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CASE LAW COMMENTARY

Case C-563/22, *SN, LN, v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite,* Judgment of the Court (Fourth Chamber) of 13 June 2024, ECLI:EU:C:2024:494

Fifty Shades of Non-Refoulement

The CJEU's Distorting Reading of Article 1D Refugee Convention for Refugees of Palestinian Origin

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Abstract

The CJEU's ruling in Case C-563/22 *SN & LN* adds to a line of judgements (*Bolbol, El Kott*, *SW*) concerning the application of EU asylum rules to refugees of Palestinian origins entitled to the assistance of the *United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*. Called upon to determine whether the UNRWA's protection "has ceased" according to Art 12(1)(a) of the Qualification Directive, the CJEU held that, in some exceptional cases, the UNRWA's assistance has ceased because it is insufficient to protect any person in its area of operation. This happens in cases of extreme material poverty and humanitarian disasters, as is currently the case in the Gaza Strip.

Questions remain open concerning both the temporal dimension of the proposed test to assess whether UNRWA's protection has ceased and its interaction with the principle of non-refoulement.

A. CASE SUMMARY

Case C-563/22 SN & LN, v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (*SN & LN*) concerns the applicants SN and LN, who are respectively a stateless mother and child of Palestinian origin who lived in the Gaza Strip. In July 2018, they fled Gaza due to unsustainable living conditions and entered Bulgaria illegally.

In March 2019, SN and LN lodged their first asylum application in Bulgaria, basing their claims on several factors (*SN & LN* §§ 23- 24), including dire conditions and instability in the Gaza Strip. In July 2019, Bulgaria rejected SN and LN's applications, arguing that they would not incur a serious risk of death, torture or inhuman and degrading treatment as required by Art 15 Directive 2011/95/EU Qualification Directive Recast (QD) if returned to the Gaza Strip. The rejection was based on earlier CJEU's case law interpreting Art 15 QD where the Court established that, in exceptional circumstances, the violence of an armed conflict is so widespread and indiscriminate that any individual returned to that area would personally run a serious risk of being killed or exposed to inhuman treatment (see *Elgafaji* § 45). Bulgaria argued that the conflict and the attacks in the Gaza Strip (at the time when the decision was taken, July 2019) were not too pervasive; therefore, SN and LN would not be exposed personally to death or inhuman treatment if returned.

In August 2020, SN and LN lodged a second application, in which they reported their registration with the UNRWA, claiming that this factor would make the special regime set in Art 12 (1) (a) QD applicable to them. This provision establishes that applicants assisted by the UNRWA cannot qualify for refugee protection in the Common European Asylum System (CEAS) unless UNRWA's protection or assistance has ceased. If this condition is met, the applicants shall be considered *ipso facto* refugees entitled to all refugees' rights set in the CEAS. In their second application, SN and LN argued that UNRWA's assistance had ceased for them and provided evidence relating to the dire living conditions in the Gaza Strip at the time relevant to their new application (2020). Since 2018, the UNRWA has been underfunded, so the assistance the applicants received from that agency was reduced, making it impossible for them to live under dignified living conditions (*SN & LN* §§ 22-25).

SN and LN's second application was found admissible. Still, it was rejected because the competent authorities did not agree that UNRWA's protection had ceased for reasons beyond SN and LN's control and did not reexamine the situation in the Gaza Strip at the time of the second application (*SN & LN* §§ 30-31). SN and LN challenged this second rejection before the Sofia administrative court, arguing that their return to the Gaza Strip would violate the principle of non-refoulement (*SN & LN* §§ 32-33).

The Sofia administrative court referred four questions to the CJEU. The first question is procedural and asks for clarification on the evidentiary rules applicable in subsequent asylum

applications (*SN & LN* §§ 36-38 and 41 (1)). The second question seeks clarification about when UNRWA's protection has ceased.(*SN & LN* §§ 39 and 41 (2)). The third question seeks clarification on applying the principle of non-refoulement in cases where Art 12 (1) (a) QD applies. In particular, the referring court asks whether the general situation in the Gaza Strip upon return must also be considered (*SN & LN* §§ 40 and 41 (3)). In its fourth question, the referring court asks whether it shall apply the test to grant subsidiary protection (and so Art 15 QD) to applicants of Palestinian origins entitled to UNRWA's assistance to establish whether they cannot be returned (*SN & LN* § 41 (4)).

B. ANALYSIS OF THE CJEU'S ANSWERS

I will limit my analysis to the Court's answers to the second and third questions, where the CJEU interprets the conditions under which applicants entitled to UNRWA's protection can obtain refugee status in the EU. The CJEU addressed the second and third questions together because they have a common element: the referring court questioned the relevance (if any) of the general living conditions in the Gaza Strip when deciding on the claim for protection of LN and SN (*SN & LN* §§ 59-87). However, I argue that the two questions have a different focus. The second question asked about how to evaluate the general living conditions when assessing whether UNRWA's assistance had ceased for the applicants. The CJEU had to indicate whether national authorities may conclude that UNRWA's assistance had ceased basing their assessment solely on evidence relating to the general living conditions in the Gaza Strip at the time when the applicants lived there (*SN & LN* § 59).

The third question concerned instead whether the general situation prevailing in the Gaza Strip, rather than the individual applicants' characteristics, may be a decisive factor when determining that an eventual return of SN and LN in the area would be compatible with the principle of non-refoulement. So, the CJEU had to clarify whether there might be cases in which the humanitarian disaster in the Gaza Strip is so widespread that "any" refugee in the area, «*irrespective of his or her wishes and personal choices*» would be exposed to forms of poverty amounting to inhuman and degrading treatment (*SN & LN* § 84).

In answering jointly the second and the third questions on the general living conditions in the Gaza Strip, the CJEU concluded that UNRWA's protection or assistance ceases within the meaning of Art 12 (1) (a) QD when two cumulative conditions are met (*SN & LN* §§ 87 and 90). First, UNRWA's protection or assistance in the area ceases for an applicant when «*it is impossible for the UNRWA (…) to guarantee that the living conditions of that individual would be compatible with its mission (…) for whatever reason, including by reason of the general situation prevailing in that sector*» (*SN & LN* §§ 71-72). The threshold that the CJEU established here is extremely high: it should be proven that, when the applicants lived in Gaza, UNRWA couldn't carry out its mission (*SN & LN* § 68). Alternatively, the applicant should be in a special position

of vulnerability, making the assistance that UNRWA usually provides to other refugees insufficient for that specific applicant to conduct a dignified life (*SN & LN* §§ 72-73).
Second, it can be concluded that UNRWA's protection or assistance has ceased based on the general conditions in the Gaza Strip when the return of an applicant to that area would create the risk of exposing her/him to extreme poverty and undignified living conditions incompatible with the UN agency's mission (*SN & LN* § 75 and § 79). This risk will materialise when the UNRWA, for whatever reason, including underfunding and the general situation prevailing in the area, cannot ensure access to the basic needs of applicants (in terms of subsistence, health, or education). The CJEU specifies that the test on whether UNRWA's assistance meets the applicant's basic needs should be conducted considering the applicant's eventual vulnerabilities relating to her/his group or personal identity (*SN & LN* §§ 78-79).
The Court acknowledges that there is currently an ongoing humanitarian disaster in the Gaza Strip. However, it still leaves the room open for some applicants' return. On the one hand, it states that «*both the living conditions in the Gaza Strip and UNRWA's capacity to fulfil its mission have experienced an unprecedented deterioration due to the consequences of the events of 7 October 2023*» (*SN & LN* § 82). On the other hand, however, it rules that it is for national courts to establish, case by case, whether the situation on the ground in the Gaza Strip is unsafe and disastrous for "any" applicant entitled to UNRWA's assistance (*SN & LN* §§ 83-84).

C. COMMENTARY

The CJEU's interpretation of Art 12 (1) (a) QD in *SN & LN* (§§87 and 90 point 2) misconstrues the protection that, under Art 1D Refugee Convention, is due to refugees of Palestinian origin who are not receiving assistance by UNRWA.
I argue that the risk of inadequate protection derives from reading as cumulative the two tests that the CJEU introduced on the general living conditions in the UNRWA's area of operation, (1) at the time of the applicant's departure and (2) at the time of a potential return. The CJEU's restrictive interpretation of when UNRWA's assistance ceases continues on the path traced by earlier case law on refugees of Palestinian origin (*Bolbol*, *El Kott*, *SW*), where the Court deviated from the purposeful interpretation of Art 1D Refugee Convention.

Under Art 1D Refugee Convention, the condition to be *ipso facto* refugees is simply that applicants of Palestinian origin entitled to UNRWA's assistance are not benefitting from it at present, for any reason. The CJEU restrictively interpreted this clause by adding several extra conditions. First, in *Bolbol* (§ 53), the CJEU ruled that Art 12 (1) (a) QD does not cover "any" applicant in principle entitled to UNRWA's assistance, but only applicants who have actually availed themselves of UNRWA's assistance. In *El Kott* (§ 82), the CJEU ruled that applicants who availed themselves of UNRWA's assistance are *ipso facto* refugees only when it can be established, on an individual basis, that they flee because their personal safety was at serious risk and the agency was unable to protect them.

This test has been recently clarified in *SW*, where the CJEU concluded that UNRWA's protection has ceased for an applicant in exceptional cases when the agency cannot grant access to healthcare. However, the threshold set by the Court to determine whether UNRWA fails to assist a patient is very high: the treatment needed should be a life-saving one (*SW*, § 49).

Compared to this earlier case law, the conclusions in *SN & LN* suggest *prima facie* a more comprehensive protection (§79). The CJEU held that there are exceptional cases, like the current situation in the Gaza Strip, where applicants do not need to show they are personally targeted by risks generated from a general situation. In those cases, extreme poverty and generalised insecurity are sufficient to establish that UNRWA's assistance cannot meet anyone's basic needs. However, in *SN & LN* (§§ 87 and 90), the CJEU introduced a demanding temporal dimension to test UNRWA's capacity to provide effective assistance over time, which is absent in Art 1 D Refugee Convention.

The Court referred to the general incapacity of the UNRWA to protect any person in the area, which should be established both at a TIME A (when the applicants left the area of UNRWA's operation) and at a TIME B (which is the one of a potential return of the applicants). The CJEU considers these two conditions cumulative. This conclusion may be drawn from a literal reading of the Court's findings in the English version where the two conditions are presented using the connectors «*(i) … and (ii)…*». Similarly, the French original version of the ruling and the Italian one indicate that the test on UNRWA's incapacity to aid should be verified both at TIME A and at TIME B, by using respectively the phrasing «*d'une part … et, d'autre part …*» and «*da un lato … e dall'altro …*» (*SN & LN* § 90).

Introducing these two cumulative conditions means that the scope of application of Art 12 (1) (a) QD becomes narrower than that of Art 1D Refugee Convention. According to the Refugee Convention, applicants entitled to UNRWA's assistance, who are present in the EU, should be able to qualify as *ipso facto* refugees as soon as they show that UNRWA's assistance is at present unavailable to them for reasons relating to the current general living conditions, "or" that it has ceased because was not available at the time when they lived in the area.

Several arguments can be used in support of a disjunctive reading of the test on UNRWA's incapacity to assist the applicant either at the time of the departure or at the time of potential return. First, the UNHCR, in its Revised Statement on Article 1D of the 1951 Convention, recommended considering Palestinian refugees who leave the areas of UNRWA's operation as *ipso facto* entitled to refugee protection. So, the test on applicants' returnability is an extra condition not included in Art 1D Refugee Convention. This extra condition should not be added interpretatively to Art 12 (1) (a) QD if EU law is to remain faithful to its aspiration of providing a «*full and inclusive application*» of International Refugee Law (Recital 3 QD).

Second, there might be cases of protection needs arising *sur place* (see Art 5(1) QD). This happens when applicants entitled to UNRWA's assistance leave its area of operation at a time when the general living conditions are not so poor to meet the severe threshold of extreme poverty and unsafety developed by the CJEU (in *Bolbol*, *El Kott*, *SW*); however, the situation

may deteriorate after the applicants' departure until the extent that their return would be incompatible with the principle of non-refoulement. In such cases, unreturnable refugees of Palestinian origin should be considered as *ipso facto* refugees under Art 1D Refugee Convention. For determining their refugee status, the reasons why the applicants left the UNRWA's area of operation in the past become irrelevant when, at present, protection is inaccessible.

D. CONCLUSIONS

The main point of critique arising from *SN & LN* lies in the formulation of the CJEU's conclusions, which suggest a restrictive reading of international refugee law. In *SN & LN*, the CJEU ruled that applicants fleeing from a UNRWA's area of operation can qualify for refugee status when two conditions regarding the general living conditions in the UNRWA's area are met:

a) it can be established that the UNRWA failed to meet the applicants' basic needs at the time when they lived in its area of operation; together with

b) UNRWA's persistent incapacity to aid any refuge in the area upon a potential applicant's return.

In the future, it would be desirable for national courts to send preliminary questions to the CJEU to question the necessity of reading these two conditions as cumulative.

Moreover, inadequate protection for applicants may derive from confusingly merging different lines of case law interpreting, respectively, Art 12 (1) (a) QD (like *SN & LN*) and material deprivation in cases relating to reception conditions in the CEAS (like *Jawo*).

In fact, there is a risk that, in the future, the CJEU will limit the application of a test on extreme material deprivation and general living conditions to only two categories of cases. Basically, only in cases of Dublin returns (like *Jawo*) and in cases of potential returns to areas under the UNRWA's mandate (like *SN & LN*) by arguing that only in such instances non-refoulement may be triggered by failures of third parties to guarantee dignified living conditions to applicants. Namely, failures attributable to institutions which should have a specific positive duty under EU law to care for the applicants. This duty derives for EU Member States from the Reception Conditions Directive in the first type of cases and for the UNRWA from UN resolutions in the second type. Such a restrictive approach, if adopted, would risk further fragmenting the interpretation of the principle of non-refoulement and limiting, in the future, the possibility for the generality of applicants to successfully claim protection from refoulement when the risk of inhuman treatment arises from an eventual return to a third-country where the applicants' basic needs cannot be met due to dire living conditions.

E. SELECTED REFERENCES

Relevant Case Law:

- ECJ, Opinion of Advocate General Emiliou delivered on 11 January 2024, *NL, SN,* C-563/22. ECLI:EU:C:2024:33.
- ECJ (Grand Chamber), Judgment 17 February 2009, Elgafaji, C-465/07, ECLI:EU:C:2009:94.
- ECJ (Grand Chamber), Judgment 17 June 2010, *Bolbol* , C-31/09, ECLI:EU:C:2010:351.
- ECJ (Grand Chamber), Judgment 19 December 2012, El Kott, C-364/11, ECLI:EU:C:2012:826.
- ECJ (Grand Chamber), Judgment 19 March 2019, *Jawo*, C-163/17, ECLI:EU:C:2019:218.
- ECJ, Judgment 5 October 2023, *OPRA v SW*, C-294/22, ECLI:EU:C:2023:733.

Literature:

- S.M. AKRAM, *UNRWA and Palestine Refugee,* in C. Costello, M. Foster, and J. McAdam (eds), *The Oxford Handbook of International Refugee Law,* Oxford, New York, *Oxford University Press,* 2021, pp 643-660.
- C. COSTELLO, *Defining Protection: Refugeehood, Non-refoulment, and Human Rights*, in C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford (United Kingdom), *Oxford University Press*, 2016, pp. 171-230.
- G. GOODWIN-GILL, S. M. AKRAM, "*Forward to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law*", in *Palestine Yearbook of International Law,* 11 (2000-2001), pp 185-260

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