNRWA was to provide protection. This passage also contains a legal conclusion that Article 1(D) of the Convention did not apply to any consideration of the respondent's claim for a protection visa and render inapplicable other provisions of the Convention. It is reasonably clear that the Tribunal reached this conclusion because the respondent was outside the geographical area in which UNRWA operated (because he was in Australia) and, necessarily, was not presently receiving protection or assistance from that agency. The extract from the UNHCR Handbook quoted by the Tribunal is important and will be discussed shortly.

78 In his application for review the Minister for Immigration and Multicultural Affairs ("the Minister") identified the grounds of review 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."

79 It can be seen that the Minister challenged the conclusion of the Tribunal that Article 1(D) had no application to the circumstances of the respondent. The learned primary Judge, after discussing at some length events which led to the inclusion of Article 1(D) and views expressed about its scope, said:

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 "…UNRWA quite clearly is unable to fulfill one of its original functions which was to provide protection to Palestinian refugees".

His Honour then said:

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.

80 His Honour then referred to a decision of Heerey J in *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2001] FCA 825 in which the prefatory words of Article 1(D) were held to apply to a Palestinian who was not in Syria but could return there and enjoy the right of a Syrian national. The expression "persons who are at present receiving" comprehended a person with the immediate right to practical assistance. The learned primary Judge then said:

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.

81 Because of the conclusion the learned primary Judge reached about the reach of Article 1(D) it was unnecessary, in a sense, for his Honour to consider the legal conclusion of the Tribunal about the scope and effect of the expression "persons who are at present receiving". In particular, it was unnecessary to consider whether the Tribunal erred in taking the approach that because the respondent was physically removed from any area in which an organ or agency of the United Nations might be providing protection or assistance, Article 1(D) had no application whatever might be the effect of the remainder of Article 1(D). However the effect of this approach was that the learned primary Judge did not directly address the alleged error of the Tribunal raised by the application for review.

82 In his notice of appeal, the Minister raised the following grounds:

"(a) His Honour erred in holding that Article 1D of the Refugees Convention does not exclude from the protection of the Convention, a person who is entitled to access the protection and assistance of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), but is outside the usual geographical area of UNRWA operations because he has a well-founded fear of persecution in the country of his former habitual residence.

(b) His Honour erred in holding that Article 1D should be read as referring to those who are or may be regarded, in a generic sense, as refugees viz a viz Israel.

(c) His Honour erred in not following the interpretation of Article 1D in the decision of Heerey J in Abou-Loughod v Minister for Immigration and Multicultural Affairs [2001] FCA 825.

(d) His Honour should have held that the Refugee Review Tribunal (the Tribunal) erred in holding that the respondent was not excluded from the protection of the Convention under Article 1D."

83 The submissions and exchanges with the Bench at the hearing of this appeal on 20 May 2002 traversed many issues. As a result of a request of the Full Court, the Minister has provided us with voluminous historical material concerning Article 1(D). Much of this material was not before the primary Judge to assist in resolving the issues raised by the Minister. For reasons which will be apparent shortly, it is unnecessary, in my opinion, to consider all this material to dispose of the issues raised in the appeal. Additionally it is undesirable to do so given that it raises issues of fact that we simply are not in

a position to deal with in any conclusive way. Moreover, those issues of fact are important and bear on an area of operation of Article 1(D) that it is strictly unnecessary for this Full Court to determine.

84 For my part, the starting point in considering the issues raised in the appeal, is ground (a) of the notice of appeal. That ground focuses on what the Tribunal decided which resulted, in its opinion, in Article 1(D) having no application to the respondent. It remains an issue pressed by the Minister.

85 Counsel for the Minister submitted that Article 1(D) applied to all Palestinians eligible to receive assistance from UNRWA and excludes not only those who remain in Palestine but equally those who seek asylum abroad. Counsel relied on a conclusion to this effect expressed by Professor Hathaway in *The Law of Refugee Status* 1991 at p.208. Professor Hathaway says at p.208:

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.

More specifically, this exclusion clause applies to all Palestinians eligible to receive UNRWA assistance in their home region. It does not exclude only those who remain in Palestine, but equally those who seek asylum abroad. It affects only Palestinians, since its scope is limited to persons in receipt of UN assistance or protection from a specialised agency (other than UNHCR) in existence in 1951. Under the terms of the Convention, exclusion is automatic once UNRWA eligibility is established.

86 Professor Goodwin-Gill is somewhat more circumspect in *The Refugee in International Law*, 2nd ed. 1996. He says at p.92:

UNHCR has taken the view that a refugee from Palestine outside the UNRWA area "may be considered for determination of refugee status under the criteria (well-founded fear of persecution) of the 1951 Convention". This interpretation does not appear to be correct on a literal reading of article 1D.

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 on what they qualify independently as refugees with a well founded fear of persecution.

87 However Professor Goodwin-Gill took a clearer position in an amicus curiae brief prepared jointly with Associate Professor Susan Akram for the Executive Office for Immigration Review of the United States Department of Justice. In that brief it was said (in relation to commentary in the UNHCR's Handbook which I discuss shortly):

There are a number of fallacies in this paragraph regarding the UNHCR's interpretation of both the first and second sentences of Article 1D. Concerning the phrase "at present receiving", the Handbook states that "a refugee from Palestine

who finds himself outside [the area of UNRWA operations] does not enjoy the assistance mentioned…". However, as previously shown, UNRWA's mandate extends to all Palestinians who become refugees as a result of the 1948 war and their descendants. Article 1D applies to all "Palestine refugees" falling under that mandate. Thus it is irrelevant for the application of the first sentence of Article 1D whether the individual is actually residing within UNRWA's area of operations.

88 In support of this conclusion, Professor Goodwin-Gill and Associate Professor Susan Akram quoted from a book entitled *The Status of Palestinian Refugees in International Law* 1998 by Mr Lex Takkenberg who was an UNRWA officer. In the quoted passage (lengthy extracts from the text have been provided by the Minister in these proceedings) Takkenberg says:

The UNHCR Handbook…misses the point by stating that "a refugee from Palestine who finds himself outside [UNRWA's area of operations] does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention" [emphasis supplied]… [W]hether or not a certain individual is personally receiving UNRWA assistance is irrelevant. What counts is whether the individual concerned falls under UNRWA's mandate, that is, that that individual has the possibility of requesting the services provided by that organisation if so required and taking into consideration the applicable procedures and criteria. This possibility not only exists for those who had left the area, as long as they are able to return.

89 We were not referred to any commentary by a learned author which took a different view. That is, a commentary in which the view was expressed that Article 1(D) did not apply to the consideration of the circumstances of a Palestinian who was usually resident in but presently outside UNRWA's area of operation and seeking asylum. As Gummow J noted in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117, it is permissible to have regard to commentaries of learned authors as aids in interpretation when determining the meaning of provisions of treaties. However it is also permissible to consider the construction adopted by UNHCR in its Handbook: see *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168 at [18] (Drummond J) and [101]-[111] (Katz J) though as would be apparent from the passage in the Handbook quoted by the Tribunal and commentaries just referred to, the view expressed in the Handbook is rejected by learned authors in the field of refugee law.

90 For my part, I not entirely sure the Handbook is saying that Article 1(D) has no application to a Palestinian who had been resident in an area in which UNRWA operates, when that person seeks asylum elsewhere and outside that area. Rather it is drawing a distinction between Palestinians who may be resident in an area in which UNRWA does operate (and is providing protection or assistance) and Palestinians who may be resident in an area in which that agency does not operate. In this respect it is necessary to bear in mind the cautionary observations of Mason CJ in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392 that the Handbook is a practical guide for use by those who are required to determine whether or not a person is a refugee.

91 Not only are the views of the learned authors persuasive and singular in their approach about the meaning of the words “are at present receiving” as they might apply to a person in the position of the respondent presenting in another country seeking asylum, they reflect, in my opinion, what the words of Article 1(D) convey in the ordinary and natural meaning viewed in context. The prefatory words of Article 1(D) declare that the Convention “shall not apply to persons”. This is to be contrasted with other sections in Article 1 where the Convention is said not to apply to “a (or “any”) person” with a particular characteristic (sections C, E and F). The use of the word “persons” suggests that Article 1(D) concerns groups or communities with a defining characteristic that they presently receive protection or assistance. Understood this way, it is improbable that Article 1(D) was intended to have no operation in relation to an individual member of the group or community who was physically and temporarily removed from an area in which the individual resided at in which a United Nations’ agency or organ provided protection or assistance. A similar conclusion, with which I respectfully agree, was reached by Carr J in a number of cases and most recently in *Al-Khateeb v Minister for Immigration and Multicultural Affairs* [2002] FCA 7 at [52]. It was also the conclusion reached by the Refugee Status Appeals Authority of New Zealand in a decision of 30 April 1992 at 32 (Refugee Appeal No 1/92).

92 The expression “who are at present receiving” raises a subsidiary question about whether “at present” is referable to circumstances in 1951 or is referable to circumstances existing at the time the operation of Article 1(D) is being considered in any particular case or matter. For the reasons given by Tamberlin J, it is more likely a reference to circumstances in 1951. But even though the words “at present” are referable to circumstances in 1951, they are, in my opinion, intended to identify a class and not an aggregation of individuals fixed in 1951. That is they are intended to identify the group or community to whom Article 1(D) would apply in 1951 and into the future. Members of the group or community, whether alive and receiving protection or assistance in 1951 or not, would remain subject to the operation of Article 1(D). The operation of the entire provision would, after 1951, depend on whether protection or assistance was still being provided and accordingly whether it had ceased.

93 In my opinion, the Tribunal erred in approaching the operation of Article 1(D) on the footing that it had no application to a Palestinian who had been resident in an area where, arguably, an agency or organ of the United Nations provided protection or assistance simply because the Palestinian was presently in Australia. Plainly enough the question raised by s 36 of the *Migration Act 1958* (Cth) concerning whether the respondent was a person to whom Australia owed protection obligations required consideration of whether the respondent was a person to whom the Convention applied. The Tribunal’s misconstruction of Article 1(D) led to a misconstruction of s 36. That is a reviewable error of law, namely an error involving an incorrect interpretation of the applicable law: see s 476(1)(e). However was it a material error?

94 It is to be recalled from the passage quoted earlier that the Tribunal made several findings about UNRWA. It found that the respondent and his

family had had no practical assistance from UNRWA since 1975. However, it also found that UNRWA was unable to fulfil one of its original functions which was to provide protection to Palestinian refugees. This was not a finding referable only to the circumstances of the respondent. It is, I think, a finding concerning the group or community on whom Article 1(D) might operate. Whether it is correct is a matter I need not express a view about.

95 What then is the relevance of this finding on the operation of Article 1(D)? It is a finding which raises for consideration the meaning of the word "or" in the expression "protection or assistance" at the conclusion of the first paragraph.

96 The question of what is meant by the expression "protection or assistance" at the conclusion of the first paragraph of Article 1(D) (which, in my opinion, has the same meaning in the first sentence of the second paragraph having regard to both the context in which the expression twice appears and the apparent purpose of the clause) was addressed by Carr J in *Al-Khateeb v Minister for Immigration and Multicultural Affairs* (supra). His Honour said at [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.

97 His Honour did not have the benefit of the detailed submissions made by reference to the extensive extrinsic material provided by the Minister in this appeal. The starting point, is of course, the language used. Usually, "or" is used disjunctively and, as Tamberlin J points out, the disjunctive is found not only in the English version of the Convention but also the French version. The German Federal Administrative Court, in a decision of 4 June 1991 (noted in Takkenberg at p.99) treated the "or" as disjunctive in that the Court treated the expression as comprehending "alternative forms of care". In the amicus curiae brief, Professor Goodwin-Gill and Associate Professor Akram say:

The plain meaning of the word "or" in this phrase means that those de facto refugees who are not receiving either protection or assistance require alternate protection scheme of the 1951 Refugee Convention triggered by Article 1D, second sentence.

98 This approach accords with what appears to be the intended effect of Article 1(D). Having regard to the travaux preparatoires, it appeared to be generally accepted during the period leading up to the finalisation of the Convention, that the Palestinians were in a special position (it is unnecessary

to enter the debate on whether Article 1(D) was intended to apply to groups or communities other than the dispossessed Palestinians as it was plainly directed at least to them). They could be excluded from the operation of the protective provisions of the Convention because of the support, in the broadest sense, that was then intended to be provided by the United Nations. There are various references in the historical material, including statements made by delegates at the Conference of Plenipotentiaries in July 1951, where the expressions "protection or assistance", "protection and assistance", "assistance" and "aid" were used apparently interchangeably to describe that which was then and later to be provided by the United Nations.

99 However the nature of the support and the bodies providing it were not entirely settled in the period during which the Convention was being drafted. It can be readily understood that the drafters used the expression “protection or assistance”, as postulating alternatives, to describe the nature of the support that might continue to be provided by an organ or organs of the United Nations in the future with the effect of excluding the Convention. It was sufficient that support of either type was then being provided in order to identify the group or community to which Article 1(D) would apply. However, it was contemplated that if support of either type ceased to be provided, the protective provisions of the Convention would apply, either in terms (by a particular individual from the group satisfying the definition of “refugee”) or automatically (depending on what was meant by the expression “shall ipso facto be entitled to the benefits”). In those circumstances and at that point in time, the group or community to which Article 1(D) was directed would be without protection or assistance (or both) provided by the United Nations, the provision of which had hitherto meant the protective provisions of the Convention did not apply.

100 One matter of detail emerging from the travaux preparatoires should be mentioned. In July 1951, a Conference of Plenipotentiaries (convened, indirectly, by resolution of the General Assembly in December 1950 to redraft the Convention) convened in Geneva to complete the drafting. Apparently prepared for the Conference in a document dated 6 July 1951, was a summary of a submission of the Commission of the Churches on International Affairs. That Commission was described as a non-governmental organisation in a consultative relationship with the Economic and Social Council. One of the matters raised by the Commission was expressed in these terms:

(iii) Material assistance is not in itself a guarantee of protection and the Commission suggests that, if this clause is to stand, it should be amended to read “assistance and protection” rather than “ assistance or protection”.

101 There is nothing to indicate in the extrinsic materials we have, that this suggestion was considered. This comment is of substance because it related to what was then draft Article 1C (which became Article 1(D)) which read:

C The present Convention shall not apply to persons who are at present receiving from other organs or agencies of the United Nations protection or assistance.

102 If “or” was disjunctive in this context it potentially could have operated to the disadvantage of the Palestinians, which was a concern apparently of the Commission. That would have been because the Palestinians might lose the benefit of the Convention if they had no protection but had assistance. However an amendment was proposed by the Egyptian representative at a meeting of the Conference on 13 July 1951, which was to add to Article 1C what became the second paragraph of Article 1(D). Once there was the repetition of the expression “protection or assistance” in the second paragraph then the Commission’s concerns were probably met. That is because the exclusionary effect of the first paragraph would not operate when either protection or assistance was no longer being provided and had ceased.

103 I think that the better view is that "or" is disjunctive. However, I am not sure it ultimately matters whether this view is correct. If the word is conjunctive then the expression "assistance or protection" would serve to identify, in the first paragraph, the group or community receiving protection and assistance in 1951, undoubtedly a reference to at least the Palestinians. If either assistance or protection is no longer provided then it would sustain a conclusion that protection and assistance had ceased. That is, the elements of the support provided by the United Nations were no longer, in combination, available to the group or community to whom Article 1(D) applied. Perhaps the inquiry whether the word "or" is disjunctive or conjunctive is an unduly narrow one and distracts attention from the real question, namely what circumstances were in contemplation which would enliven the first paragraph of Article 1(D) and what were in contemplation enlivening the second paragraph.

104 A conclusion that the expression "protection or assistance" operates in way just discussed does not, however, end the inquiry in the present matter having regard to the submissions of the Minister. That is because a great deal of material concerning the operation of not only UNRWA but also the United Nations Conciliation Commission for Palestine (“UNCCP”) has been provided by the Minister in this appeal. Counsel for the Minister contends that it raises for consideration the question of whether the UNCCP is an organ of the United Nations which must be considered in the context of considering the first paragraph of Article 1(D). In most of the academic commentaries on Article 1(D) is it not suggested that UNCCP was an organ or agency that the drafters of the Convention had in mind when introducing the notion of “protection or assistance”. Indeed, Hathaway and Goodwin-Gill refer in their respective texts, in this context, only to UNRWA. Takkenberg says (at p.97):

The only other specialised refugee relief agency [apart from the United Nations Korean Reconstruction Agency] already in existence at the time of the Convention’s drafting was UNRWA. It may therefore be concluded that article 1D only applied to persons receiving protection or assistance from UNRWA.

The term “organs or agencies of the United Nations” implies that article 1D is also applicable to a possible successor body of UNRWA, provided the beneficiaries of both are the same.

Notwithstanding what he says in this second sentence, Takkenberg does not suggest that UNCCP was such a body even though earlier in his text (at p.24-28), he describes its role in some detail.

> 105 What follows must be understood having regard to the role of this Court and the Tribunal. The task of finding facts which may be relevant to a consideration of the respondent's application for a protection visa is the province of the Tribunal. As Kirby J said in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32 at [125]:

In judicial review, limited to requiring that the process of decision-making not be legally flawed, this Court's task is not to make its own factual assessments. It is to uphold the respondent's right to have such decisions made lawfully by the repository of the fact-finding power, relevantly the Tribunal.

> 106 It is for this reason that ordinarily evidence will not be received in judicial review proceedings to establish an error of law on the part of the decision maker: see *McCormack v Commissioner of Taxation* (2001) 114 FCR 574 at [35]. However in construing an instrument a Court can have regard to the matrix of facts in which the instrument was created: see *Black-Clawson International Ltd v Papierwerke Waldorf-Aschaffenberg* [1975] AC 591 at 646 and *Re Maurice's Application; ex parte Attorney-General for the Northern Territory* (1987) 18 FCR 163 at 171 which could, in a case such as the present, involve ascertaining facts which might constitute the matrix of facts. In my opinion, it is open to this Full Court to review the material before us about events in 1951 where those events may bear upon the construction of the Convention.
>
> 107 This Court has been provided with considerable material about events in 1951 and shortly before and also material about events since. Insofar as it concerns events in 1951 this Court can have regard to those events for the reasons just given but only for the limited purpose of construction. Insofar as the material concerns events since 1951 it might be relevant to establishing facts which would provide the factual context in which the Convention, properly construed, would operate at any particular point in time. However while our task is to construe the Convention, it is not to determine, in the context of judicial review of an administrative decision, how the Convention would operate at any particular point in time if the administrative decision maker has not found the facts concerning events at that time. Nonetheless, some of the material that has been provided in this appeal points to the possibility that as a necessary part of the fact-finding process, particular facts could be found which would bear upon the operation of Article 1(D) (depending on what it means) and the consequential scope of s 36. Material of that character may not have been considered by the Tribunal because of the erroneous view it took about the meaning of the expression "persons who are at present receiving".
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> 108 From some of the extrinsic material about events in the late 1940s concerning Palestine it is apparent that when the UNCCP was established (by resolution of the General Assembly of the United Nations in 11 December

1948) it was to assume the functions given to the United Nations Mediator on Palestine by resolution of the General Assembly of 14 May 1948. By that latter resolution, the Mediator was empowered to exercise a variety of functions including "arrang[ing] the operation of common services necessary to the safety and well-being of the population of Palestine" (part II,1(a)(iii) of the resolution). It was a body apparently established to provide protection. Moreover, the UNCCP would probably have then been viewed, for the purposes of the future operation of Article 1(D), as an organ of the United Nations intended to provide protection to the Palestinians. Its position was not considered by the Tribunal. I do not agree, with respect, with the conclusion of Hill J that it is necessary, or will be necessary for the Tribunal, to find, as a matter of fact, whether UNCCP did provide protection in 1951 as a step in the process of determining whether protection has ceased. The framers of the Convention proceeded on the basis that protection (as part of the composite expression protection or assistance) was being provided in 1951 (Tamberlin J has concluded (at [155]) it was being provided by UNCCP) and it was on that footing that the complementary provisions in the first and second paragraph of Article 1(D) were adopted. The unanswered question the Tribunal must address (insofar as protection is concerned) relates to whether protection has ceased in the sense that it is no longer provided. It introduces, in my respectful opinion, an unintended measure of artificiality to say that the operation of the second paragraph of Article 1(D) at some point in the future, and the scope of the application of the Convention to dispossessed Palestinians, was intended to depend on a factual determination (after the event and probably well after) as to whether protection was provided by UNCCP (or any other organ or agency of the United Nations) in 1951 in order to determine whether protection has ceased.

109 In my opinion, the first paragraph of Article 1(D), and subject to the operation of the second paragraph, operates to render inapplicable the Convention more generally if UNRWA or UNCCP (or some other body created after 1951 to take over their functions (though, it would appear, this has not occurred)) provided protection to the group or community who were to receive protection in 1951 or provided assistance to the same group or community who were to receive assistance in 1951, namely, dispossessed Palestinians. But the effect of the second paragraph is that if the provision of protection or assistance has ceased then the exclusionary effect of the first paragraph is nullified.

110 In the present case the Tribunal did not address the question of whether the group or community from which the respondent came were presently receiving assistance from UNRWA (though it did make a finding about the respondent's personal position) nor did it make a finding about whether UNCCP was presently providing either protection or assistance (from the material before us it would appear the answer to that factual question is almost certainly no). Because the Tribunal failed to make findings about these matters it did not address sufficient of the combinations and permutations of circumstances which would determine whether the second paragraph of Article 1(D) had been enlivened. It only found, as a matter of fact, that UNRWA does not provide protection though that had been an original function

of UNRWA. That is, in substance, a finding that UNRWA had ceased providing protection. However a finding that one United Nations body (UNRWA) had ceased providing protection does not necessarily lead to a conclusion that protection has ceased. It may be provided by UNCCP though all material before us would suggest that protection is not now provided by UNCCP and has ceased. However, until that possibility is excluded by a finding of fact to that effect by the Tribunal, it is not possible to say that protection has ceased for the purposes of the second paragraph of Article 1(D). It is only such a conclusion (or a conclusion that assistance had ceased) which would render immaterial the error of the Tribunal earlier discussed.

111 It is unnecessary, in this appeal, to go on to consider what Article 1(D) means when it speaks of persons being ipso facto entitled to the benefits of the Convention. The competing views are, on one hand, that without anything more such persons are refugees or, on the other, those persons need to demonstrate that they are comprehended by Article 1(A)(2). It is unnecessary because the Tribunal found that the position of the respondent was comprehended by Article 1(A)(2).

112 For these reasons the Tribunal erred in law, and it is not possible to say its error was an immaterial one. The appeal should be allowed and the orders of the primary judge and the decision of the Tribunal set aside. In my opinion, this is a case where it is appropriate to order that the matter be referred to the member of the Tribunal who made the decision so that the respondent does not have to establish, again, that he has a well founded fear of persecution were he to return to Syria assuming circumstances have not changed. Such an order can be made in appropriate circumstances: see *Wang v Minister for Immigration & Multicultural Affairs* (2001) 108 FCR 167. In the event that the member is unable to hear the matter, liberty to apply is reserved. I agree with what Tamberlin J has said about costs in this appeal.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 8 November 2002

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY	W 516 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT
AND:	WABQ RESPONDENT

JUDGES:	HILL, MOORE AND TAMBERLIN JJ
DATE:	8 NOVEMBER 2002
PLACE:	SYDNEY (HEARD IN PERTH)

REASONS FOR JUDGMENT

TAMBERLIN J:

113 The respondent is a stateless Palestinian who was born in Syria on 18 March 1963 and has habitually resided there. He arrived in Australia with his family on 23 December 2000 and lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs ("the Department") on the basis that he was a refugee. His wife and children were included in that application.

114 The respondent's parents were born in Palestine and held that nationality until they were forced to flee to Syria in 1948. The respondent, his two brothers and four sisters were all born in Syria. All of the family members continued to reside in Syria except for one brother who now resides in Russia, having departed Syria thirteen years ago. The family has been recognised as Palestinian refugees, registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"). They lived in a refugee camp in Syria where they received assistance from UNRWA until 1975. They were also able to access a range of Syrian government services, including education, employment and medical services, as well as having a right to travel documents issued by the Syrian government.

115 On 21 February 2001, a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") decided that the respondent was not a "refugee" because he did not have a well-founded fear that he would be persecuted for a Convention reason if returned to Syria. The respondent subsequently applied to the Refugee Review Tribunal ("the Tribunal") for a review of the delegate's decision. On 4 June 2001, the Tribunal remitted the matter for reconsideration with the direction that the respondent **is** a person to whom Australia has obligations under the Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). The Convention, in Article 1(A), defines a "refugee" as being 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 nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

116 On 3 July 2001, the appellant filed with the Court an application for review of the Tribunal's decision pursuant to s 476(1) of the *Migration Act 1958* (Cth) ("the Act"). The application was dismissed by French J, on 16 October 2001. His Honour, affirmed the decision of the Tribunal and was satisfied that it had not erred in its interpretation and application of Article 1(D) of the Convention which was the principal issue raised in the case.

117 Article 1(D) of the Convention is in these 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 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**." (Emphasis added)

Each of the emphasised expressions raises a question of interpretation. It is common ground that to date the position of Palestinians has not been definitively settled by a resolution of the United Nations ("UN").

118 The Tribunal found that the respondent and his family are stateless Palestinians registered with UNRWA. It made findings that the respondent and his family were habitually resident in Syria and were now outside the geographical area where UNRWA operates to provide assistance. The Tribunal found that the respondent and his family in fact were, by reason of their location, not **presently** (that is to say at the date of the Tribunal decision)

receiving protection or assistance from UNRWA and had not received practical assistance from that agency since 1975. The Tribunal concluded that UNWRA had ceased to provide protection to Palestinians and has thus failed to fulfil one of its original functions which was to provide protection to Palestinian refugees.

119 Having regard to these findings the Tribunal concluded that the first paragraph of Article 1(D) of the Convention did not apply to the respondent and his family, because they had left the geographic area where UNRWA assistance was provided and therefore they could avail themselves of the "benefits" of the Convention. The basis for the Tribunal's acceptance of this position was that the respondent fell within the interpretation of Article 1(D) given by the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* in the following terms:

"With regard to refugees from Palestine, it will be noted that UNRWA 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**." (Emphasis added)

120 The Minister challenges the findings of the Tribunal on the basis that there had been an error of law under s 476(1)(e) and jurisdictional error under s 476(1)(b) of the Act.

121 The case for the Minister is that properly interpreted and applied Article 1(D) of the Convention excludes from the protection of the Convention, persons who are "entitled" to access the protection or assistance of UNRWA notwithstanding that in fact the person is outside the usual geographical area of UNRWA operations because he or she has a well-founded fear of persecution in his or her home region. It is submitted for the Minister that the expression "at present receiving" should be read as "presently **entitled** to receive" protection or assistance. In addition, it was submitted by the Minister that although the Tribunal found as a fact that the respondent and his family were registered with UNRWA, it nevertheless failed to ask the relevant and material question whether the respondent and his family could obtain UNRWA protection or assistance in another region of the territorial area in which UNRWA operated and whether protection or assistance had ceased in accordance with the second paragraph of Article 1(D).

122 The primary Judge, after reviewing the historical developments relating to Palestinian refugees and considering what he took to be the relevant documentation, concluded:

"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 '…UNRWA 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 to and fought with, but had left and from 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."

> 123 It is important to note in this case that the Tribunal decided that the respondent has a well-founded fear of persecution within the Convention definition of "refugee" if returned to Syria and was a "refugee" within the meaning of the Convention and eligible for a protection visa under the Act. That finding is not challenged. The consequence of the appellant's submission is that notwithstanding this finding the respondent cannot avail himself of the benefits of the Convention because he is "entitled" to obtain assistance from a relevant UN agency (namely UNRWA) even though he is outside the geographic area within which such assistance is available.

124 The central question for the Court to determine on this appeal turns on the construction and application of Article 1(D) of the Convention.

previous decisions

125 The application of Article 1(D) was briefly considered by Heerey J in *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2001] FCA 825. In that case Heerey J made the following observation at [13]-[14]:

"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."

126 In that case the observations of his Honour, in his **ex tempore** decision, were made in the context where, unlike the present case, the Tribunal had found that the applicant had a right to resume residence in Syria and that the applicant was not a "refugee" in accordance with the Convention, because there was not a real chance that he faced persecution on returning to his country of former habitual residence. There was no detailed consideration of Article 1(D) in the reasons for judgment of Heerey J.

127 An appeal from the decision in *Abou-Loughod* was dismissed by the Full Court on the basis that that the notice of appeal was out of time and it was not appropriate to grant leave: see *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 21. The Full Court referred to the observations of Heerey J as to the operation of Article 1(D) of the Convention and noted that since the judgment of his Honour there had been disagreement by two Judges of the Court with his Honour's interpretation. These cases are the present case, at first instance, and a decision of Carr J, in *Jaber v Minister for Immigration and Multicultural Affairs* [2001] FCA 1878. The Full Court, in *Abou-Loughod,* expressly refrained from making any observations as to the proper operation and interpretation of Article 1(D), as it was not necessary to the determination of the appeal.

128 In *Jaber*, Carr J considered the operation of Article 1(D). In the course of his reasoning his Honour reached a number of conclusions.

129 The first was that 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 given an ambulatory operation and be read as applying to persons who are currently actually receiving protection or assistance from relevant UN organs or agencies. His Honour agreed with the view taken by French J in the present case at first instance in relation to this point.

130 Second, his Honour considered that it was not necessary for him to decide whether Article 1(D) applied only to Palestinians, because the applicant was a Palestinian and the agency concerned was UNRWA, which is an ongoing organisation concerned specifically with Palestinian refugees.

131 Third, his Honour considered that the reference to "**or**" in the phrase "**protection or assistance**" in the first paragraph should be read as "**and**" so that receiving such assistance as UNRWA might be able to provide would not give rise to exclusion from the Convention under the first paragraph of Article 1(D) if UNRWA did not also provide protection from persecution. His Honour considered that assistance without "protection" was not contemplated by the language used.

132 Fourth, his Honour rejected a construction of the words "at present receiving" as meaning "at present **entitled** to receive" even though the relevant person may not be within the area of UNRWA's operations. His Honour expressly differed from the view expressed by Heerey J in the case of *Abou-Loughod* in this aspect.

133 Fifth, his Honour agreed with the conclusion of French J in the present case at first instance, that Article 1(D) does not apply to exclude from protection of the Convention a Palestinian entitled to protection and assistance from UNRWA who is nevertheless at risk of persecution if returned to his own home region notwithstanding that it is within the territorial competence of UNRWA.

134 Sixth, in relation to the second paragraph of Article 1(D), his Honour considered that the words "when such protection or assistance has ceased for any reason" should be broadly construed.

135 Seventh, his Honour considered that the reference to "the benefits of this Convention" did not mean that the second paragraph of Article 1(D) operates **automatically** to confer refugee status on the applicant but that an applicant must establish refugee status within the definition of the Convention.

background to the situation relating to palestinian refugees

136 I should note that at the conclusion of the appeal hearing the parties agreed to provide detailed background material to the Court. A considerable body of material was provided to the Court and written submissions were made as to the significance of that material which I have considered in

reaching my conclusions in this matter. This material related largely to the history, functions and operations of the UN organs or agencies charged with the provision of protection or assistance to Palestinians.

137 During the period between 1948 and the finalisation of the Convention on 28 July 1951, there were a series of discussions and negotiations proceeding in parallel concerning the adoption of the *Statute of the Office of the United Nations High Commissioner for Refugees*, (adopted by the UN General Assembly as Annex to Resolution 428(V) on 14 December 1950), together with the creation of a relief agency for Palestinians. That agency (UNRWA) was established by UN General Assembly Resolution 302 (IV), passed on 8 December 1949. It continues in operation through to the present time. Resolution 302(IV) is entitled "Assistance to Palestine Refugees" and it contains the following resolution whereby the General Assembly:

"7. Establishes the United Nations Relief and Works Agency for Palestine Refugees in the Near East:

(a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission;

(b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available;

…"

138 The Commissioner-General of UNRWA has furnished reports since the inception of the agency and its work is described in the Report to the General Assembly for the year ended 30 June 2000 in these terms:

"1. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) is the largest United Nations programme in the region, employing some 21,000 staff and operating or supporting some 900 facilities. Through its regular programmes, **UNRWA provides education, health care, relief and social services to the 3.7 million refugees registered with the Agency in Jordan, Lebanon, the Syrian Arab Republic, and the West Bank and Gaza Strip**. Agency services include: elementary and preparatory schooling; vocational and technical training; comprehensive primary health care, including family health; assistance towards hospitalization; environmental health services in refugee camps; relief assistance to needy households; and developmental social services for women, youth and persons with disabilities. Those services are for the most part provided directly by UNRWA to the beneficiaries, in parallel to public-sector services. UNRWA services are funded mainly by voluntary contributions from donors. Where appropriate and feasible, refugees contribute to the cost of Agency services by means of voluntary contributions, co-payments, self-help schemes, volunteer efforts and participation fees. In addition to its regular programmes, the Agency carries out a range of infrastructure projects and operates a highly successful income-generation programme which provides loans to micro and small enterprises.

2. UNRWA commemorated 50 years of operation during the reporting period (the Agency was established by General Assembly resolution 302 (IV) of 8 December 1949 and began its work on 1 May 1950). The Secretary-General spoke at a special observance in New York on 8 December 1999 and later inaugurated a commemorative exhibition of photographs portraying refugee living conditions, which was on view in the General Assembly building throughout May 2000. The Secretary-General paid tribute to UNRWA's many staff who had delivered essential services to generations of refugees in a region and during a half-century marked by displacement, destruction and political upheaval. He said UNRWA's achievements in education, health and relief care were a result of their dedication, and warned that those achievements were under threat due to the Agency's financial situation. The anniversary was also marked by the refugees in field-based events during the period, including the preparation of five large embroidered quilts illustrating what UNRWA has meant to them. During these anniversary events, it was widely noted that the longevity of UNRWA, and the continuing need for its services, signified that the refugee problem remained unsolved." (Emphasis added)

139 The work of UNWRA is described in pars 55 and 56 of that Report in the following terms, which also includes a description of the registration system for eligibility to claim the benefits provided by UNRWA:

"55. Refugee registration. There were 3.7 million Palestine refugees registered with UNRWA on 30 June 2000, an increase of 3.1 per cent over the 30 June 1999 figure of 3.6 million (see annex I, table 1). As in the previous reporting period, the rate of increase reflected the rate of natural population growth, with most requests for updating of records representing new births, marriages and deaths. The largest proportion of refugees was registered in Jordan (42 per cent of the Agency-wide total), followed by the Gaza Strip (22 per cent), the West Bank (15.6 per cent), the Syrian Arab Republic (10.3 per cent), and Lebanon (10.1 per cent). Of the registered population, 36.5 per cent were aged 15 or under, 54 per cent were between 16 and 59 years of age, and 9.5 per cent were aged 60 or older. About one third of the total registered refugee population lived in the 59 refugee camps in the areas of operation, the remainder resided in towns and villages (see annex I, table 2). During the period under review, the Agency witnessed an increase in the number of refugees updating their registration records with UNRWA, particularly in Jordan. As a result, a working group of senior managers from the fields and headquarters was formed to update the guidelines for registering Palestine refugees. The Agency continued to consolidate all the data pertaining to registered refugees in the family files (which form the historical archives of the registered refugees over the 50 years of UNRWA operations) through the amalgamation of "ex-codes" (previous registration numbers) within the family files. At the end of the reporting period 250,013 index cards were amalgamated within the respective 337,116 files.

56. Unified registration system. Further progress was made on the unified registration system (URS), which aimed to integrate two existing computerized databases — namely, the registration database and the socio-economic database — with the family files archive. Contacts continued with outside parties, and a related study was undertaken by external archival experts to computerize the family files paper archives and integrate them with the existing computerized components of the URS. Project implementation was to begin once extrabudgetary contributions were received.

Extensive work on a redesign of the outdated field registration system was carried out, and a detailed study of user requirements, together with a comprehensive project proposal, was coordinated with external consultants. Subject to the availability of funds, the development and implementation of a new field registration system, which would be open for future linkages to other UNRWA databases, was to commence during the next reporting period. The field social study system, which was completely decentralized to all fields and areas during the reporting period, is now fully operational, and a number of amendments aimed at further improving the system were implemented. The URS Unit at headquarters (Amman) continued its field support activities through visits and workshops. To improve local programme support further, the post of Field Unified Registration System Administrator was established in all fields. The Unit and the Social Services Office began the development of a non-governmental organization information system aimed at supporting programme-related networking and fund-raising efforts in the fields."

140 There is no suggestion in the background material that UNWRA ever provided "protection" as distinct from "assistance" in the nature of education, health care and social services.

uncCp

141 In 1948, by virtue of UN General Assembly Resolution 194(III) entitled "Palestine – Progress Report of the United Nations Mediator" the General Assembly established another United Nations agency, the United Nations Conciliation Commission for Palestine ("UNCCP") with the following functions:

"2. …(a) To assume the functions given to the United Nations Mediator on Palestine by resolution 186(2) of the General Assembly of 14 May 1948.

11. …that the **refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so** at the earliest practicable date, and that **compensation should be paid for the property of those choosing not to return and for loss of or damage to property which**, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

[The General Assembly] Instructs the Conciliation Commission to **facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees** and the **payment of compensation**, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations; …" (Emphasis added)

142 The General Assembly Resolution 186(S-2) of 14 May 1948 required the United Nations Mediator on Palestine to:

"…

(i) Arrange for the operation of common services necessary to the safety and well-being of the population of Palestine; …"

143 It can be seen from this resolution that, unlike UNRWA which was designed to provide assistance in the form of aid, education and welfare, UNCCP was designed to afford protection to the Palestinians by permitting them to return to their homes and live at peace and to protect their property rights by enabling them to obtain restitution for loss of, or damage to, property. This conclusion is reinforced UN General Assembly Resolution 302(IV) of 8 December 1949 (which set up UNRWA) where the UN General Assembly recalls and affirms paragraph 11 of Resolution 194(III) and subsequently directs UNRWA to consult with UNCCP,

"… in the best interests of **their respective tasks**,with particular reference to paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948." (Emphasis added).

This indicates that UNWRA and UNCCP were seen as agencies with complementary functions.

144 The role of UNCCP was further elaborated by UN General Assembly Resolution 394(V) of 14 December 1950 which specified that the General Assembly:

"2. Directs the United Nations Conciliation Commission for Palestine to establish an office which, under the direction of the Commission, shall:

(a) Make such arrangements as it may consider necessary for the assessment and payment of compensation in pursuance of paragraph 11 of General Assembly resolution 194 (III);

(b) Work out such arrangements as may be practicable for the implementation of the other objectives of paragraph 11 of the said resolution;

(c) Continue consultations with the parties concerned **regarding measures for the protection of the rights, property and interests of the refugees**;

3. Calls upon the governments concerned to undertake measures to ensure that refugees, whether repatriated or resettled, will be treated without any discrimination either in law or in fact." (Emphasis added)

145 UNCCP explicitly acknowledged the effect of Resolution 394(V) in par 1 of its Ninth Progress Report to the UN General Assembly, dated 22 March 1951. The Report recognised that Resolution 394(V) recalled:

"… the concern of the United Nations for the settlement of all questions on which the parties have not reached agreement, and instructs the Commission to … work out such arrangements as may be practicable for the implementation of the other objectives of paragraph 11 of General Assembly resolution 194(III), and continue negotiations towards **safeguarding the rights, property and interests of the refugees**." (Emphasis added).

This reference to safeguarding the interests of the refugees reinforces the protective role of UNCCP.

> 146 By 20 November 1951, Article 1(D) of the Convention had come into effect. However, it had become apparent that UNCCP may not be able to carry out its mandate to protect the Palestinians. In the Tenth Progress Report of UNCCP to the UN General Assembly for the period ended 19 November 1951, it was stated that:

"87. The Commission is of the opinion, however, that the present unwillingness of the parties **fully** to [sic] implement the General Assembly resolutions under which the Commission is operating, as well as the changes which have occurred in Palestine during the past three years, have made it impossible for the Commission to carry out its mandate, and this fact should be taken into consideration in any further approach to the Palestine problem." (Emphasis added)

> 147 The possibilities envisaged in the second paragraph of Article 1(D) of the Convention, that the protection or assistance may cease, appear to have been realised by the end of 1951.
>
> 148 A resolution of the UN General Assembly of 26 January 1952 noted the Tenth Progress Report with regret and considered that UNCCP should continue its efforts to secure the implementation of the resolutions of the General Assembly on Palestine and accordingly should be available to the parties to assist them in reaching agreement on outstanding questions.
>
> 149 In a paper presented to an international conference on Palestine refugees at the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") headquarters in Paris on 26 and 27 April 2000 entitled "*The Work of the United Nations Conciliation Commission for Palestine*" (http://www.un.org/Depts/dpa/ngo/refugees/reanda.htm), a former United Nations official consultant, Ms Laura Reanda, discussed the work of UNCCP and noted, after referring to the establishment of the Commission and its anticipated role in reaching an overall settlement, that:

"This role, however, was short-lived although the basic mandate has not been amended. **By the early 1960s,** following a series of setbacks and some modest achievements, the UNCCP concluded that it could make no progress in finding a way acceptable to the parties for advancing a final settlement and, in particular, resolving the refugee question in accordance with its mandates. **Since then**, the UNCCP has undertaken no new initiatives and its annual reports to the General Assembly have been purely procedural." (Emphasis added)

150 The author noted that **after** January 1952, UNCCP had shifted its role towards intensifying its technical program in the hope that it would be possible to improve prospects for peace by bringing about progress in some aspects of the refugees' situation.

151 It appears that the protection of Palestinian refugees originally envisaged by the establishment of UNCCP had ceased to be of any practical substance since late 1951 and that since then, UNCCP has been unable to fulfil its mandate. This view is reinforced by the fact that even as recently as 10 December 2001, the UN General Assembly adopted Resolution 56/52, noting with regret that UNCCP *"… has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194(III) …".*

152 The role and practical demise of UNCCP is outlined in an illuminating paper by Terry M Rempel, entitled: "*The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees*"(http://www.badil.org/Publications/ Briefs/Brief-No_5.html). In that paper the author points out that the ability of UNCCP to provide protection and facilitate a durable solution based on the principle of refugee choice and the framework set down in the original resolution was severely hampered by the internal contradiction of the Commission's mandate. The author notes that, when established, the international community believed that the UN had a unique and special responsibility to Palestine refugees as the refugee flow was a direct result of the UN decision to partition Palestine. The international community was therefore reluctant to submerge the Palestinian refugee case with all other refugee flows or controls.

153 In light of the above material it is important for the Court, when interpreting Article 1(D), to bear in mind the position prevailing as at the date when the Convention was finalised in 1951 when Article 1(D) first took effect. It is a provision inserted to deal with a specific problem arising from the partition of Israel which was designed to give effect to the position prevailing at that time. The history of UNRWA and UNCCP, the two bodies intended to provide assistance and protection to Palestinian refugees bears directly on the interpretation of Article 1(D).

154 Accordingly, when construing the particular language adopted, the need to consider the context and purpose of the provision makes it necessary to address the question whether as at 28 July 1951, when the Convention was done, Palestinians, as a group, were receiving protection from UNCCP. It is apparent from the progress reports of UNCCP that during the period after it was established on 11 December 1948, steps were being taken to carry out its mandate to protect Palestinians. By way of example, in its Seventh Progress Report to the UN General Assembly, for the period May to July 1950, the record discloses:

"As indicated in its Sixth Progress Report to the Secretary-General, the Conciliation Commission for Palestine, on 29 March 1950, submitted concrete proposals to the

parties for the establishment of a new procedure, combining direct negotiations in mixed committees with mediation by the Commission itself."

155 That Report also repeats the commitment of UNCCP to carry out its mandate as specified in par 11 of UN General Assembly Resolution 194(111) of 11 December 1948. The work of the UNCCP described above can, in my view, properly be characterised as the taking of steps to provide protection to Palestinians. These steps were designed to implement the objectives set out in the UNCCP mandate of December 1948 and lead me to the conclusion that Palestinians as a group were receiving protection under the mandate of UNCCP as at the date of the Convention.

156 One way international bodies implement their mandate is by negotiating for acceptance of measures by states or territories to give effect to their objectives. The setting up of an active mediation process designed to provide protection to Palestinians is, in my view, a way of affording protection.

157 The circumstances in this case and the actions taken by UNCCP to actively pursue the implementation of its objectives support my conclusion that, as at the date of the Convention, it was taking protective measures for the benefit of Palestinians and that they could properly be said to have been receiving the benefit of these efforts. The records indicate that it was not until late 1951, at the earliest, that the UNCCP considered that it would not be able to implement its mandate. Also relevant in this respect is the observation made earlier that, as at 28 July 1951, the framers of the Convention must have been aware of the functions of the United Nations organisations and agencies then in existence, namely UNCCP and UNWRA, which were assigned tasks of protection or assistance in relation to Palestinians.

reasoning on appeal

158 In the case of either paragraph of Article 1(D), the interpretation presents a number of difficulties when attempting to ascertain the meaning and operation of the provision. The expressions which raise the difficulties are emphasised in [117] above. Although the Court is required to give primacy to the text of the particular instrument, the process of interpretation calls for a consideration of the context, object and purpose of the provision. This approach accords with Article 31 of the Vienna Convention on the Law of Treaties (1969) ("Vienna Convention"): see the discussion in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. In that case, the Court considered the approach that should be taken by an Australian court when interpreting instruments of international law. Brennan CJ stated, at 231, that:

"In interpreting a treaty, …… 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." (Emphasis added) See also McHugh J at 252-256.

159 The High Court has recently affirmed the approach set out above in *Applicant A* in the case of *Morrison v Peacock* [2002] HCA 44. When speaking of Article 31 of the Vienna Convention, the Court said at [16]:

"The effect of Art 31 is that, although primacy must be given to the written text of the 1973 Convention, the context, objects and purpose of the treaty must also be considered. The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation." (Citations omitted)

160 When considering the context of the Convention the Court is entitled to examine historical documents and other material pertaining to the drafting of the Convention. Ultimately, regard must be had by the Court to the factual matrix. As Lord Simon of Glaisdale stated in *Black-Clawson Ltd v Papierwerke* [1975] AC 591, at 646, there is no reason:

"… why a court of construction of statute should limit itself in ascertaining the matrix of facts more than a court of construction of any other written material … The object is … to ascertain the meaning of the words used …"

161 In this case it is important to keep in mind that at the time the Convention was done, there were two UN agencies in existence and the function of "protection" was given to UNCCP and the function of providing "assistance" was assigned to UNWRA. This factual context is relevant to the interpretation of Article 1(D). There is of course some overlap in the expression "protection" and the expression "assistance" in that protection may qualify as a form of assistance. However, as used in Article 1(D) the word "protection" appears to embrace activities or measures extending beyond the social, educational and other types of assistance assigned to UNWRA. This distinct role assigned to UNCCP must be borne in mind in the interpretation of Article 1(D).

162 The first question which arises in construing Article 1(D) is what is meant by "persons" in the first paragraph of the Article. This could possibly be a reference to an individual or to a group of persons, namely "Palestinians". Some light is thrown on the meaning of the expression by the reference in the second paragraph to "such persons" in the context of their position being definitively settled in accordance with the relevant resolution adopted by the General Assembly of the United Nations. It is inappropriate to speak of an **individual's** situation being "definitively settled" in the context of a UN resolution. The expression must refer to a **group**. The language strongly

supports the view that the reference is to a group of persons, namely "Palestinians" and not to individuals. There is no justification for giving a different meaning to the word "persons" in the two paragraphs.

163 A second difficulty which arises concerns the expression "at present receiving from organs or agencies". The question is whether this is a reference to the date of the Convention when Article 1(D) began operation (namely 28 July 1951) or whether it is an ambulatory reference to the position from time to time with respect to receiving protection or assistance. The better view, in my opinion, is that the expression is to be interpreted as at 28 July 1951 because the first paragraph proposes to exclude Palestinians who do not need protection or assistance because they were then receiving those benefits from UN agencies. However, it was foreseen that those agencies, namely UNWRA and UNCPP, might cease to provide such assistance or protection and if this occurred Palestinians would be entitled to the benefits of the Convention. This explains the wording of the second paragraph: see L Takkenberg, *The Status of Pakistan Refugees in International Law* Clarendon Press, Oxford, 1998 and J Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991.

164 The reference to persons (ie Palestinians as a group) "receiving protection **or** assistance" on its face and on an ordinary reading would indicate **actually** receiving rather than an **entitlement** to receive as contended for by the appellant. The language is plain and there is no basis in the words used or in the historical background for inserting a presumed reference to groups who may be "entitled" to receive protection or assistance but which are not in fact receiving either. To give effect to the appellant's submission is to require the deletion of the words used and to insert into the provision another concept, namely an "entitlement to receive".

165 Once the view is taken that the word "persons" refers to Palestinians as a **group** rather than to **individual** Palestinians the distinction sought to be made between receiving and being entitled to receive largely disappears. If the "group" receives protection or assistance then all persons who compromise that group must be taken to be receiving assistance or protection even though an individual member is not actually receiving that assistance.

166 The next important expression in the first paragraph is the reference to "protection **or** assistance" and whether the disjunctive expression "or" must be read as "and", for the reasons which Carr J has accepted. When regard is had to the circumstance that as at 28 July 1951 it must have been known to those drafting and entering into the Convention that there were two agencies of the United Nations other than the United Nations High Commission for Refugees ("UNHCR") mandated to provide protection or assistance, it seems reasonable to construe the expression "protection or assistance" in the disjunctive, rather than in the conjunctive. In this respect, I respectfully disagree with the construction placed on these words by Carr J, namely that the expression "or" is to be read in a conjunctive sense.

167 The latter interpretation is contrary to the language of the Convention and does not take account of the circumstance that as at 1951 UNRWA was providing assistance and UNCCP, a distinct UN agency, was mandated to provide protection. Municipal Courts should be slow to adopt a departure from the language agreed upon in the absence of a broad international consensus. When interpreting the Convention, it must be kept in mind that each provision is negotiated in detail. The background material indicates that this occurred in the present instance. Thus in order to justify a departure from the ordinary meaning of the language finally chosen, it is necessary to have a powerful context to justify such a step. In the present case, substantial alterations of the language would be required to give the disjunctive word "or" a different meaning in each paragraph of Article 1(D). The language can be given a reasonable meaning without any alteration. Moreover, it is important to note that the other official version of the Convention is in French, and the French version of Article 1(D) clearly expresses the concept of protection or assistance in the disjunctive form, in both paragraphs.

168 The reference in Article 1(D) to "organs or agencies" of the United Nations, in the plural, indicates that it was contemplated there was more than one organ or agency to provide those benefits and that such protection or assistance might cease in the foreseeable future for reasons which may not have been contemplated as at 28 July 1951. This explains the reference in the second paragraph to ceasing **for any reason**. In fact, the position at that time was that UNRWA was providing assistance and UNCCP was charged with the function of **providing protection** to persons in the sense of repatriation for Palestinians and the protection of their property rights. The position which has developed, as appears from the extensive documentation referred to above, is that as from late 1951, UNWRA provided assistance but never provided protection and that after 1951 it became apparent that UNCCP was unable to provide any effective protection to Palestinians, and its protection could therefore be said to have "ceased" within the meaning of the second paragraph of Article 1(D). However, notwithstanding the weighty documentary evidence before the Court on appeal indicating that protection has ceased, because such a conclusion involves a finding of fact as to cessation of protection, the matter should be referred back to the Tribunal for determination.

169 Having regard to the conclusions expressed above, in my view, the first paragraph of article 1(D) should be applied in the following way. Palestinians as a **group** were as at 28 July 1951, protected by UNCPP and assisted by UNWRA and therefore could be described as "at present receiving protection or assistance". Therefore the Convention did not apply in this case by reason of the first paragraph of Article 1(D).

170 Having reached this decision as to the operation of the first paragraph it is then necessary to consider the operation of the second paragraph. The words "**such** protection **or** assistance has ceased for any reason" in that paragraph must be read by reference to the first paragraph. Consistently with the conclusion that the expression protection "or" assistance in the first paragraph must be read in the disjunctive, the same expression in the second

paragraph should also be read in the disjunctive sense. The expression "persons" in the second paragraph should also be read consistently with the first paragraph to mean a group, namely "Palestinians".

171 The documents relating to UNCPP, referred to above, strongly indicate that since 1951 protection has ceased to be available because UNCPP has been unable to perform its mandate. Accordingly, if protection has ceased, the respondent would be entitled to the benefit of the Convention, that is to say, to have his application for refugee status determined according to the Convention definition in Article 1(A). The Convention operates to protect "refugees" and therefore to obtain protection an applicant must be found to be "a refugee", within the meaning of the Convention. The respondent in this case has been found to be a refugee and no challenge has been made to that finding.

172 A further question in relation to the second paragraph is the meaning of the expression "ipso facto" being entitled to the benefit of the Convention. I agree with the conclusion of Carr J in *Jaber* that the better view is that the expression "ipso facto" does not require a conclusion that upon cessation of protection or assistance, an applicant becomes automatically entitled to protection as a "refugee" without satisfying the definition of "refugee" under the Convention. Essentially, the protection of the Convention is provided in Article 33 which refers to a "refugee". The entitlement of a refugee is not to be sent to a country where he or she would be persecuted for a Convention reason. In this case because the respondent has established that he is a "refugee" within the definition, it follows that if he comes within the second paragraph he is entitled to the protection of the Convention.

173 In my opinion for the above reasons, the Tribunal erred in its interpretation of Article 1(D) in a number of respects. First, it treated the expression "persons" as referring to individuals, rather than the group, which is "Palestinians". Second, it interpreted the expression "at present receiving" as referring to the present time, rather than 28 July 1951. Third, it treated the disjunctive expression "or" as meaning "and". Fourth, it treated UNWRA as having the function of protection as well as assistance. Fifth, it did not consider the existence or functions of UNCCP and whether those functions had ceased after 1951 with respect to protection. These are important errors of principle and approach and the matter must be remitted for consideration.

174 It follows also that the primary Judge erred in concluding that the Tribunal decision should not be set aside, although it must be pointed out that the above questions and the extensive documentation furnished to the Court on appeal were not raised with or provided to the primary Judge so that his Honour did not have an opportunity to consider all aspects of the case as finally presented.

175 I have read in draft form the judgment of Moore J and I substantially agree with his Honour's reasoning and conclusions. The appropriate orders, in my opinion, are that the appeal be allowed, the orders of the primary Judge be set aside, the application to the Federal Court for review is granted, and the

decision of the Tribunal is set aside. The matter is remitted to the Tribunal for determination in accordance with these reasons by the member who made the decision, the subject of the appeal, so far as this is practicable. The respondent should pay the costs of the appellant of the appeal and at first instance. This is a case where it is appropriate to give a Certificate under s 6 of the *Federal Court Proceedings (Costs) Act 1981* (Cth).

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 8 November 2002

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