REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

	REFUGEE APPEAL NO. 72635/01
AT AUCKLAND	
Before:	RPG Haines QC (Chairperson)
	DJ Plunkett (Member)
Representing the Appellant:	R Chambers and K Gore
Date of Hearing:	16 & 17 July 2001
Date of Decision:	6 September 2002

DECISION OF THE AUTHORITY DELIVERED BY RPG HAINES QC

INDEX

INTRODUCTION [1]

THE APPELLANT'S CASE [8]

THE DECISION AT FIRST INSTANCE [21]

SUMMARY OF DECISION ON APPEAL [23]

ASSESSMENT OF THE APPELLANT'S CASE [25]

- **The alleged visit by the Kuwaiti authorities to the appellant's sister** [26]
- **Forced to act as driver for Iraqi military** [30]
- **Forced to spy for Iraq** [33]

CONCLUSIONS ON CREDIBILITY [38]

THE BEDOONS OF KUWAIT [41]
- **Whether Bedoons can return to Kuwait** [50]

THE INCLUSION CLAUSE - TWO FUNDAMENTALS [53]
- **A prospective risk of persecution** [55]
- **Past persecution alone insufficient** [59]

THE INCLUSION CLAUSE AND STATELESS PERSONS [63]
- **A single test for refugee status - stateless claimants must satisfy the well-founded fear standard** [65]

NATIONALITY AND STATELESSNESS [69]

- **The doctrine of the freedom of states in matters of nationality** [70]
- **The rules relating to the acquisition of nationality** [76]
- **Definition of statelessness** [78]
- **No duty to confer nationality** [83]
- **Conclusion** [90]

THE TWO CONVENTIONS ON STATELESSNESS [91]

- **The UNHCR and stateless persons** [97]

STATELESS PERSONS AND THE REFUGEE CONVENTION [100]

Not all stateless persons are refugees [100]
***De jure* stateless and *de facto* stateless [107]**

FORMER HABITUAL RESIDENCE [112]

The meaning of habitual residence [113]
Habitual residence in more than one country [117]

FORMER HABITUAL RESIDENCE AND LEGAL RETURN [125]
Introduction [125]
Whether claimant must be legally able to return to the country of former habitual residence [129]
Article 12 ICCPR [147]
Conclusion on the "return" point [149]
General conclusions on statelessness [151]

CONCLUSION ON "WELL-FOUNDED" REQUIREMENT [158]
Iraq [158]
Kuwait [159]

ALTERNATIVE GROUND FOR DECISION - NO NEXUS [160]

CAUSATION [162]
The New Zealand jurisprudence on causation [163]
The standard of causation [167]
***The Michigan Guidelines on Nexus to a Convention Ground* [175]**
***Michigan Guidelines* on Nexus to a Convention ground and New Zealand refugee law [177]**

APPLICATION OF CAUSATION PRINCIPLES TO THE FACTS [181]
The social group ground [185]
Nationality [187]
Causation - conclusions on the facts [193]

EXCLUSION [195]
The appellant's evidence [195]
Assessment [199]
The exclusion clause [200]

CONCLUSION [210]

INTRODUCTION

[1] This is an appeal against the decision of a refugee status officer to decline the grant of refugee status to the appellant, a 40-year-old married man born in Kuwait but who claims ***not*** to have Kuwaiti nationality or indeed any nationality. He says that he is stateless.

[2] The appellant arrived in New Zealand at Auckland International Airport on 24 August 2000 travelling on a false Saudi Arabian passport. At the airport he applied for refugee status and was issued with a temporary permit.

[3] He was interviewed by a refugee status officer on 24 January 2001. In a decision published on 12 April 2001 the refugee application was declined on the basis that as the appellant has no legal right of return to Kuwait and further, as he is unable (as a matter of fact) to return there, he cannot return to persecution with the result that he is unable to establish a well-founded fear of being persecuted. An identical finding was made in relation to Iraq, a country in which he lived for seven years in the period 1993 to 2000.

[4] The appeal before this Authority occupied two full days. The appellant was the only witness. The principal legal issue addressed by counsel was the significance of the returnability of a stateless refugee claimant to his or her country of former habitual residence. Counsel filed detailed written submissions accompanied by a ring binder of country information (relating to both Kuwait and Iraq) and voluminous case law.

[5] At the conclusion of the hearing on 17 July 2001 counsel was invited to address further issues and the Authority has received under cover of counsel's letter dated 3 August 2001 further documentation which has been taken into account in the preparation of this decision.

[6] The Authority acknowledges the assistance received from counsel. The delay in delivering this decision is regretted. However, the legal issues have not been without difficulty and the appeal has been something in the nature of a test case.

[7] It is proposed to first outline essential aspects of the appellant's case before addressing the country information and legal issues. The terms "nationality" and "citizenship" will be used interchangeably in this decision.

THE APPELLANT'S CASE

[8] The account which follows has been taken from the decision of the Refugee Status Branch, an account expressly adopted by the appellant for the purpose of the appeal hearing. Where necessary, reference is made to evidence given by the appellant at the appeal hearing itself. Our assessment of the appellant's claims follows in a later section of this decision.

[9] The appellant was born in Kuwait, as were his parents and grandparents before him. However, no member of his family has Kuwaiti citizenship. They are described in Kuwait as "Bedoon" which means either "without nationality" or "without citizenship". The status of the Bedoons of Kuwait will be addressed later in this decision.

[10] After graduating from high school the appellant joined the Ministry of Interior, working in a department responsible for executing prison sentences. At times he loosely described his occupation as working for the police force. Because of his employment he was entitled to special privileges not normally accorded to Bedoon. In particular he was issued with a form of Kuwaiti passport described as an Article 17 passport which, while not recognising him as a national of Kuwait, allowed him to

travel abroad and to return to Kuwait. The appellant says that he has travelled to most of the Middle Eastern countries and also to Germany. He described himself in this period as being in a very good financial position, drawing a generous salary.

[11] The appellant married in March 1984 and now has seven children aged between six and seventeen. The appellant's wife and children are currently in Jordan.

[12] The appellant's life was uneventful until the Iraqi invasion of Kuwait on 2 August 1990 and the liberation of 26 February 1991. The returning Kuwaiti government accused (wrongly) all Bedoon of supporting and helping the Iraqi forces during the occupation. Although some Bedoon retained their government employment post-liberation, many did not. The appellant was among those refused further employment by the state. He says that as a consequence he and his family were denied access to state-provided education and health services. The appellant went into business as a second-hand car dealer together with his brother-in-law, a Kuwaiti citizen. Although he continued to suffer disadvantages as a Bedoon, the business prospered.

[13] However, on 1 August 1993 the appellant was stopped at a checkpoint and after being identified as a Bedoon no longer in government employment, was arrested and detained for deportation from Kuwait. He spent the next two months in custody before being taken to the northern border with Iraq. There he was joined by his wife and family, a truck with the contents of their house and his two motor vehicles. The appellant, his wife and children were then expelled into Iraq. Also expelled with them was a brother-in-law (not the one with whom he was in business) and three of his (the brother-in-law's) children. The appellant produced in evidence a copy of a document issued by the Ministry of Interior of Kuwait which states, according to the English translation, that the appellant and his family are "allowed to leave" through the exit checkpoint of Al-Abdali. In the same document it is recorded (by Iraqi border officials) that:

> On 28/9/1993 a Bidun family has arrived at Safwan border check point. The family was deported by the authorities of the Kuwaiti regime; and their names are listed below, and with two cars only ...

[14] After entering Iraq the appellant was detained for fifteen days and questioned as to his identity, his circumstances in Kuwait, whether he had Iraqi citizenship and what his purpose was. After being fingerprinted and released with the help of an Iraqi guarantor and the payment of a bribe he and his family moved to Wasset Al Kut where they lived for approximately one year. During this time he inquired whether he would be able to apply for Iraqi citizenship but was told that he had no right to apply for citizenship. While he and his family were able to live off the money they had previously saved in Kuwait, his children did not attend school and he himself did not work. During this time the appellant was visited by Iraqi authorities who questioned him about his political opinions and he came under pressure to join the Ba'ath Party. On occasion he was detained for a few days and on other occasions he was asked to donate money and allow his car to be used by the Ba'ath Party.

[15] Tired of these attentions he and his family moved to Beesyah, a desert village where the family lived for approximately four years. During this time he experienced similar problems with the authorities.

[16] In 1997 the appellant and his family moved to Al-Zubair. By this time they were receiving financial support from family members living in Saudi Arabia.

[17] On 15 June 2000 the appellant was arrested and taken to Basrah where he was accused of being a member of the Al Dawa Party, a Shi'ite organisation opposed to the current Iraqi regime. Although a Shi'ite himself, the appellant had never supported or participated in the Al Dawa Party, did not have an interest in religion and did not practice his religion. However, he was told by Iraqi intelligence officers that they had

reports from neighbours that he was in fact involved in Al Dawa. The appellant says that in Iraq this is an extremely serious allegation given that Al Dawa has mounted underground attacks against the Iraqi regime since the late 1970's and has conducted violent operations, including bombings and assassinations, against regime officials. The independent country information confirms that torture and execution of suspected Al Dawa members is common: see the various Responses to information requests prepared by the Research Directorate of the Immigration and Refugee Board, Ottawa, Canada filed by counsel for the appellant under cover of his letter dated 3 August 2001.

[18] The Iraqi intelligence officers told the appellant that if he wished to contest the accusations and prove his loyalty to the Iraqi regime, he would have to do something for Iraq. The proposition put to him was that as he had lived in Kuwait for most of his life, he would still have contacts and relations there who trusted him. He was asked to travel to Jordan to make contact with relatives in Kuwait, although he was not told what his "job" was going to be once he arrived there. On this basis he was released from detention. The Iraqi officials were unaware of his previous employment by the Kuwaiti government.

[19] On his release the appellant made arrangements for his wife and children to leave Iraq for Jordan and to that end paid a bribe to secure for them false Iraqi passports.

[20] In July 2000 the appellant crossed into Jordan, his family following shortly thereafter. Once in Jordan he paid an agent to arrange for his (the appellant's) travel to Canada and to that end obtained a false Saudi Arabian passport. On 22 August 2000 he left Jordan by air and after transiting through Paris and Seoul, arrived in New Zealand on 24 August 2000.

THE DECISION AT FIRST INSTANCE

[21] On the evidence before him, the refugee status officer accepted the appellant's account and found that he was stateless, possessing the nationality of neither Kuwait nor Iraq. In determining whether either country was a "country of former habitual residence" within the meaning of Article 1A(2) of the Refugee Convention, the officer drew on and applied the statement by Professor James C Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 62-63 that a state is a country of former habitual residence only if the claimant is legally able to return there. The officer was of the view that as the appellant has no legal right of return to either Kuwait or Iraq, neither country is a country of former habitual residence. It followed that the appellant fell outside the refugee definition in Article 1A(2).

[22] A further reason given by the officer for declining the refugee application was that as the appellant is stateless and cannot in fact be returned to either Kuwait or Iraq, he cannot be returned to persecution. It followed that he did not have a well-founded fear of being persecuted in either country.

SUMMARY OF DECISION ON APPEAL

[23] In view of the complexity of the issues raised by this case, it might be helpful at the outset to summarise in a general way our conclusions on key issues:

1. The appellant is a stateless person.

2. Stateless persons can be, but are not automatically, refugees.

3. The general rules of refugee law apply, including the need to show a prospective risk of being persecuted. Evidence of past persecution standing alone is insufficient to satisfy Article 1A(2).

4. In the case of a stateless person, the Inclusion clause issues are to be considered in relation to the appellant's "country of former habitual residence".

5. A stateless person may have more than one country of former habitual residence.

6. Legal returnability is not a requirement for a state to be a country of former habitual residence, with the result that the appellant's case should be assessed in relation to both Iraq and Kuwait.

7. The case in relation to Iraq fails because there is no credible evidence of a well-founded fear of being persecuted there.

8. The claim in relation to Kuwait fails because the appellant cannot in fact be returned there. It follows there is no well-founded fear of being persecuted there.

9. In the alternative, the case in relation to Kuwait fails because application of nationality laws based on *jus sanguinis* principles does not *per se* amount to a risk of being persecuted.

10. In the further alternative, the case in relation to Kuwait fails because even if a persecutory act, the application of *jus sanguinis* nationality principles by Kuwait does not give rise to a forward-looking risk.

11. No Convention ground has been established.

12. In any event, the appellant is excluded from refugee status by virtue of Article 1F(a).

[24] The first step in explaining these conclusions is to set out our determination of the credibility of the appellant's claims.

ASSESSMENT OF THE APPELLANT'S CASE

[25] Having interviewed the appellant for two full days we are of the view that we have not been given a full and truthful account. At significant points he was evasive and his evidence was characterised by exaggeration, if not invention. Examples follow. The primary impact of the credibility finding is on the refugee claim vis-à-vis Iraq.

The alleged visit by the Kuwaiti authorities to the appellant's sister

[26] The appellant claims that one month prior to the appeal hearing the authorities in Kuwait visited a sister of his who lives in Kuwait and told her that they knew that the appellant had lodged a refugee claim in New Zealand, that it is a test case and also knew he was going to succeed in his claim. They concluded by telling his sister that they did not want the appellant to say anything bad about Kuwait. The appellant says that implicit in this statement was a threat that if in his refugee claim he said anything critical of Kuwait, the family would suffer.

[27] We are of the view that this claim is pure invention. Details of all refugee claims made to the authorities in New Zealand are kept strictly confidential and there is no way the Kuwaiti authorities could learn of the appellant's claim, unless, of course, he himself has made disclosure. At the time of the alleged visit, the appellant's claim had failed at first instance and the assertion by the Kuwaiti authorities that the appellant's case would succeed before this Authority would require an ability to see into the future, an ability which the Kuwait authorities plainly do not have. In addition the assertion that the authorities are anxious that the appellant say nothing negative about Kuwait is itself unintelligible. Kuwait has already been criticised by the appellant in his refugee statement and in his evidence before the refugee status officer. Kuwait has also been heavily criticised before the international community for its treatment of the

Bedoons as witness, for example, the Human Rights Watch reports, "The Bedoons of Kuwait: Citizens Without Citizenship" (1995) and *Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression* (October 2000). As the second of these reports notes, the UN Human Rights Committee as well as the Committee on the Rights of the Child have been critical of Kuwait. The more difficult it is to understand why the Kuwaiti authorities should be at all concerned as to what the appellant might say about Kuwait in the context of his confidential refugee application to the New Zealand authorities.

[28] In support of his claim that the Kuwaiti authorities visited his sister in Kuwait, the appellant alleged that the visit had resulted in family members in Kuwait suspending their support payments to his wife and children presently in Jordan. He also claimed that the two sisters living in Saudi Arabia who were contributing to these payments, likewise suspended their payments. He further claims that he cannot communicate with any of these individuals because they have, without exception, refused to have anything to do with him. One difficulty to these claims is that the appellant's evidence (at least initially) was that the support payments ceased prior to the visit by the Kuwaiti authorities to the sister. When the appellant realised that this meant that the effect preceded the cause, the timing of the visit to the sister and his telephone calls suddenly became rather elastic. He also admitted that he had not spoken by telephone to the sister who had been visited by the Kuwaiti authorities even though he had had contact with other relatives. He conceded that he could have spoken to the sister about the visits rather than relying on second-hand accounts but claimed that he could not afford long phone calls and also "it was history and did not concern me".

[29] Having seen and heard the appellant we are of the clear view that the claim that Kuwaiti authorities have visited his sister is invention and illustrates the exaggeration and embellishment which characterised his evidence.

Forced to act as driver for Iraqi military

[30] In his written statement the appellant stated that one of the problems he experienced in Iraq at Wasset Al Kut was that he was taken to do "slave" work for the Ba'ath Party or "the Security". He described his life as severe and said that he was under threat of death at any confrontation with the security forces, or for opposing the regime. This was because he and his car were used by them. As he did not want to do this he took his family to Beesyah. Asked by the refugee status officer about the "slave work" the appellant is recorded by the officer at p 133 of the file as saying:

> Wanted me to join Ba'ath Party so sometimes I gave money or get help from friends. They keep quiet for a while then carry on again.

In the written interview report (adopted by the appellant) the following summary of his evidence is given:

> [The appellant] explained that whenever the authorities wanted anything, they would always go to the Bedoon. By way of example, he described how on occasion he was asked to donate money to the "country", and allow his car to be used by the Ba'ath Party. He advised that on the occasions that he was arrested he would have to pay sums of up to $1,000 *dinar* to be released, or to give the authorities cigarettes, and shout [ie donate] them lunch.

[31] Asked at the appeal hearing about the "slave" work the appellant's account was more graphic. For the first time he stated that:

(a) While living at Wasset Al Kut he was required to use his van to transport Iraqi military to frontline fighting against Shi'a Muslims in the marsh area. He was under armed guard while the fighting took place. He was close enough to see the fighting. After the engagement he would then drive the soldiers back home. He said there were approximately fifteen such incidents;

(b) When he moved to the south-west, he was commandeered to drive customs officers who were chasing smugglers. There were approximately thirty such incidents. The appellant had never previously mentioned chasing smugglers. He had only mentioned ongoing difficulties with party officials and having furniture stolen.

[32] If these somewhat vivid experiences were true, we would have expected them to have been described much earlier than at the appeal hearing. The clear impression gained by the Authority is that the appellant's account of the events leading to his arrival in New Zealand has been an evolving one, reflecting his attempts to strengthen or buttress his claim.

Forced to spy for Iraq

[33] Mention has been made that on 15 June 2000 the appellant was arrested and taken to Basrah where he was accused of being a member of the Al Dawa Party. In the Iraqi context, this is an extremely serious allegation and independent country information confirms that torture and execution of suspected Al Dawa members is common. The appellant's claim is that the accusation of membership of the Al Dawa Party was made in order to blackmail him into spying for Iraq.

[34] The account given to the refugee status officer (p 181) is brief:

> [The appellant] then explained how the officers told him that if he wanted to deny his relations to the Al Dawa Party, and to prove his loyalty to the Iraqi regime, he would have to do something for Iraq. The officers explained to [the appellant] that because he is from Kuwait, he would still have contacts, and relations there, who trust him. [The appellant] was then asked to travel to Jordan and make contact with relatives in Kuwait, although he was not told what his "job" was going to be once he arrived there. He stated that on that basis he was released from detention, so as to prepare for his travel to Jordan. When asked why the Iraqi authorities approached him, [the appellant] explained that it was just his luck.

[35] At the appeal hearing the appellant initially adhered to the assertion made in his written statement that one of the conditions of his release was that his family remain in custody. On this being explored further, the appellant shifted his ground, saying that the family were not physically detained and were not in fact in any form of custody. The appellant was noticeably evasive on this point.

[36] Questioned by the Authority about what instructions he received from the Iraqi intelligence officers, the appellant replied that he was given virtually no information except that he would be given a passport. But he was not told whether it would be a Kuwaiti, Iraqi or Jordanian passport and no passport was in fact given to him. He also claims that he was given no information as to where in Jordan he was to go to, who his contacts were, how he was to communicate with his handlers, how he was to support himself and how his handlers were to discover his whereabouts. Our finding is that the account is fanciful. There is also the added factor that as a Bedoon who had been expelled from Kuwait, the appellant was a person least likely to be able to be of assistance to the Iraqi intelligence services and as someone who had been out of Kuwait for at least seven years it is difficult to understand his relevance.

[37] Our conclusion is that the allegation that the appellant was arrested on 15 June 2000 and forced to spy for Iraq is an invention to disguise the true circumstances of the appellant's departure from Iraq.

CONCLUSIONS ON CREDIBILITY

[38] The birth, marriage and death certificates produced by the appellant persuade the Authority to the view that the appellant is a Bedoon born in Kuwait as were his parents and grandparents before him. However, as none of them had Kuwaiti citizenship, the appellant is himself stateless. While in Kuwait, at least until Liberation in February 1991, he was employed by the Ministry of Interior working in a department

responsible for executing prison sentences. After liberation the appellant, along with many other Bedoons was dismissed from government employment but apart from suffering discrimination as a Bedoon, he was able to prosper economically. In September 1993 he and his immediate family were expelled from Kuwait to Iraq. In Iraq the appellant was able to support his family on his savings and on remittances sent by family members. His difficulties in Iraq have been grossly exaggerated. At worst, he and his family encountered no more than discrimination. Specifically it is found that he was not required to act as a slave for the military, nor was he later asked to spy on Kuwait. The true circumstances of his departure from Iraq in July 2000 and his arrival in New Zealand have not been disclosed.

[39] We find that both Kuwait and Iraq are countries of former habitual residence as defined in a later part of this decision. As far as Kuwait is concerned, as will be seen from the next section, as a Bedoon the appellant is not able, as a matter of fact, to return to Kuwait. One issue to be addressed is whether the failure of Kuwait to recognise the appellant as a national of Kuwait and the consequential denial of a right of return to Kuwait are sufficient to meet the definition of Convention refugee in Article 1A(2) of the Refugee Convention. In relation to Iraq, there is insufficient evidence on which a conclusion can be reached, one way or the other as to whether the appellant will, as a matter of fact, be readmitted by Iraq. However, the issue is academic as we are satisfied that if readmitted to Iraq, the appellant does not, in relation to that country, have a well-founded fear of being persecuted for a Convention reason. Nor is there any risk of his being returned by Iraq to Kuwait.

[40] We have not yet mentioned a disturbing aspect of the appellant's evidence to this Authority in which he disclosed, for the first time, that in Kuwait he habitually watched prisoners being tortured. This evidence raises the issue of exclusion under Article 1F of the Refugee Convention. In the interests of clarity we will first deal with

the inclusion clause issues under Article 1A(2) before addressing the question of exclusion under Article 1F.

THE BEDOONS OF KUWAIT

[41] As mentioned, the Bedoons of Kuwait are the subject of two extensive reports by Human Rights Watch, namely Human Rights Watch, *The Bedoons of Kuwait: "Citizens without Citizenship"* (1995) and Human Rights Watch, *Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression* (October 2000). There is also the *Report by Mr Maurice Glèlè-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance - Addendum: Mission to Kuwait* (E/CN.4/1997/71/Add.2, 14 January 1997), a document prepared for the Commission on Human Rights, 53rd session.

[42] As to the meaning of the word "*bedoon*", the following explanation is taken from Human Rights Watch, *The Bedoons of Kuwait: "Citizens without Citizenship"* at 10:

> The word "*bedoon*" is from the Arabic phrase "*bedoon jinsiyya*", literally meaning either "without nationality" or "without citizenship". The phrase was originally the official designation for anyone whose qualification for Kuwaiti citizenship was in doubt. The phrase was later officially replaced with terms such as "non-Kuwaiti" or "Undetermined Nationality", but Bedoon is still the most common designation. The term should not be confused with Bedouin from the Arabic word "*badawi*", meaning nomad (the plural is "*badu*" or the more colloquial "*bidwan*"). Although many of the Bedoons are of Bedouin origin, most of them have long settled in the urban centres of Kuwait, and many have never lived a nomadic life.

[43] The report goes on to record at p 14 that:

> Most of today's Bedoons fit the definition of the 1954 Stateless Status Convention, in that they are not considered nationals of any state. They arrived at this situation either because of Kuwaiti law or the long-established practice of Kuwaiti authorities. Bedoons were either rendered stateless de jure, ie, by the Kuwaiti citizenship law as stated, interpreted and amended by the government; or de facto, when they were excluded in practice from the scope of the law.

[44] The principles of Kuwaiti citizenship are explained at pp 66-79 of the report. In essence, citizenship in Kuwait is based on descent (*jus sanguinis*), not on the place of birth (*jus soli*). The fact that the appellant was born in Kuwait is not, of itself, a relevant circumstance as far as Kuwaiti citizenship law is concerned. The essential

difficulty he faces is that neither his father nor his grandfather were themselves ever citizens of Kuwait. The following quote is taken from p 66 of the report:

> Kuwaiti law is based mainly on a restrictive male-orientated doctrine of blood-link (*jus sanguinis*), whereby citizenship is passed through a Kuwaiti father, but not mother, to off-spring. This is consistent with local traditional kinship customs - a patrilineal system in which the familial and tribal identity is passed through the male. However, while most citizenship laws in the region make special provisions to prevent or reduce statelessness, Kuwaiti law does not.
>
> The link to territory (*jus soli*) was considered mainly in determining the "founding citizens" of 1920. Only in the case of foundlings did the law recognize the territorial link as a criterion for conferring citizenship: "Kuwaiti citizenship is conferred on any person born in Kuwait to two unknown parents. A foundling is considered born in Kuwait unless proved otherwise" (Article 3 of the Citizenship Law, as amended).
>
> Kuwaiti citizenship laws became exceedingly restrictive through numerous amendments clearly aimed at denying citizenship to all but a small group of original Kuwaiti city inhabitants. All citizenship decisions are made by a special secret committee whose decisions are explicitly made exempt from judicial review.

[45] In the Human Rights Watch, *Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression* (October 2000) at 9 it is stated that there are approximately 120,000 Bedoon resident in Kuwait. An estimated 240,000 are living outside the country, many of whom wish to return to Kuwait but have not been permitted to do so by the government. Until the mid-1980's the Kuwaiti government treated Bedoon as lawful residents of Kuwait whose claims to citizenship were being considered, a status that distinguished them not only from other foreign residents but also from other groups of stateless residents, such as Palestinians from Gaza. Bedoon made up the vast majority of the rank and file of all branches of the police and military and as already noted, were eligible for temporary passports under Article 17 of the Passport Law 11/1962. Intermarriage among Bedoon and Kuwaiti citizens was and is common, and because of the vagaries of the implementation of the Nationality Law it is not unusual for a single family to have members with different citizenship statuses: original citizenship, citizenship by naturalization, and Bedoon. However, in 1985 the government began applying a series of regulations stripping the Bedoon of almost all their previous rights and benefits. It also fired government employees not employed by the army or the police and who could not produce valid passports, whether issued

by Kuwait or another country and instructed private employers to do the same. Restrictions increased in the aftermath of the 1990-1991 Iraqi occupation. Bedoon government employees were dismissed *en masse*, and only a small portion were later rehired. Beginning in 1993 Bedoon were also required to pay fees to use healthcare centres, although those services remained free for Kuwaiti citizens. More recently, in May 2000 the Kuwaiti National Assembly passed amendments to the Nationality Law which were intended to be the final statement on which Bedoon would be eligible for naturalization and in June 2000 the Ministry of Interior ended a nine month programme during which Bedoon who signed affidavits admitting to a foreign nationality and renouncing claims to Kuwait nationality could apply for a five year residency permit and other benefits.

[46] The two Human Rights Watch reports cited raise serious concerns about the impact of these various measures on the human rights of Bedoons. The two reports document the inability to work (with few exceptions) in the public and private sectors or to receive most basic government services, the withholding of civil identification cards, driver's licences and travel documents and the denial of the right to leave and return to one's own country contrary to Article 12 of the International Covenant on Civil and Political Rights, 1966. Cumulatively, the measures mean that Bedoons are vulnerable to harassment and exploitation and the 1995 report estimated that since the end of the war over 24,000 expulsion orders for Bedoons had been issued, though not all had been executed as for many Bedoons there is no country to which they can be expelled.

[47] The position of the Kuwaiti government is explained in the 1995 Human Rights Watch report, *The Bedoons of Kuwait: "Citizens Without Citizenship"* at 54-65. Kuwaiti officials dismiss the issue of Bedoons as one of immigration control and say that the Bedoon "problem" has resulted from leniency on the part of the authorities in the past towards illegal immigration. Because very generous benefits are provided to Kuwaiti citizens it is alleged that many foreign residents hide their original documents

and claim to be citizens of Kuwait (p 55). In the Department of State, *Country Reports on Human Rights Practices for 2000: Kuwait* (September 2001) 1968, 1969 it is reported that in the year 2000 the government of Kuwait found that 12,000 Bedoon were documented as nationals of other states, primarily Syria and Saudi Arabia. Kuwaiti officials also cite the fact that many Bedoons fled to Iraq during the occupation as proof of their Iraqi origins. The view that Bedoons collaborated with the Iraqis during the occupation has reinforced official hostility to them.

[48] Whatever the merits of the Kuwaiti government position, the short point is that the appellant says that he is a Bedoon, not a citizen of Kuwait and stateless. All of the official documents tendered in evidence by the appellant support this contention. On the appellant's birth certificate there is a space for the recording of the nationality of both the mother and father of the child. In the appellant's case, this column has been left blank in relation to both his father and his mother. The father's death certificate records the deceased's nationality as "Undefined". The appellant's marriage certificate records his nationality and that of his wife as "Non-Kuwaiti". The same description appears on his driving licence. The birth certificates for five of his children born in Kuwait records the nationality of both the appellant and his wife as "Non-Kuwaiti". For the remaining two children nationality is not given. The nationality given in the "expulsion" document dated 30 August 1993 is "Bedun".

[49] These documents are consistent with the approach taken by Kuwait to the issue of citizenship and which is summarised in the Human Rights Watch report, *The Bedoons of Kuwait: "Citizens without Citizenship"* at 90:

> "Most nations in the Middle East, including Kuwait, determine citizenship not according to one's place of birth but according to the nationality of one's father. Thus, under Kuwaiti law, those born in Kuwait to a father of another nationality are considered to be members of that nationality. Because most Bedoons are born to fathers who themselves were Bedoons, they have been relegated to a permanent stateless limbo. They have no legitimate claim to citizenship anywhere other than Kuwait, but Kuwait refuses to grant them citizenship."

Whether Bedoons can return to Kuwait

[50] Bedoons without Kuwaiti passports and who try to return to Kuwait are turned back at the border: Human Rights Watch, *The Bedoons of Kuwait: "Citizens without Citizenship"* 28, 35; Human Rights Watch, *World Report 2001: Kuwait* 399; US Committee for Refugees, *World Refugee Survey 2001: Kuwait* 186; US Committee for Refugees, *World Refugee Survey 2002: Kuwait* 178-179; Department of State, *Country Reports on Human Rights Practices for 2000: Kuwait* (September 2001) 1968, 1979. The following passages from Human Rights Watch, *Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression* (October 2000) at 10-11 are illustrative of the point:

> Kuwait refuses to acknowledge the right of return of, and arbitrarily denies re-entry to, many Bidun who can claim Kuwait as their "own country". This is the case particularly with regard to Bidun who became stranded abroad after the 1991 liberation of Kuwait from Iraqi occupation. When the Human Rights Committee recently questioned Kuwait's failure to acknowledge this group's right of return, Kuwait's representative responded: "The state of Kuwait does not prohibit a person who left Kuwait during the invasion from returning to Kuwait if that person has a valid [foreign] passport and qualifies for a visa according to the law". This response further demonstrates that Kuwait is not fulfilling its obligations to facilitate the right of return, which under the terms of the Covenant cannot be made dependent on a person's ability to obtain a foreign passport or qualify for a Kuwaiti visa.
>
> In addition to denying reentry to Bidun who have gone abroad, Kuwait has also carried out deportations of Bidun, and then denied them re-entry to what effectively constitutes their "own country". Under article 16 of the Alien Residence Law 17/1959, the Minister of Interior may deport non-Kuwaiti nationals by administrative action if he determines that they have "no recognizable sources of livelihood;" if he "believes that the deportation is mandated by public interest, public security, or public morals;" or if a court orders them deported after sentencing them in a criminal case. Administrative decisions to deport non-Kuwaitis are explicitly excluded from judicial review.
>
> Recent statements by Kuwaiti government officials suggest that the government may be considering additional deportations of Bidun....
>
> In addition to preventing Bidun from entering their "own country", Kuwait also limits their ability to leave their "own country" by placing severe and arbitrary restrictions on the circumstances under which it will grant Bidun travel documents....

[51] Further country information establishing that most Bedoons cannot return to Kuwait is cited by the refugee status officer in the decision of 12 April 2001 at 246-

245. Whatever the limited ability of some Bedoons travelling on Article 17 passports to return to Kuwait, it is clear that for Bedoons like the appellant who have been expelled into Iraq and who have subsequently lived in that country for some period of time, there is no realistic possibility of being permitted to re-enter Kuwait. Like the refugee status officer, we find that the appellant is stateless and cannot in fact be returned to Kuwait. The significance of this finding will be addressed later.

[52] It is necessary to first set out the refugee definition and a framework for the analysis of statelessness in the context of the Refugee Convention.

THE INCLUSION CLAUSE - TWO FUNDAMENTALS

[53] Article 1A(2) of the Refugee Convention relevantly provides that the term "refugee" applies to any person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.
>
> 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."

[54] For reasons which will become apparent, two aspects of this definition deserve mention:

(a) The well-founded fear standard mandates an inquiry into the ***prospective*** risk of persecution. The definition looks to the future, not the past.

(b) Past persecution alone is not enough to satisfy the definition.

A prospective risk of persecution

[55] An essential precondition to the application of the Refugee Convention is that the refugee claimant (whether possessing a nationality or having no nationality) is outside the country of nationality, or as the case may be, outside the country of former habitual residence. The essential question posed in both cases is the same, namely whether the individual faces a well-founded fear of being persecuted for a Convention reason (necessarily a future event), in which case he or she is entitled to all the rights in the Refugee Convention, including but not limited to protection against *refoulement*.

[56] The "well-founded fear of being persecuted" standard involves evidence of a present or prospective risk in the country of origin should return take place. The term "fear" is here used in the sense of "anticipation", not in the sense of "trembling in one's boots". See in particular Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 68-69, a passage specifically approved in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 307B (HL) per Lord Lloyd. It has long been an established fundamental of New Zealand refugee jurisprudence that the inquiry into refugee status is concerned not with the subjective perceptions of the claimant, but with the of the risk of persecution should the claimant be returned to the country of origin: *Refugee Appeal No. 70074/96* (17 September 1996); [1998] NZAR 252, 260-263; *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236, 254-256; 263; *Refugee Appeal No. 71404/99* (29 October 1999) at [25] to [40]; *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [116] to [140]. The law in Australia is the same. See in particular *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572 (HCA). In Canada the Federal Court of Appeal has repeatedly emphasised that it is the well-foundedness of a fear of ***future*** persecution that is tested: *Naredo v Canada (Minister of Employment & Immigration)* (1981) 130 DLR (3d) 752, 753 (FC:CA); *Oyarzo v Canada Minister of Employment & Immigration)* [1982] 2 FC 779, 781 (FC:CA).

[57] In determining whether a fear of being persecuted is well-founded an objective assessment must be made as to whether or not the anticipated persecution might or might not occur in the event of return. A fear is "well-founded" when there is a real substantial basis for it. A substantial basis for a fear may exist even though there is far less than a 50 percent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation: *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572 (HCA) adopted in *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [154]. If, for whatever reason, there is ***no*** risk of persecution in the country of origin, or if the risk is but conjecture or surmise, the fear of being persecuted is not well-founded. It follows that if the country of origin refuses to admit or accept the return of the refugee claimant, the fear of being persecuted is similarly not well-founded in that country.

[58] The decision in *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958, 993E, 994F, 998G, 1000E (HL) likewise emphasises the objective and forward-looking nature of the well-founded fear standard as well as the need for there to be a real and substantial danger of the person being persecuted. See also *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305E, 308B (HL) and *Revenko v Secretary of State for the Home Department* [2001] QB 601, 617H, 632F, 642C (CA) (Pill & Clarke LJJ & Bennett J).

Past persecution alone insufficient

[59] Past persecution is not sufficient on its own to establish a well-founded fear of being persecuted should the individual return to the country of origin. This is explained at length in *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236 at 251-

264. Given the extensive examination of the issue in that case it is not intended to rehearse here the grounds for the holding.

[60] Two corollaries flow from the preceding paragraph, namely:

(a) As the Refugee Convention is concerned with protection from prospective risk of persecution, past persecution is in no sense a condition precedent to recognition as a refugee: Professor James C Hathaway, *The Law of Refugee Status* 87; *Salibian v Canada (Minister of Employment & Immigration)* (1990) 11 Imm LR (2d) 165, 173 (FC:CA).

(b) Inability to return or alternatively, unwillingness to return, unconnected with any present or future fear of persecution falls outside the Refugee Convention. See *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 301F (HL) per Lord Slynn:

> "The first matter to be established under paragraph (2) of the article is that the claimant ***is*** outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the paragraph that he had such fear when he left his country but no longer has it. Since the second matter to be established, namely that the person "***is*** unable or, owing to such fear, ***is*** unwilling to avail himself of the protection of that country" (emphasis added) clearly refers to an inability or unwillingness at the time his claim for refugee status is to be determined, it seems to me that the coherence of the scheme requires that the well-founded fear, the first matter to be established, is also a current fear. The existence of what has been called a historic fear is not sufficient in itself, though it may constitute important evidence to justify a claim of a current well-founded fear."

[61] The decision of *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 148 ALR 366, 375 (Cooper J) which was followed in *Al-Anezi v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 283 (Lehane J) is not good law, based as it is on the now overruled decision of the English Court of Appeal in *Adan*. This was explicitly recognised in *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313 at [32] (Sackville J).

[62] We will return shortly to the significance of these two fundamental aspects of the refugee definition. First, however, it is necessary to set out a framework for the analysis of statelessness in the context of the Refugee Convention.

THE INCLUSION CLAUSE AND STATELESS PERSONS

[63] As observed in *Refugee Appeal No. 1/92 Re SA* (30 April 1992) 77 and *Refugee Appeal No. 70074/96* [1998] NZAR 252, 256 the refugee definition in Article 1A(2) of the Refugee Convention recognises that those who have a well-founded fear of being persecuted for a Convention reason potentially fall into three categories:

(c) Those who have a single nationality;

(d) Those who have more than one nationality;

(e) Those who have no nationality at all (ie those who are stateless).

[64] Persons in each of the three categories must satisfy the common requirement of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Thereafter the requirements vary:

(a) A person who possesses nationality must be outside the country of nationality and be unable, or owing to the well-founded fear of being persecuted for a Convention reason, be unwilling to avail him or herself of the ***protection*** of that country;

(b) In the case of a person who has more than one nationality, such person is required, in effect, to first avail him or herself of the protection of each one of

the countries of which he or she is a national. To be recognised as a refugee he or she must therefore establish a well-founded fear of being persecuted in each country of nationality;

(c) A person who has no nationality must be outside the country "of his former habitual residence" and must be unable or, owing to the well-founded fear, be unwilling to ***return*** to it. The word "return" underlines the fact that a stateless person does not enjoy the protection of a country of nationality.

A single test for refugee status - stateless claimants must satisfy the well-founded fear standard

[65] It will be seen that the only difference between persons with nationality and those who are stateless is that the latter have a "country of former habitual residence" in place of a country of nationality and not having the protection of a country of nationality, the definition omits any reference to the availment of ***protection***. Instead there must be an inability or unwillingness ***to return*** to the country of former habitual residence. These necessary differences aside, the requirements of the definition are the same.

[66] An unsuccessful attempt has been made to argue, contrary to the language of Article 1A(2), that stateless persons do not have to establish a well-founded fear of being persecuted for a Convention reason in order to qualify for refugee status. It is argued that such persons need establish only that they are presently unable to return to their country of former habitual residence. This at least was the view taken in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1115H; [1997] 2 All ER 723, 730f (CA) and at first instance in *Savvin v Minister for Immigration and Multicultural Affairs* (1999) 166 ALR 348 (Dowsett J). It is also the view espoused by Professor Guy S Goodwin-Gill in a "report" prepared for the plaintiff in *Revenko v Secretary of State for the Home Department* [2001] QB 601 (CA).

[67] This view was decisively rejected by the House of Lords on appeal in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 304C-E (HL) (decision of the Court of Appeal reversed) and by the Court of Appeal itself in *Revenko v Secretary of State for the Home Department* [2001] QB 601, 623C, 631G, 642B (CA). The argument has also been emphatically rejected in Australia. See for example *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 148 ALR 366, 372-373 (Cooper J); *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313, 320-321 (Sackville J) and *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 171 ALR 483, 484, 488, 494-518 (Spender, Drummond & Katz JJ) reversing the decision of Dowsett J. In New Zealand the reasoning of the English Court of Appeal in *Adan* was rejected in *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236, 274-276. The Authority has never accepted the proposition that statelessness equals refugee status. See *Refugee Appeal No. 1/92 Re SA* (30 April 1992) 83-84. The position in Canada is the same: *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4^{th}) 666 at [16] & [17] (FC:CA) (Linden & McDonald JJA and Henry DJ). There it was held that statelessness does not give a person an advantage over those refugees who are not stateless. While the definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection and the two groups cannot be treated identically, nevertheless one should seek to be as consistent as possible.

[68] In the result there is but a single test for refugee status. The only modification in the case of a stateless refugee claimant is that he or she must show that he or she is unable, or owing to such fear, unwilling to return to the country of former habitual residence.

NATIONALITY AND STATELESSNESS

[69] It is not possible to reason that because a person has no nationality, the fact of his or her statelessness establishes persecution. Nationality rules are imperfect and statelessness can arise in circumstances far removed from persecution. A brief outline of the international rules relating to nationality which contribute to the problem of statelessness follow.

The doctrine of the freedom of states in matters of nationality

[70] In the present state of international law, questions of nationality are principally within the jurisdiction of a state. See particularly the statement by the Permanent Court in the Advisory Opinion concerning the *Tunis and Morocco Nationality Decrees Case* (Advisory Opinion) PCIJ Ser B No 4 at 23 (1923):

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.

[71] The principle was restated by the International Court of Justice in the *Nottebohm case* [1955] ICJ 4 at 20, the Court leaving open the question whether international law limits the freedom of states in matters of nationality:

> It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

[72] This rule finds expression in Articles 1 and 2 of the Hague Convention of 1930 (Convention on Certain Questions relating to the Conflict of Nationality Laws, 12

April 1930), reproduced in Richard Plender (ed), *Basic Documents on International Migration Law* 2nd rev ed (Martinus Nijhoff 1997) at 85:

> **Article 1**
>
> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.
>
> **Article 2**
>
> Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

[73] It is not necessary in the present context to determine what limits international law places on the right of States to regulate nationality. It is a topic addressed in general terms by Professor Ian Brownlie, *Principles of Public International Law* 5th ed (Clarendon Press, Oxford) 1998 385 and it would appear that there is a prohibition on the discriminatory denial of the benefits attaching to a nationality: *East African Asians v United Kingdom* 3 EHRR 76 (1973) and *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion of 19 Jan. 1984 No OC-4/84); (1984) 5 HRLJ 161 (IACHR). Dr Paul Weis in his *Nationality and Statelessness in International Law* 2nd rev ed (Sijthoff & Noordhoff 1979) at 88-91, 121 expressed the view that while the freedom of States in this area is limited by the principles and rules of customary international law, few specific rules on nationality have emerged. But even if the municipal law is found to be inconsistent with international law, the law remains valid though unlawful and the national status of the individual concerned continues to be governed by that law:

> Acquisition and loss of nationality are determined by the municipal law of the State concerned. Such municipal law must be consistent with international law. Within the jurisdiction of the State concerned, this municipal law is supreme. Outside its jurisdiction, before international tribunals and the authorities of other States, the question of its consistency with international law has to be examined. If the municipal law is found to be inconsistent with international law this means that the State which enacted it has incurred responsibility for the violation of an international legal duty. The State is obliged, by international law, to take remedial action, ie, to bring its municipal law into accordance with international law, to revoke any decisions made under the inadmissible law, and to render such satisfaction for the breach of international law as may be imposed on it. So

> long as remedial action has not been taken, the law remains valid though unlawful, and the national status of the individuals concerned continues to be governed by that law.

[74] Looked at from the perspective of 2002, caution must be exercised in relation to the statement by Dr Weis that state freedom in nationality is limited by few specific rules. Some of the subsequent international cases have already been cited. There is also Article 26 of the International Covenant on Civil and Political Rights, 1966 (equal protection of the law without discrimination) which has received from the Human Rights Committee a broad interpretation. See for example Human Rights Committee, *General Comment 18 - Non-Discrimination* Doc.HRI/GEN/1/Rev.1 (1994) at para 12 and the discussion in Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary* (Oxford 2000) at 518.

[75] Whatever the precise limits international law places on the right of States to regulate nationality, it has never been suggested that the *jus sanguinis* principle violates those limits. The fact that the appellant is denied Kuwaiti citizenship by the law of Kuwait and that he is *de jure* stateless does not of itself establish persecution.

The rules relating to the acquisition of nationality

[76] The general principles concerning conferment of nationality are summarised in *Laws NZ*, Citizenship and Nationality para 2. Nationality is usually acquired either by birth or by naturalisation, that is, by grant. Acquisition by birth may be a result either of birth within the territory of the state (*jus soli*) or of birth to a parent who is a national wherever the birth occurs (*jus sanguinis*). A state may base its nationality law upon either *jus soli* or *jus sanguinis*, or upon a combination of the two. Either may be qualified in its application. The second mode of acquisition, naturalisation, is the process by which a state confers its nationality upon an alien after that person's birth, usually upon the alien's request.

[77] See generally Weis, *Nationality and Statelessness in International Law* 2nd rev ed 95-115 and Brownlie, *Principles of Public International Law* 5th ed 390-397.

Definition of statelessness

[78] The most widely accepted definition of statelessness is that contained in Article 1 of the Convention relating to the Status of Stateless Persons, 1954:

Article 1 - Definition of the Term "Stateless Person"

1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply: -

   (i) 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 so long as they are receiving such protection or assistance;

   (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the position of the nationality of that country;

   (iii) To persons with respect to whom there are serious reasons for considering that:

      (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

      (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

      (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

[79] According to Paul Weis in *Nationality and Statelessness in International Law* 2nd rev ed 160, a person may either be stateless at birth, as a result of the fact that he or she does not acquire a nationality at birth according to the law of any State, or he or she may become stateless subsequent to birth by losing his or her nationality without acquiring another. One can thus distinguish between original and subsequent statelessness; original statelessness may also be termed "absolute" statelessness, and subsequent statelessness "relative" statelessness, insofar as in the latter case the relation of the stateless individual to the State whose nationality he or she formerly possessed is of some legal relevance. In the present case the appellant is an example of "absolute" statelessness.

[80] There are a variety of circumstances in which statelessness is or can be created . Some of the possible causes are described by Manley O Hudson, Special Rapporteur in his report *Nationality, Including Statelessness* (Doc A\CN.4\50, 21 February 1952)

YBILC 1952-II 3, 17-19 and there is the useful list compiled by Roberto Córdova, Special Rapporteur in his *Report on the Elimination or Reduction of Statelessness* (Doc A/CN.4/64, 30 March 1953) YBILC 1953-II 167, 195. For convenience, we list below the factors noted in the UNHCR Division of International Protection, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (June 1996, Revised January 1999) at 5 and the UNHCR, *Training Package: Statelessness and Related Nationality Issues* (1 January 1998) at para 22:

(a) Conflict of laws. For example, State A, in which the individual is born, grants nationality by descent only [*jus sanguinis*] and State B, in which the parents hold nationality, grants nationality by place of birth only [*jus soli*] resulting in statelessness for the individual.

(b) Transfer of territory or of sovereignty (including legal categories such as post-colonialism, independence, State dissolution, State succession and State restoration). Statelessness may result if, following any of the aforementioned events, there is adoption of a new Act on citizenship, new laws or decrees concerning citizenship, new administrative measures are introduced, or old practices are reinterpreted in which conflicts of laws or failure to acquire nationality for those whose nationality status is affected by the change, occurs. This may happen with or without the conclusion of a treaty relating to the transfer. Contrast the unusual circumstances of *Toala v New Zealand* (Comm No 675/1995, 22 November 2000, CCPR/C/70/D/675/1995) at para 11.5 (Human Rights Committee) where New Zealand citizenship was acquired involuntarily.

(c) Laws relating to marriage. One problem is the automatic loss of nationality for a woman who marries a foreign national. Statelessness may occur if she does not automatically receive the nationality of her husband or if her husband has

no nationality. Statelessness may also occur if, after receiving the nationality of her husband, the marriage is dissolved and she loses the nationality acquired by marriage but her original nationality is not automatically restored. Nationality of the children may also be unresolved under these circumstances. Some of these difficulties are addressed by the Convention on the Nationality of Married Woman, 1957 and the Convention on the Elimination of All Forms of Discrimination against Women, 1979, Article 9. New Zealand is a party to both Conventions.

(d) Administrative practices. The administrative and procedural issues relating to the process of acquisition, restoration and loss of nationality are numerous. For example, someone eligible, perhaps even a successful applicant for citizenship in the initial stages, may not actually receive citizenship due to excessive administrative fees which are unaffordable, additional deadlines which cannot be met, inability to produce documents in the possession of the former State of nationality, destroyed over time or in a war, etc.

(e) Discrimination. The inability to acquire nationality, despite a genuine and effective link or connection, because of discrimination based upon ethnicity, religion, gender, race, political opinion and so on. Nationality legislation in all States contains distinctions and individuals are not entitled to nationality in all countries. There must be a legitimate link with a country in order for the claim to nationality to be maintained. Discrimination within a State between equally-situated persons is, however, a cause of statelessness.

(f) Laws relating to registration of birth. A principle criterion in establishing identity and, therefore, the right to citizenship based on either place of birth or heritage, is proof of to whom a child is born and where. Failure or refusal of a State to ensure registration of births has led to the inability to establish identity and, therefore, to establish the basis of a claim to citizenship.

(g) Strict application of the principle of *jus sanguinis* (nationality based solely on descent, often only of the father) which in some regions, results in the inheritance of statelessness. See further Carol A Batchelor, "UNHCR and Issues Related to Nationality" (1995) Refugee Survey Quarterly Vol 14, No 3 91, 104:

> *Jus sanguinis*, when applied without modifications based on residency, place of birth or other factors, extends to children the status of their parents. The result is that statelessness is inherited, passed from generation to generation regardless of place of birth, number of years of residency, cultural ties, or the fact that in some cases the individuals concerned have neither entered nor resided in another state.

This description fits the appellant's circumstances. He is an example of *de jure* stateless as a result of the principle of *jus sanguinis*.

(h) Denationalisation. Deprivation of nationality by an act of State, based often on discriminatory practices is often followed by expulsion.

(i) Renunciation. Individual renunciation of nationality without the necessity of prior acquisition, or guarantee of acquisition, of another nationality before the renunciation takes place can result in statelessness.

(j) Automatic loss by operation of law. This may occur, for example by the acquisition of the citizenship of a third country or by residence abroad. It may be associated with faulty administrative practices which, for example, fail to notify those residing abroad of an obligation to register. A New Zealand example of automatic loss of citizenship by operation of law is provided by s 7 of the Citizenship Act 1977 which, in conferring citizenship by descent provides for the lapsing of that citizenship unless within a stipulated period of acquiring majority, an application is made for registration of the citizenship by descent. Because this provision would have rendered certain individuals

stateless, s 10 of the Citizenship Amendment Act (No. 2) 2001, now provides that the citizenship of any New Zealand citizen by descent that has lapsed under s 7(2) of the principal Act before the commencement of the Amendment Act is reinstated with effect from the time it lapsed.

[81] As the UNHCR documents point out, these examples illustrate the wide range of factors which could result in statelessness. Even states with laws aimed at paying full regard to international law in the matter of nationality may have legislation which, due to conflicts with another State's legislation, or for other good reason, inadvertently results in statelessness. This is a significant point. Being without an effective nationality does not necessarily signify persecution under the terms of the Refugee Convention. The definition of a stateless person was, in fact, chosen with the intent of excluding the question whether the person has faced persecution, as there are conflicts of laws issues which might result in statelessness without any wilful act of neglect, discrimination or violation on the part of the State.

[82] To some extent statelessness is a product of the principles on which nationality is based. As Paul Weis points out in *Nationality and Statelessness in International Law* 2nd rev ed at 162, it is obvious that *jus sanguinis* is more apt to lead to statelessness since it makes it hereditary. The adoption of *jus soli* as a secondary principle for the acquisition of nationality by *jus sanguinis* countries, and the adoption of the rule prohibiting loss of nationality except concurrently with the acquisition of another nationality, would lead to the elimination of statelessness. So far, States have not, however, been willing to accept these rules, as witness the relatively small number of states which are party to the Convention on the Reduction of Statelessness, 1961. The measures contained in this Convention are specifically directed to the elimination of statelessness.

No duty to confer nationality

[83] The foregoing points are underlined by the fact that international law does not impose a duty on States to confer their nationality. See Paul Weis, *Nationality and Statelessness in International Law* 2nd rev ed at 162:

> To the extent that there are no rules of international law imposing a duty on States to confer their nationality, and few, if any, rules denying or restricting the right of States to withdraw their nationality, one may say that statelessness is not inconsistent with international law.

[84] As to this, Article 15 of the Universal Declaration of Human Rights, 1948 provides:

> **Article 15**
>
> 1. Everyone has the right to a nationality.
>
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[85] The voting history in relation to this Article shows that while the majority of States accepted that nationality has certain human rights aspects, the understanding of the right as well as its implications differed among States. These differences were subsequently one cause of the rather slow development of any international practice on this issue, as well as the fact that the right to nationality was omitted from the International Covenant on Civil and Political Rights, 1966 (except to the extent that children have "the right to acquire a nationality" under Article 24(3)): Ziemele & Schram, "Article 15" in Alfredsson & Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 297, 302. While the authors at 321 (see also Johannes MM Chan, "The Right to a Nationality as a Human Right: The Current Trend Towards Recognition" (1991) 12 Human Rights Law Journal 1) argue that Article 15 of the Universal Declaration of Human Rights has entered into customary international law, the better view is that Article 15(1) is aspirational in nature. It is one thing to declare a general right of persons to possess a nationality; it is quite another to impose a duty on a State to confer, or refrain from

withdrawing, its nationality in particular circumstances: Stephen Hall, "The European Convention on Nationality and the right to have rights" (1999) 24 E.L.Rev. 586, 588. As the author points out, even if Article 15 has been transformed into a binding customary norm, it still fails to specify who in any particular case bears the duty of conferring nationality on a stateless person. It also co-exists with very widespread state practice, also evidence of custom, of withdrawing nationality from persons in a broad spectrum of situations ranging from residence abroad to treason even where statelessness results for the affected person. It has been reported that in the course of the 50th Session of the General Assembly, Asian states expressed particular concern for setting any responsibilities for States to adopt nationality legislation. The reasons for the concern pertain to the existence, in Asian countries, of legislation allowing the states concerned to deprive their citizens of nationality. Moreover, the Asian countries fear that states could be called upon to grant nationality to refugees: Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (Martinus Nijhoff 1997) 197-198.

[86] Richard Plender in "The Right to a Nationality as Reflected in International Human Rights Law and the Sovereignty of States in Nationality Matters" (1995) 49 Austrian J. Publ. Intl. Law 43 also argues that states do not have a duty to confer nationality:

> Article 15, however, resembles Article 14. Just as the right under Article 14 to "seek and enjoy asylum" is not equated with the right to receive it, so the right to a nationality, pronounced in Article 15, is not the same as the right to demand that any particular State grant nationality to an individual. The famous rule in the *Nottebohm* case, which requires a real and substantial connection between an individual and the State espousing his claim as one of its nationals, is a principle in respect of the ***opposability*** of nationality. It cannot be asserted, at least in the present state of international law, that an individual is entitled to be granted the nationality of a State with which he has real and substantial connections, even if he would otherwise be stateless.

See also Penelope Mathew, "Lest we Forget: Australia's Policy on East Timorese Asylum-Seekers" (1999) 11 IJRL 1, 21-22.

[87] The difficulty of identifying the state which should grant nationality is also referred to by Carol A Batchelor, "Statelessness and the Problem of Resolving Nationality Status (1998) 10 IJRL 156, 169. At 161 she points out that the drafters of the 1961 Convention on the Reduction of Statelessness focussed on how best to avoid statelessness, not on the development in general of the right to a nationality.

[88] By way of contrast the European Convention on Nationality, 1997, in proclaiming a general right to nationality endows this right with substance as a conventional norm giving rise to specific obligations on State's parties. This is done in such a way as to ensure that instances of statelessness among persons subject to the jurisdiction of a State party should be almost, but not quite entirely, eliminated. See further Stephen Hall, The European Convention on Nationality and the right to have rights" (1999) 24 E.L.Rev. 586, 595.

[89] Also to be contrasted is Article 20 of the American Convention on Human Rights, 1969 which provides:

Article 20

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Paragraphs 1 and 3 of Article 20 are materially identical to Article 15 of the Universal Declaration of Human Rights. The inclusion of paragraph 2, however, allows the American Convention to transcend previous international instruments dealing with nationality and establish a substantive and definite right to nationality. It does this by establishing *jus soli* as the law of last resort should a person be unable to establish a nationality on any other basis. As Hall points out at *op cit* 602, for the purposes of totally eliminating statelessness, this is the only reliable way to proceed; everyone has a place of birth, but not everyone has parents who possessed a nationality.

Conclusion

[90] The short conclusion is that broadly speaking, statelessness is considered to be the result of the operation and conflict of nationality laws, not the result of persecution.

THE TWO CONVENTIONS ON STATELESSNESS

[91] At least thirteen international instruments relating to nationality and statelessness are reproduced in Plender (ed), *Basic Documents on International Migration Law* 2nd rev ed ranging from the Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930 to the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 13 Dec 1985. For present purposes it is necessary to refer only to the Convention relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Statelessness, 1961. While the Convention relating to the Status of Stateless Persons, 1954 lays down basic rights, obligations and standards of treatment for the non-refugee stateless person, the Convention on the Reduction of Statelessness, 1961 sets out measures to ensure that persons do not become stateless, or are enabled to regain an effective nationality.

[92] The definition of the term "stateless person" in the 1954 Convention is not one of content or quality but simply one of fact. See para [78] above. The definition also contains exclusion provisions modelled on Articles 1D, 1E and 1F of the Refugee Convention. Indeed, given that the two Conventions were, in a sense, drafted side by side, there are many analogies between them. However as pointed out by Paul Weis in "The Convention relating to the Status of Stateless Persons" (1961) 10 ICLQ 255, 257-259 there are significant differences, though none are material in the present context. Generally, however, as regards a number of rights and benefits, the provisions of the Convention relating to the Status of Stateless Persons are less favourable than those of the Refugee Convention. By way of example the Convention relating to the Status of Stateless Persons does not contain freedom from penalties for unlawful entry, as in Article 31 of the Refugee Convention, nor a provision prohibiting expulsion or return to countries of persecution, as in Article 33 of the Refugee Convention. As Paul Weis suggests at *op cit* 259, this latter point may be explained by the fact that, while fear of being persecuted is an essential element of refugee status, this is not the case for

stateless persons. He goes on to note, however, that the Final Act of the Conference on the Status of Stateless Persons declares explicitly that:

> *The Conference*
>
> *Being of the opinion* that Article 33 of the Convention relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> *Has not found it necessary* to include in the Convention relating to the Status of Stateless Persons an Article equivalent to Article 33 of the Convention relating to the Status of Refugees of 1951.

[93] Like the Refugee Convention, the Convention relating to the Status of Stateless Persons provides for the issuance of a uniform travel document to stateless persons (Article 28), but unlike the Refugee Convention, the right of re-entry has only to be accorded to the holder when the country to which he or she proposes to travel insists on the travel document according the right of re-entry (para 13 of the Schedule to the Convention). See Weis at *op cit* 259.

[94] The provisions of the two Conventions relating to expulsion are similar. Article 31 of the Convention relating to the Status of Stateless Persons, 1954 provides:

> **Article 31 - Expulsion**
>
> 1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of nationality security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

[95] The provisions of the Convention on the Reduction of Statelessness, 1961 are too complicated to summarise here. A full account is to be found in Paul Weis, "The United Nations Convention on the Reduction of Statelessness, 1961 (1962) 11 ICLQ 1073. Broadly speaking, however, Articles 1 and 4 of the Convention are the most important from the aspect of elimination of future statelessness as they relate to the acquisition of nationality by persons stateless at birth. The dual solution adopted should enable states to confer their nationality on persons who would otherwise be stateless, on conditions which are not inconsistent with their basic approach to the concept of nationality.

[96] New Zealand is not a party to either of the Conventions but the Ministry of Foreign Affairs and Trade is presently consulting with government departments with a view to New Zealand acceding to both instruments.

The UNHCR and stateless persons

[97] While Article 35 of the Refugee Convention provides that Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, no corresponding provision is to be found in the Convention relating to the Status of Stateless Persons, 1954. By contrast, Article 11 of the Convention on the Reduction of Statelessness, 1961 anticipated a body to which a person claiming the benefit of the Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authority. This responsibility was eventually given to the United Nations High Commissioner for Refugees. This does not mean that stateless persons are refugees.

[98] The role and mandate of the United Nations High Commissioner for Refugees in the context of statelessness is succinctly summarised by Volker Türk in "The role of the UNHCR in the development of international refugee law" in Nicholson &

Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge 1999) 153, 157:

Stateless Persons

> The UNHCR has precisely defined responsibilities for refugees who are stateless, pursuant to paragraph 6(A)(II) of the UNHCR Statute and article 1(A)(2) of the Geneva Convention, both of which specifically refer to stateless persons who meet the refugee criteria. In addition, in accordance with General Assembly Resolutions 3274 (XXIX) and 31/36 [of 10 December 1974 and 30 November 1976 respectively], the UNHCR has been designated by the General Assembly, pursuant to articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, as the body to which a person claiming the benefits of this Convention may apply for the examination of her or his claim and for assistance in presenting it to the appropriate authorities. Furthermore, the prevention and reduction of statelessness and the protection of stateless persons are important for the prevention of situations leading to involuntary displacement. In 1995 the Executive Committee adopted a Conclusion to this effect which requested the UNHCR actively to promote accession to the international statelessness instruments. The UNHCR also provides technical and advisory services pertaining to the preparation and implementation of nationality legislation.

[99] Further reference can be made to Irene Khan, "UNHCR's Mandate Relating to Statelessness and UNHCR's Preventative-Strategy" (1995) 49 Austrian J. Publ. Intl. Law 93-98 and to Carol A Batchelor, "Stateless Persons: Some Gaps in International Protection" (1995) IJRL 222, 252-256; Carol A Batchelor "UNHCR and Issues Related to Nationality" (1995) Refugee Survey Quarterly Vol 14, No 3 91, 92-96.

STATELESS PERSONS AND THE REFUGEE CONVENTION

Not all stateless persons are refugees

[100] In the first phase of international refugee law, formal statelessness was a condition precedent to recognition as a refugee: Professor James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) at 60. However, under the 1951 Refugee Convention and its Protocol the opposite position has been reached. There is no correlation, either positive or negative, between refugeehood and statelessness: Atle Grahl-Madsen, *The Status of Refugees in International Law Vol 1* (AW Sijthoff 1966) 77 citing the proposition that "Not all stateless people are refugees, nor are all refugees technically stateless ... Statelessness is not the essential quality of a refugee, though many refugees are in fact stateless people". To similar effect see Professor Guy S Goodwin-Gill, *The Refugee in International Law* 2nd ed (Clarendon Press 1996) 42;

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 102; Niraj Nathwani, "The Purpose of Asylum" (2000) 12 IJRL 354, 361-364 and finally Professor James C Hathaway, *The Law of Refugee Status* 61:

> It is thus clear that statelessness *per se* does not give rise to a claim to refugee status.

[101] The force of these statements is underlined by the drafting history of the Refugee Convention and of the Convention relating to the Status of Stateless Persons, 1954. That drafting history is addressed at length in Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1955) (reprinted by the Division of International Protection of the UNHCR 1997) at 1-6 and by Paul Weis in "The Convention Relating to the Status of Stateless Persons (1961) 10 ICLQ 255. Other accounts are to be found in Professor James C Hathaway, *The Law of Refugee Status* 60-61; Professor James C Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law"(1990) 31 Harvard Int. Law Journal 129, 145-147 and in Carol A Batchelor, "Stateless Persons: Some Gaps in International Protection" (1995) 7 IJRL 232, 241-249. There is a brief summary in *Revenko v Secretary of State for the Home Department* [2001] QB 601, 609-612 (CA).

[102] The abbreviated account which follows has been taken from Paul Weis, "The Convention Relating to the Status of Stateless Persons (1961) 10 ICLQ 255. In 1948 the Economic and Social Council of the United Nations requested the Secretary-General to undertake a study of the existing situation in regard to the protection of stateless persons. The comprehensive study which followed was published under the title *A Study of Statelessness*. Part I of that study is reproduced in Takkenberg & Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees Vol 1* (Dutch Refugee Council 1990) at 10. The Economic and Social Council appointed at its Ninth Session an Ad Hoc Committee consisting of representatives of thirteen governments possessing special competence in this field to consider, *inter alia*, the desirability of preparing a revised and consolidated

convention relating to the international status of refugees and stateless persons, and if they considered such a course desirable, to draft the text of such a convention. The Committee drew up in 1950 a draft Convention relating to the Status of Refugees and a draft Protocol relating to the Status of Stateless Persons. The draft Protocol provided that certain provisions of the Convention should apply *mutatis mutandis* to stateless persons not refugees in the sense of the Convention.

[103] The General Assembly, by Resolution 428(V) of December 14, 1950 decided to convene in Geneva a Conference of Plenipotentiaries to complete the drafting of and to sign both the Convention relating to the Status of Refugees and the Protocol relating to the Status of Stateless Persons. This Conference, held in July 1951, adopted the Convention relating to the Status of Refugees, but did not find time to deal with the draft Protocol. The Economic and Social Council therefore convened a special Conference of Plenipotentiaries to consider the Protocol, which was held in New York in September 1954. The Conference discarded the proposed Protocol and adopted an independent Convention relating to the Status of Stateless Persons which, however, is closely modelled on the Convention relating to the Status of Refugees.

[104] Against this background the existence of the Convention relating to the Status of Stateless Persons is an irresistible argument against the general inclusion of stateless persons as refugees. See *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313 at [28] and [29] (Sackville J):

> **[28]** Thus, by the time the 1967 Protocol was done, the Stateless Persons Convention had come into force. It represented an attempt, as the recitals indicate, to regulate and improve the status of stateless persons. The Stateless Persons Convention proceeds on the basis that only those stateless persons who are "refugees" are covered by the Refugees Convention, and that many stateless persons are not so covered. It provides, inter alia, that the contracting States cannot expel stateless persons lawfully in their territory, save on grounds of nationality security or public order (Art 31(1)) and that such persons are to be given the right to choose their place of residence and to move freely within their territory: Art 26. It seems clear enough that the Stateless Persons Convention forms part of the context for the purposes of construing the Refugees Convention: see Vienna Convention Art 31(3)(a), (c).

> **[29]** Having regard to this context, it seems to me difficult to construe the Refugees Convention, as amended by the 1967 Protocol, as protecting a stateless person who is outside the country of his or her former habitual residence and unable to return, regardless of whether the person's inability to return is associated with a fear of persecution for a Refugees Convention reason. To do so would be to render superfluous much of the Stateless Persons Convention.

[105] See also *Revenko v Secretary of State for the Home Department* [2001] QB 601, 628H-629B (CA) per Clarke LJ:

> It is, I think, clear that the purpose of the 1951 Convention was not to afford general protection to stateless persons. The Final Act of the 1951 UN Conference on the Status of Refugees and Stateless Persons resolved to refer the draft Protocol relating to stateless persons back for further consideration. The problem was subsequently met by the 1954 Convention relating to the Status of Stateless Persons to which Pill LJ has referred. It is true that the 1951 Convention made some provisions with regard to stateless persons, but it would, in my view, be surprising if it intended to put stateless persons in a better position than nationals, which is, I think, the effect of the construction urged on behalf of the applicant.

[106] The preamble to the Convention relating to the Status of Stateless Persons, 1954 expressly acknowledges:

> ... that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention.

De jure stateless and *de facto* stateless

[107] Confusion does, however, sometimes arise because a Convention refugee may sometimes be referred to as *de facto* stateless because he or she is without effective nationality. This contributes to an unfortunate tendency to collapse refugees into the stateless category and (impermissibly) to treat all stateless persons as refugees. It is therefore necessary to distinguish between *de jure* and *de facto* stateless persons.

[108] *De jure* stateless persons are those who meet the definition of the term "stateless person" in Article 1 of the Convention relating to the Status of Stateless Persons. They must be a person who is not considered as a national by any State under the operation

of its law. Those who cannot establish their nationality and those without an effective nationality, referred to as *de facto* stateless persons, are not included in the legal definition of a *de jure* stateless person. According to Carol A Batchelor in "Statelessness and the Problem of Resolving Nationality Status" (1998) 10 IJRL 156, 172 the drafters separated these groups to avoid confusion in an individual's status, to avoid encouraging individual efforts to secure an alternative nationality, to avoid a situation in which some States decide to treat a person as stateless, while other States consider that person to still hold nationality, and to avoid confusing overlap between the 1954 Convention relating to the Status of Stateless Persons and the 1951 Convention relating to the Status of Refugees.

[109] Being without a nationality does not necessarily signify persecution under the terms of the Refugee Convention. The definition of a stateless person was, in fact, chosen with the intent to exclude the question of whether the person faces persecution, as there are conflicts of laws issues which might result in statelessness without any wilful act, discrimination or violation on the part of the state. See Carol A Batchelor in "Statelessness and the Problem of Resolving Nationality Status" (1998) 10 IJRL 156, 172:

> However, neither *de jure* nor *de facto* statelessness necessarily signifies the existence of a well-founded fear of persecution under the terms of the 1951 Convention. The definition of a *de jure* stateless person was chosen in order to exclude the question of whether the person has faced persecution, as there are conflicts of laws issues which might result in statelessness without any wilful act of neglect, discrimination, or violation on the part of the state.

The author points out that quite intentionally, the drafters of the 1954 Convention relating to the Status of Stateless Persons adopted a strictly legal definition of stateless persons which, like legal definitions relating to death, marriage, or to the establishment of a business, is not one of content or quality but simply one of fact. *De jure* statelessness could be ascertained by reference to national law, and *de facto* statelessness covered persons who were unable to "act" on their nationality because its effectiveness was denied to them.

[110] After acknowledging that not all *de facto* stateless persons are refugees, Carol A Batchelor at *op cit* 173 observes that the "grey zone" of *de facto* statelessness has grown substantially:

> Given the developments in practice relating to asylum seekers over the years, and the number of persons who do not receive citizenship in their country of habitual residence but continue to live there, it has become clear that not all *de facto* stateless persons are refugees. This is complicated by the various positions adopted by States on nationality status ... The "grey zone" of *de facto* statelessness has grown substantially, and today may include, persons who are confirmed *de jure* stateless in their country of long-term habitual residence but treated as if they held another State's nationality, for example, because they might have the technical possibility of applying for naturalization, notwithstanding the absence of any effective link or ancestral connection; persons who have the nationality of a country but who are not allowed to enter or reside in that country; persons who following a succession of States or transfer of territory, do not receive nationality in the State where they were born, where they reside, work, own property and have all their links but, rather, receive nationality in the successor State with which they have no genuine or effective connection (the result being they are no longer able to work, own property, have healthcare, education, and so on in the only place of residence they have known); persons who have the theoretical right to the nationality of a State but who are unable to receive it owing to administrative and procedural hurdles, excessive registration or naturalization fees, or other criteria which block access to the nationality. The majority of *de jure* and *de facto* stateless persons requiring assistance on questions relating to their nationality status are not, today, refugees.

[111] We emphasise these points because the thrust of the appellant's argument is that the "denial" of Kuwaiti nationality, his consequential stateless status and his subsequent expulsion were acts of persecution for reason of his [lack of] nationality. He also relied on his membership of a particular social group, namely Bedoon, but in our view that is but a different way of saying the same thing, namely that he is persecuted for reason of the fact that he is a stateless person. But as *A Study of Statelessness* makes clear, the position of a stateless person at domestic and international law is one of serious disadvantage and difficulty on every front, from international movement, sojourn and settlement to inferior status in domestic law. Statelessness may result from a variety of factors and is not, of itself, the basis for granting refugee status or of itself evidence of persecution.

FORMER HABITUAL RESIDENCE

[112] In a refugee claim by a stateless person the claimant must establish a well-founded fear of being persecuted in his or her country of former habitual residence. The question in the appellant's case is whether his country of former habitual residence is Kuwait or Iraq or both countries.

The meaning of habitual residence

[113] There appears to be a consensus that "habitual residence" does not mean domicile, but merely residence of some standing and duration. See Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (reprinted by the Division of International Protection of the UNHCR 1997) 90 and Atle Grahl-Madsen, *The Status of Refugees in International Law Vol 1* (AW Sijthoff 1966) 160:

> In order that a country may qualify as a person's "country of former habitual residence" the person concerned must have resided in that country, but in this respect it seems as if a liberal interpretation is in place. It does not matter whether a person is born in the country or has migrated thereto. It cannot be required that he shall have stayed there for any specific period of time, but he should be able to show that he has made it his abode or the centre of his interests. There is, however, no need to prove any *animus manendi*, because "habitual residence" does not mean domicile, but merely residence of some standing or duration.

[114] To similar effect see Professor Guy S Goodwin-Gill, *The Refugee in International Law* 2nd ed (Clarendon Press, Oxford 1996) at 309-310.

[115] Although in a different context, the interpretation of "habitually resident" in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937 (HL) is of assistance. The appellant, who had lived all her life in Bangladesh, upon her arrival in the United Kingdom with an intention to settle, claimed an entitlement to income support. The issue turned on whether she was habitually resident in the UK at the relevant time. It was held by Lord Slynn (Lords Steyn, Hope, Clyde & Hutton agreeing) at 1942D that

habitual residence is to be construed as a matter of ordinary language so that a person was not "habitually resident" unless he or she had in fact taken up residence and lived there for a period which showed that the residence had become, and was likely to continue to be, habitual; that the requisite period of residence was not fixed and whether and when habitual residence had been established was a question of fact to be determined on all the circumstances of each case.

[116] We are of the view that the approach suggested by Grahl-Madsen and the test set out in *Nessa* are in accord and may be helpfully read together. In the result, "habitual residence" does not mean domicile, but merely residence of some standing or duration. That is, the individual must show that he or she has in fact taken up residence and lived in the country for a period which showed that the residence had become, and was likely to continue to be, habitual. The requisite period of residence is not fixed and the question whether habitual residence had been established is a question of fact to be determined on all the circumstances of each case, but the individual should be able to show that he or she has made it his or her abode or the centre of his or her interests.

Habitual residence in more than one country

[117] The evidence of the appellant is that both Kuwait and Iraq are countries of former habitual residence. It is therefore necessary to address the significance of habitual residence in more than one country.

[118] Where a stateless person has habitually resided in more than one country it is necessary to identify which of those countries is relevant to the determination of the refugee claim. As to this there is some controversy and five possible approaches were identified in *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 666 at [18] - [30] (FC:CA) (Linden & McDonald JJA & Henry DJ). In the list which follows, the last was preferred by the Court:

(a) The relevant country is the last country of former habitual residence. This was the approach preferred by the trial judge but was rejected by the Court of Appeal as it leaves open the possibility that the refugee claimant could be returned to a place of persecution as the removal need not be effected to the last country of residence.

(b) The relevant country is the first country of former habitual residence. This is the view favoured by Atle Grahl-Madsen in *The Status of Refugees in International Law Vol 1* at 162 but has been challenged by Professor James C Hathaway in *The Law of Refugee Status* (1991) at 62. The Court of Appeal in *Thabet* rejected the Grahl-Madsen view as it does not take into account the fact that the refugee claimant must show that he or she is without a safe alternative. In other words, if the claimant can access surrogate protection in one of the other countries of former habitual residence, the refugee claim cannot be established. The question is not whether someone faces persecution, but whether the claimant can be protected from that persecution: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (SC:Can).

(c) The third approach is to look at all countries of former habitual residence. This is the approach advanced by Professor Hathaway at *op cit* 62 and the requirement to show an inability or unwillingness to return to all countries of former habitual residence is consistent with the need, in cases of multiple nationality, to establish a claim against all countries of which one is a national. Insisting that stateless persons validate their claims against all countries of former habitual residence would encourage a degree of symmetry between the concepts of nationality and habitual residence. Although attracted to this view the Court of Appeal refrained from adopting Professor Hathaway's approach because of its discomfort with his views on a different question, that being whether a country to which a stateless person is not legally returnable may still constitute a country of former habitual residence. We share some of the Court

of Appeal's concerns on the latter point (see paras [128], [132] and [156] below), but do not consider this to be a reason to reject Professor Hathaway's view that a stateless person must establish a claim in relation to "all countries of former habitual residence".

(d) The fourth alternative is any country of former habitual residence. This is the most generous of the alternatives available and is the approach adopted by the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 104. This approach was rejected by the Court of Appeal at [26] as it takes no account of the existence of alternative protection options (ie the *Ward* factor):

> If the claimant has available a place of former habitual residence which will offer safety from persecution, then he or she must return to that country.

(e) The final alternative is any country plus the *Ward* factor. This is the test adopted by the Court of Appeal and as they acknowledged at [27], it is a variation of the Hathaway "any country" solution. The Court held that in the light of *Ward*, proper account must be taken of the situations where stateless claimants have other possible safe havens. At [28] it held:

> [28] Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these two groups, where possible. It is not enough to show persecution in any of the countries of habitual residence - one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere. This is in harmony with the language in the definition and is also consistent with the teachings of the Supreme Court in *Ward*. If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden, here as elsewhere, of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. This is not an unreasonable burden. This is merely to make explicit what is implicit in *Ward* and in the philosophy of refugee law in general ...
>
> [29] It is unlikely that many countries of former habitual residence will grant their former residents the right to return, but there may be lands that do normally accept

> back former habitual residents. In such cases, this would affect a claim for refugee status. So long as the claimant does not face persecution in a country of former habitual residence that will take him or her back, he or she cannot be determined to be a refugee....

[119] In the result the Federal Court of Appeal held that where there is more than one country of former habitual residence, in order to be found to be a Convention refugee, a stateless person must show a well-founded fear of being persecuted for a Convention reason in one country of former habitual residence, and that he or she cannot return to ***any*** of his or her ***other*** countries of former habitual residence.

[120] Whether there is any real difference between the Federal Court of Appeal "any country plus the *Ward* factor" approach and the Hathaway "any country of former habitual residence" approach is a moot point. We see no material difference in the present context as both approaches require a stateless claimant to establish a well-founded fear of being persecuted in a country of former habitual residence and both approaches would deny refugee status where safety from persecution is available in some other country of former habitual residence.

[121] Our conclusion (paraphrasing Article 1A(2)) is that where a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in ***at least one*** country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to ***each*** of his or her ***other*** countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention reason must be established in relation to each and every country of former habitual residence before a State party to the Convention has obligations to the stateless person.

[122] In our view, this formulation is consistent with the essential premise of the decision in *Thabet*. As Linden JA states at [28], the Court merely makes explicit what is implicit in *Ward* and in the philosophy of refugee law in general. The *Ward*

decision has long underpinned the jurisprudence of this Authority and in *Butler v Attorney-General* [1999] NZAR 205, 217 (CA) the New Zealand Court of Appeal expressly adopted the articulation by the Supreme Court of Canada in *Ward* of the rationale underlying international refugee protection, namely that international refugee law was formulated to serve as a back-up to state protection. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. The lynch-pin is the state's inability to protect. The true object of the Refugee Convention is not to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven when fear of persecution is in reality well-founded.

[123] The Australian decision of *Al-Anezi v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 283 (Lehane J) is illustrative of the fourth approach identified in *Thabet*. Although *Thabet* was decided twelve months earlier, the Canadian decision appears not to have been drawn to the attention of Lehane J with the result that the compelling reasons given by the Canadian Federal Court of Appeal for rejecting the fourth approach are not addressed in the decision. Specifically, the Australian judgment does not address the fundamental point made by *Ward*, namely if a person in danger of persecution has other protection alternatives, these must be exhausted before the claim can be determined under the Refugee Convention.

[124] It is now necessary to address a further controversy, namely whether a country can only be a country of former habitual residence if the claimant has a right of return to that country.

FORMER HABITUAL RESIDENCE AND LEGAL RETURN

Introduction

[125] In his seminal text, *The Law of Refugee Status* published in 1991, Professor Hathaway at 62-63 wrote that a country is not a "country of former habitual residence" unless the claimant has a ***right*** to return to that country and (in a passage applied by the refugee status officer in the current case) that a state is a country of former habitual residence only if the claimant is ***legally*** able to return there:

> Conversely, where the stateless refugee claimant has no right to return to her country of first persecution or to any other state, she cannot qualify as a refugee because she is not at risk of return to persecution. Assessment of the claimant's fear of returning to the country of first persecution is a non-sensical exercise, as she could not be sent back there in any event. Thus, when it is determined that the claimant does not have a right to return to any state, and does not therefore have a country of "former habitual residence", her needs should be addressed within the context of the conventional regime for stateless persons rather than under refugee law.
>
> ... Third, and most important, a state is a country of former habitual residence only if the claimant is legally able to return there....

[126] Professor Hathaway's view that if a claimant is not at risk of return to persecution, assessment of the fear of returning to that country is a non-sensical exercise, as the claimant cannot be sent back there in any event, is not one that has been challenged in the extensive case law.

[127] On the other hand, his position that a state is a country of former habitual residence only if the claimant is legally able to return there, has been rejected in a number of cases decided by the Trial Division of the Federal Court of Canada. The reason for his insistence on a legal right to return is set out at 61-62 of his text:

> Because the notion of a "former habitual residence" is intended to establish a point of reference for stateless refugee claimants that is the functional equivalent of a country of nationality, it implies some degree of formal responsibility for protection of the putative refugee. A purposive interpretation of "former habitual residence" focuses on the nature of the ties between the claimant and countries in which she has resided, with a particular

> view to the identification of one or more countries to which she is readmissible. Since refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution exists, the proper point of reference is the country to which the claimant would normally be expected to return if not admitted to the asylum state.

[128] As this passage makes clear, Professor Hathaway's insistence on returnability as a criterion for a state to be a "country of former habitual residence" is inextricably connected to the view that it would be non-sensical to assess risk in a state to which return cannot, in any event, be effected. Despite the arguable efficiency of Professor Hathaway's determination to define a "country of former habitual residence" in a way that allows for the peremptory rejection of claims that could not, in any event, succeed on the merits, a succession of Canadian decisions has determined that his formulation cannot be justified on the basis of the ordinary meaning of the Convention's text. We are ourselves of this view, though for different (and arguably more compelling) reasons. Even if a purposive construction of "country of former habitual residence" were to be adopted as suggested by Professor Hathaway, we believe that a broader focus than simply "legal" returnability is required (see paras [132] - [133] and [156] below).

Whether claimant must be legally able to return to the country of former habitual residence

[129] We turn then to the Canadian case law referred to. Initially, some members of the Canadian Convention Refugee Determination Division adopted Professor Hathaway's argument that a state is a country of former habitual residence only if the claimant is legally able to return there. However, in a line of cases decided by the Trial Division of the Federal Court between 13 December 1993 and 13 December 1994 this approach was held to be erroneous. See *Maarouf v Canada (Minister of Employment and Immigration)* [1994] 1 FC 723; (1993) 23 Imm LR (2d) 163 (FC:TD) (Cullen J); *Abdel-Khalik v Canada (Minister of Employment & Immigration)* (1994) 23 Imm LR (2d) 262 (FC:TD) (Reed J); *Bohaisy v Canada (Minister of Employment*

and Immigration) [1994] FCJ No 902 (FC:TD) (McKeown J); *Zdanov v Canada (Minister of Employment and Immigration)* [1994] FCJ No 1090 (FC:TD) (Rouleau J); *Shaat v Canada (Minister of Employment & Immigration)* (1994) 28 Imm LR (2d) 41 (FC:TD) (McGillis J); *Desai v Canada (Minister of Citizenship and Immigration)* [1994] FCJ No 2032 (FC:TD) (Muldoon J).

[130] The principal decision is *Maarouf*. The ruling in that case was that the definition of country of former habitual residence does not require that the refugee claimant be legally able to return there. Professor Hathaway's approach was expressly disapproved. The reasoning of Cullen J in the Trial Division at 173-174 was:

(a) The UNHCR *Handbook* at para 104 is correct in stating that a stateless person may have more than one country of former habitual residence, but the definition does not require the person to satisfy the Convention criteria in relation to all of them;

(b) The Hathaway argument that habitual residence necessitates the claimant be legally able to return to that state creates a substantial hurdle and is contrary to the (surrogate) shelter rationale underlying international refugee protection. Reference was made to the *Handbook* at para 101 and the statement there that "[O]nce a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return". The Court did not explore the qualification implied by "usually unable";

(c) As a final act of persecution a state could strip a person of his right to return to that country.

Thus, said Cullen J, to require that a claimant have a legal right of return would allow the persecuting state control over the claimant's recourse to the Convention and effectively undermine its humanitarian purpose.

[131] As to (a), this approach was modified by the Federal Court of Appeal in *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 666 at [26] to [28] (FC:CA):

> It is not enough to show persecution in any of the countries of habitual residence - one must also show that he or she is unable or unwilling to return to any of these countries ... there is no obligation to a person if an alternate and viable haven is available elsewhere ... This means that the claimant would bear the burden ... of showing ... that he or she is unable or unwilling to return to any country of former habitual residence ... This is merely to make explicit what is implicit in *Ward* and in the philosophy of refugee law in general.

If the person is not at genuine risk of harm (ie if the person would be safe from persecution in another country of former habitual residence) refugee status is not appropriate: *Thabet* at [28]. In our view the same result should follow if the person cannot be returned to the country of former habitual residence in which the harm is anticipated.

[132] As to (b), the challenge to Professor Hathaway's argument (if it is to be understood as literally meaning that legal ability to return is a *sine qua non* of a country of former habitual residence) does not lie in the surrogacy principle as claimed in *Maarouf*. We are of the view that the better answer to the "legal returnability" point is the *non-refoulement* principle contained in Article 33(1) of the Refugee Convention. The obligation of a State party is not to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened for a Convention reason. The protection thereby afforded to the refugee is protection from the ***act*** of expulsion or return, irrespective whether that act is "legal" under the domestic law of either the sending or the receiving State. The issue of return to a country of former habitual residence is therefore an issue of whether return is possible as a matter of fact, not as a matter of law. Article 33 prohibits return "in any manner whatsoever", not in any ***legal*** manner whatsoever.

[133] However, in fairness it is not entirely clear whether Professor Hathaway intended to be understood as arguing in favour of a legal right of return in the sense of a legal right of return enforceable by the individual against the country of former habitual residence. For reasons set out at paras [126] to [128], it is more likely that what he had in mind was the question whether the intended receiving country would permit the return (hence the reference to a "non-sensical" exercise). This is a question of fact which bears directly on the related question whether the sending state can lawfully return the individual either under its own domestic law or at the international level. Professor Hathaway's test accurately identifies a group of persons who are legitimately subject to removal by a sending state, given the principle is that a state is under a duty to receive its own nationals. See for example *Van Duyn v Home Office* [1975] 1 CMLR 1, 18 and Paul Weis, *Nationality and Statelessness in International Law* 2nd ed 45 - 61. There is also a helpful discussion in Reinhard Marx, "Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims" (1995) 7 IJRL 383, 395-396. But because it may also be possible in practice to remove persons to a state which they are not legally entitled to enter, legal returnability cannot be considered a *sine qua non* for the recognition of the refugee status of a stateless person.

[134] As to (c), while it is clear that stripping a person of nationality and of the right to return may constitute persecution, once the individual is outside the relevant country and it is factually impossible for that person to return there, there is no well-founded fear of being persecuted in that country in the future. Any refugee claim would have to be based on the persecution which has already taken place. But as explained in paras [59] and [60], it is a first principle of refugee law that past persecution alone cannot satisfy the requirements of the refugee definition.

[135] It would be different if, on the particular facts, it is indeed possible for the person to return to the relevant country or there is real doubt on the issue. In these

circumstances the past persecution is directly relevant to the assessment of the well-foundedness of the refugee claimant's fear of being persecuted on return: *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236, 263-264.

[136] In our view, expulsion followed by denial of re-entry cannot on its own justify recognising a stateless person as a refugee under the Refugee Convention. There must be a prospective risk of persecution should the individual ***return*** to the relevant country. Such risk cannot exist where re-entry is, as a matter of fact, not possible. The resulting predicament of the individual is to be addressed under the Convention relating to the Status of Stateless Persons, 1954. If the country of intended refuge is not a party to that Convention, the individual is without remedy. This does not, however, mean that the ***prospective*** risk demanded by Article 1A(2) of the Refugee Convention can be put to one side so as to employ the Convention as a "catch all" safety net.

[137] Problems relating to sojourn, entry and exit are inherent in the condition of statelessness as expressly recognised in *A Study of Statelessness* at 20-23. The problems which the Bedoon face are problems which attach to their being stateless persons. To recognise these problems as qualifying the individuals for the status of refugee would collapse the clear distinction between stateless persons and refugees.

[138] In none of the Canadian cases decided subsequent to *Maarouf* has the reasoning in *Maarouf* been explored, amplified or challenged. Nor, so far as we can tell, has the issue received consideration in the Federal Court of Appeal. In *Thabet* the decision in *Maarouf* is referred to only in passing. It is interesting to note that even in the Trial Division, while there has been a routine affirmation of *Maarouf*, the actual holding of that case has been undermined. In both *Zdanov* and *Desai* it was held that the status of statelessness is not one that is optional for a refugee applicant. If by making application the stateless refugee claimant can obtain citizenship, the claimant must apply for such nationality. A person cannot chose not to make such an application.

The principle was explained in *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD) (Rothstein J):

> In my view, the status of statelessness is not one that is optional for an applicant. The condition of not having a country of nationality must be one that is beyond the power of the applicant to control. Otherwise a person could claim statelessness merely by renouncing his or her former citizenship. This would then render unnecessary those provisions of the definition of Convention refugee that require that a person demonstrate an inability or unwillingness by reason of a well-founded fear of persecution to return to the person's country of former citizenship. The definition should not be interpreted in such a manner as to render some of its words unnecessary or redundant.

[139] On the facts in *Bouianova*, it was held that the necessity of making an application for Russian citizenship was nothing more than a mere formality. The Court rejected the proposition that a person does not have a country of nationality just because they choose not to make such an application. The premise of these decisions is that to hold otherwise would allow the undermining of the rationale underlying international refugee law as expressed in *Ward* at 709:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which one is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection....

[140] The law in the United Kingdom has developed along similar lines. In *R v Secretary of State for the Home Department Ex parte Bradshaw* [1994] Imm AR 359 the Court of Session received evidence that a stateless person had not made an application for citizenship of states which may have granted it. It was held by Lord MacLean at 366-367 that before a person could be said to be stateless under the Refugee Convention, he would have to have applied to those states which might consider him to be, and might accept him as, a national.

[141] The jurisprudence of this Authority is to similar effect. See for example *Refugee Appeal No. 70240/96 Re KS* (24 January 1997); *Refugee Appeal No. 70021/96 Re VK*

(20 February 1997); *Refugee Appeal No. 1949/93 Re MBY - Interim Decision* (7 April 1997) and *Refugee Appeal No. 71075/98 - Minute* (24 November 1998).

[142] Counsel for the appellant has drawn attention to the fact that another noted academic, Professor Guy S Goodwin-Gill, has challenged Professor Hathaway's argument that a country is a country of former habitual residence only if the claimant is legally able to return there. In particular, the appellant relies on the following passage from Professor Goodwin-Gill's *The Refugee in International Law* 2nd ed (Clarendon Press, Oxford 1996) at 42, fn 43:

> There is no historical, textural or commonsensical basis for the view that because a stateless person is not "returnable" to his or her country of former habitual residence, so he or she is not in danger of being *refouled* and is therefore not a refugee: Hathaway, *Law of Refugee Status*, 59-63. None of the citations or references to the *travaux préparatoires* provides any support for the "returnability" gloss. Although this notion was adopted by some members of Canada's Convention Refugee Determination Division, principally as a ground for denying protection to Palestinians expelled from the Gulf States, it has since been categorically rejected by the Federal Court; see, for example, *Desai v Canada (Minister of Citizenship and Immigration)* [1994] FCJ No 2032.

[143] Also cited by counsel is an earlier article by Professor Goodwin-Gill "Stateless Persons and Protection under the 1951 Convention" in Développements Récents En Droit de L'Immigration (Les Éditions Yvon Blais, 1993) at 91. The article is less than objective and in *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 666, 682 it was described by Linden JA writing for the Federal Court of Appeal as "overly harsh". Significantly it is not referred to in the second edition of Professor Goodwin-Gill's text. Having derived little assistance from the article we have given primary consideration to the cited footnote set out in the preceding paragraph.

[144] It is to be recalled that in the contentious passage, Professor Hathaway made two points. The first was that if a claimant is not at risk of return to persecution, assessment of the fear of returning to that country is a non-sensical exercise. Second, that a state is a country of former habitual residence only if the claimant is legally able

to return there. Professor Goodwin-Gill responds only to the second point, not the first. As already explained, we would ourselves disagree with Professor Hathaway if he is indeed to be understood as requiring the stateless person to have a legal ability to return to the country of former habitual residence. For this we rely on Article 33(1) of the Refugee Convention, not on Professor Goodwin-Gill's critique. But as we are not persuaded that Professor Hathaway has been correctly understood, we need observe only that Professor Goodwin-Gill does not address Professor Hathaway's first point which is that if there is no well-founded fear of a prospective risk of persecution, the refugee claim must fail. This is a decisive point, as is the *Ward* principle and we note that although *Ward* predates the second edition of his text, Professor Goodwin-Gill does not address the significance of the surrogacy principle in the context of refugee claims by stateless persons. In the result, we do not see Professor Goodwin-Gill's writings as being of assistance to us in disposing of the issues in this appeal. We are reinforced in these conclusions by the *Thabet* decision which in general terms takes a similar approach.

[145] For analogous cases which recognise that refugee status may be withheld because the person (though possessing a well-founded fear) is not in need of international protection, see the cases of *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685 (FC:FC) (claimant already recognised as a refugee in France); *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 166 ALR 619 (FC:FC) (claimant had right of permanent residence in a third country) and *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 167 ALR 175 (FC:FC) (a Bedoon from Kuwait had lived in Jordan since leaving Kuwait and there was no reason why he could not re-enter Jordan and find refuge there).

[146] It is convenient at this point to deal with the appellant's argument based on the International Covenant on Civil and Political Rights, 1966.

Article 12 ICCPR

[147] Relying on Article 12(4) of the International Covenant on Civil and Political Rights, 1966 (no one shall be arbitrarily deprived of the right to enter his own country) and the Human Rights Committee, *General Comment 27: Freedom of Movement* (UN CCPR/C/21/Rev.1/Add.9 (1999)) the appellant sought to argue from the fact of Kuwait's accession to the Covenant to the conclusion that Bedoon enjoy a right of return to Kuwait. This was said to be sufficient to meet the Hathaway "returnability" test.

[148] In view of the fact that we do not ourselves accept that legal returnability is the appropriate test, the appellant's argument based on Article 12(4) of the International Covenant on Civil and Political Rights does not have to be addressed. The only issue is whether the appellant could, in fact, be returned to Kuwait and hence capable of establishing a well-founded fear of being persecuted there. We do note, however, that whether Article 12(4) applies to non-citizens may be a controversial issue.

Conclusion on the "return" point

[149] On the facts of the present case, we find that the appellant cannot in fact be returned to Kuwait and is therefore not at risk of being refouled to a country of former habitual residence. It follows that he cannot satisfy the Convention requirement of a well-founded fear of being persecuted.

[150] As to return to Iraq, we find also in relation to this country of former habitual residence that there is insufficient evidence on which a conclusion can be reached, one way or the other as to whether the appellant will, as a matter of fact, be readmitted by Iraq. However, the issue is academic as even assuming return in fact, we are satisfied that if readmitted to Iraq, the appellant does not, in relation to that country, have a well-founded fear of being persecuted for a Convention reason. Nor is there any risk of his being returned by Iraq to Kuwait.

General conclusions on statelessness

[151] In view of the extended discussion of issues relating to statelessness, it is convenient at this point to summarise our general conclusions.

[152] First, statelessness *per se* does not give rise to a claim to refugee status. The Refugee Convention distinguishes sharply between stateless persons and refugees.

[153] Second, before a stateless person can be recognised as a refugee, that person must establish that owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion he or she is outside the country of his or her former habitual residence and is unable or, owing to such fear, is unwilling to return to it.

[154] Third, "habitual residence" does not mean domicile, but merely residence of some standing or duration. That is, the claimant must show that he or she has in fact taken up residence and lived in the country for a period which showed that the residence had become, and was likely to continue to be, habitual. The requisite period of residence is not fixed and the question whether habitual residence had been established is a question of fact to be determined on all the circumstances of each case, but the individual should be able to show that he or she has made it his or her abode or the centre of his or her interests.

[155] Fourth, where a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in ***at least one*** country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to ***each*** of his or her ***other*** countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention reason

must be established in relation to each and every country of former habitual residence before a State party to the Convention has obligations to the stateless person.

[156] Fifth, the protection afforded by Article 33(1) of the Refugee Convention is protection from the ***act*** of expulsion or return, whether that act is "legal" under the domestic law of either the sending or the receiving State. The issue of return to a country of former habitual residence is therefore an issue of whether return is possible as a matter of fact, not as a matter of law. Article 33 prohibits return "in any manner whatsoever", not in any ***legal*** manner whatsoever.

[157] Sixth, if a stateless person cannot, as a matter of fact, return or be returned to a country of former habitual residence in relation to which a fear of being persecuted is claimed to exist, the claim to refugee status must fail as the fear is not a well-founded fear and past persecution alone is insufficient to establish a claim to refugee status.

CONCLUSION ON "WELL-FOUNDED" REQUIREMENT

Iraq

[158] Applying these principles to the appellant's claim vis-à-vis Iraq, our credibility finding is that notwithstanding the appellant's claims to the contrary, he does not have a well-founded fear of being persecuted for a Convention reason in Iraq. It is therefore not necessary to make a determination whether he is able, in fact, to return to Iraq. For the purposes of this decision, we will assume (without deciding) that he can.

Kuwait

[159] Applying the principles to the appellant's claim vis-à-vis Kuwait, we have earlier found that Bedoons for whom Kuwait is a country of former habitual residence and who are similarly placed to the appellant are denied re-entry and are refused re-

admission. As a matter of fact the appellant will not be allowed or permitted by the Kuwaiti authorities to return to Kuwait. It follows that his fear of being persecuted in Kuwait is not a well-founded fear. The predicament he faces is the predicament of a stateless person, not of a Convention refugee.

ALTERNATIVE GROUND FOR DECISION - NO NEXUS

[160] Even if we are wrong in relation to our sixth point, the outcome would be no different as the appellant's fear of being persecuted in Kuwait is not for one of the five Convention reasons. The problems he faces as a stateless person are not "for reason of" his race, religion, nationality, membership of a particular social group or political opinion. The causation element is lacking.

[161] The basis for this alternative finding will now be explained.

CAUSATION

[162] For the appellant to satisfy the refugee definition he must establish that his denial of Kuwaiti citizenship, his expulsion and refusal of re-entry are "for reasons of" one of the five recognised Convention grounds. The Convention grounds relied on by the appellant are:

(a) Nationality. The foundation is *Refugee Appeal No. 71687/99* (27 September 1999) at 20:

> ... the Authority has accepted that persecution *for reasons of nationality* is also understood to include persecution for *lack* of nationality (see discussion in *Refugee Appeal No. 1/92* (30 April 1992) 84-85).

(b) Membership of a Particular Social Group. The group is defined as Bedoons.

The New Zealand jurisprudence on causation

[163] New Zealand refugee jurisprudence has developed incrementally according to the classic common law model of case-by-case determination. On the question of causation, there are no relevant High Court or Court of Appeal cases. However, the

Authority has addressed causation in two significant contexts. First, causation in the context of the bifurcated approach to persecution and second, causation in the civil war context. The only significant issue it has not yet addressed is the ***standard*** of causation, an issue expressly left open in *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [115].

[164] On the question of causation and the bifurcated approach to persecution, the Authority has recognised that the "for reasons of" element can be satisfied either by the reason for the serious harm ***or*** by the reason for the failure of state protection, or by both. In *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112] it said:

> Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided ***either*** by the serious harm limb ***or*** by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (eg husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because "persecution" is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is "for reason of" a Convention ground, the summative construct is itself for reason of a Convention ground. See *Shah* 646C-D, 648C, 653E-G and 654D.

[165] It is implicit that the claim to refugee status is not grounded in, and decided solely upon, evidence that the claimant has about the mental state of the persecutor. Nor must the claimant establish that he or she will be singled out or targeted: *Refugee Appeal No. 71462/99* [2000] INLR 311 at [69].

[166] On the question of causation in the civil war context, the Authority in *Refugee Appeal No. 71462/99* [2000] INLR 311 at [67] and [68] held that no special rules apply. It said:

> **[67]** If a refugee claimant from such a civil war is at risk of persecution because of his or her race, it is not possible to ignore that fact simply because it is a civil war situation and to require the individual to show a super-added risk, that is, in the words of Lord Lloyd, to show a fear of persecution for Convention reasons ***over and above*** (emphasis added) the "ordinary risks of clan warfare". Yet on our interpretation, this is precisely what the decision in *Adan* requires, a fact underlined by the explicit recognition in the passage taken from the judgment given by Lord Lloyd that the civil war in Somalia is "clan warfare". The implicit holding is that to be at risk of serious harm in a civil war because of one's race is not enough to meet the Convention definition.
>
> **[68]** If the *Adan* decision is to be so understood, the Authority declines to follow it. For the reasons given earlier, the risk of persecution and the reasons for that persecution are separate elements. And as to the latter, there can be no requirement that a person who, along with others, is at risk of persecution for a Convention reason must also show that he or she is ***more*** at risk for that Convention reason than those others. The essential point is that once a refugee claimant shows that he or she faces a real risk of persecution "for reason of" one of the five Convention reasons, nothing more can be required.

The standard of causation

[167] The Authority has not until now addressed the standard of causation in any substantive way. It is clear, however, that the causation standard in refugee law should be context-specific. That is, in terms of the Vienna Convention on the Law of Treaties 1969, Article 31(1) the causation standard must be determined by the language of the Convention read together with its context, object and purpose: *Refugee Appeal No. 70366/96 Re C* (22 September 1997) at 43-45; [1997] 4 HKC 236, 272-274; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [43] - [45]. It is wrong in law to uncritically import causation standards from other bodies of law (in particular, the notoriously problematical "but for" test from tort law). See generally Michelle Foster "Causation in Context: Interpreting the Nexus Clause in the Refugee Convention" (2002) 23 Mich. J. Int'l L. 265 and see also Professor James C Hathaway "The Causal Nexus in International Refugee Law" (2002) 23 Mich. J. Int'l L 207. As pointed out by Gaudron J in *Chappel v Hart* (1998) 195 CLR 232, 238 (HCA), questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. Even within discreet areas of the law different causation standards apply, depending on the relevant underlying policy considerations. An equity case illustrating this point is *Bank of New Zealand v New Zealand Guardian Trust Co Limited* [1999] 664, 681-683 (Richardson P, Gault, Henry

& Blanchard JJ), 688 (Tipping J) (CA). While these factors were recognised by Kirby J in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [68] & [69] (HCA) the "intuitive approach" seemingly favoured by him must surrender to a principled interpretive approach.

[168] Looking first at the language of the Refugee Convention, the "for reasons of" clause relates not to the word "persecuted" but to the phrase "being persecuted". The employment of the passive voice ("being persecuted") establishes that the causal connection required is between a Convention ground and the ***predicament*** of the refugee claimant. The Convention defines refugee status not on the basis of a risk "of persecution" but rather "of ***being*** persecuted". The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant's predicament rather than on the mindset of the persecutor, a point forcefully recognised in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [33] & [65] (HCA). At a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence.

[169] In this regard we respectfully, but nevertheless strongly disagree with the contrary view expressed in *Immigration and Naturalisation Service v Elias-Zacarias* 502 US 478 (1992), a decision in which the Supreme Court of the United States required a refugee claimant to establish two separate and distinct states of mind. First, an intention to persecute. Second, an intention to persecute because of a specific attribute of the victim (ie his or her race, religion, nationality, membership of a particular social group or political opinion). The Court thereby imposed a double burden on refugee claimants - first, to prove clearly that they possess a political opinion or recognised status; and, second, to prove that their persecutor is motivated to harm them because of hostility to that opinion or status: Joan Fitzpatrick, "The International Dimension of US Refugee Law" 15 Berkeley J. Int'l Law 1, 20 (1997). It may be that the decision is explicable on the basis that the unique terms of the

domestic law provision considered, namely the Immigration and Nationality Act s 208(a) (codified at 8 USC § 1101 (a) (42)), is differently worded to Article 1A(2) of the Refugee Convention. Whereas the Refugee Convention refers to a well-founded fear "of being persecuted" for a Convention reason, the Immigration and Nationality Act materially provides:

> ... because of persecution or a well-founded fear of persecution on account of....

First, it should be noted that the Convention phrase "well-founded fear of being persecuted", which describes a passive predicament, is not duplicated in the Act.

Second, the Convention phrase:

> Owing to ... for reasons of ... political opinion....

Has been transformed into:

> ... because of ... on account of ... political opinion....

The differences are material. The inquiry is shifted decisively from the cause of the predicament, to a search for causation in the sense of "because of" or "on account of".

[170] Possibly for these reasons no attempt was made by the Supreme Court to interpret the Convention definition itself, or to approach the interpretation exercise from the orthodox perspective of the language of the Convention read together with its context, object and purpose. The distortion and difficulty this has led to in the United States context is discussed by Shayna S Cook in "Repairing the Legacy of *INS v Elias-Zacarias*" (2002) 23 Mich. J. Int'l L 223. As Joan Fitzpatrick points out in "The International Dimension of US Refugee Law" 15 Berkeley J. Int'l Law 1, 21 (1997),

Elias-Zacarias illustrates the dangers of a domestic asylum system disconnected from an international framework.

[171] In our view the primary object of the Refugee Convention is to provide the surrogate protection of the international community for those genuinely in need of protection. The focus is on assisting the (potential) victim, not on assigning guilt to the persecutor: *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 716-717 (SC:Can); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [49]. While the responsibility to establish the claim to refugee status rests on the claimant (*Refugee Appeal No. 72668/01* [2002] NZAR 649 and *Jiao v Refugee Status Appeals Authority* (High Court Auckland, M207-PL02, 29 July 2002, Potter J)) the Convention cannot be interpreted so as to impose on the claimant the often impossible task of establishing intent. A low evidentiary threshold is more in keeping with the humanitarian purpose of the Convention.

[172] The determination of refugee status is a notoriously difficult exercise, dependent to a large degree on the credibility of the refugee claimant. The claim must necessarily be dealt with in confidence (see for example s 129T Immigration Act 1987) and without the opportunity of inquiry in the country of origin: *AB v Refugee Status Appeals Authority* [2001] NZAR 209, 222-226 (Nicholson J). Both the refugee claimant and the decision-maker are handicapped by evidentiary voids, not the least of which is the inability to cross-examine the agent of persecution as to the reasons for the anticipated harm or the withholding of protection. Often the reasons for the anticipated harm or absence of protection will be for mixed reasons and an inquiry into which reason is more important than another is impossible in a practical sense. This the Authority recognised in the civil war context when in *Refugee Appeal No. 71462/99* [2000] INLR 311 at [51] it said that "the very nature of civil war situations will often preclude access to the facts required for judgments of this kind to be made. More often the decision-maker will, of necessity, be forced to make a broad and general assessment". Fact finding difficulties are not, of course, confined to the civil

war context. Multiple causes and evidentiary gaps, so characteristic of refugee law, pose serious challenges to the successful determination of causation. Ultimately, causation standards in the refugee context must operate clearly and consistently to accommodate both multiple causes and evidentiary insufficiency, if not ambiguity.

[173] We are of the view that it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing*** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established.

[174] Against this background we turn to the *Michigan Guidelines on Nexus to a Convention Ground* (2002) 23 Mich. J. Int'l L. 210.

The Michigan Guidelines on Nexus to a Convention Ground

[175] In the Fall Term 2000 a collective study on causation in the refugee context was initiated by Professor James C Hathaway and convened by the Programme in Refugee and Asylum Law, the University of Michigan Law School. The research was debated and refined at the Second Colloquium on Challenges in International Refugee Law (March 2001). The participants in the study included Professor James C Hathaway, Professor of Law and Director of the Programme in Refugee and Asylum Law at the University of Michigan Law School; Professor Alexander Aleinikoff, Professor of Law at the Georgetown University Law Center; Dr Catherine Dauvergne, Faculty of Law at the University of Sydney; Suzanne Egan, Member of the Faculty of Law at the National University of Ireland, Dublin (UCD); Professor Walter Kälin, Professor of Constitutional and International Law at the Faculty of Law of the University of Bern and Professor Jens Vedsted-Hansen, Professor of Law at the University of Aarhus Law

School, Denmark. The Colloquium deliberations benefited from the counsel of Mr Volker Türk, Chief, Standards and Legal Advice Section, Office of the United Nations High Commissioner for Refugees. The author of this decision was also a participant in the study and in these circumstances, some caution must be exercised in promoting the *Michigan Guidelines on Nexus*. That having been said, however, the collective wisdom of an otherwise distinguished body of persons cannot be lightly put aside, especially when the principles underlying the *Michigan Guidelines on Nexus* are, to a very large degree, already part of New Zealand refugee jurisprudence.

[176] We reproduce the *Michigan Guidelines on Nexus to a Convention Ground* in full.

The Michigan Guidelines on Nexus to a Convention Ground

Efforts to promote the vitality of the Convention refugee definition have usually focussed on redefining our understanding of the circumstances in which an individual may be said to be at risk of being persecuted, or on giving contemporary relevance to the content of the five grounds upon which risk must be based race, religion, nationality, membership of a particular social group, or political opinion. Comparatively little thought has been given to how best to conceive the linkage or nexus between the Convention ground and the risk of being persecuted. In what circumstances may the risk be said to be causally connected to one of the five Convention grounds?

The jurisprudence of many leading asylum states is simply silent on this issue, while decisions rendered in other states assume that causation in refugee law can be defined by uncritical analogy to standards in other branches of the law. Only rarely have senior courts sought carefully to conceive an understanding of causation of specific relevance to refugee law, including the critical questions of a standard of causation and the types of evidence which should inform the causation inquiry.

With a view to promoting a shared understanding of the basic requirements for the recognition of Convention refugee status, we have engaged in sustained collaborative study and reflection on the norms and state practice relevant to the causation inquiry. This research was debated and refined at the Second Colloquium on Challenges in International Refugee Law, convened in March 2001 by the University of Michigans Program in Refugee and Asylum Law. These Guidelines are the product of that endeavour, and reflect the consensus of Colloquium participants on how the causal nexus to a Convention ground should be understood in international refugee law.

General considerations

1. Not every person who is outside his or her own country and has a well-founded fear of being persecuted is a Convention refugee. The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention race, religion, nationality, membership of a particular social group, or political opinion.

2. In many states, the requisite causal linkage is explicitly addressed on the basis of the requirement that a refugees well-founded fear of being persecuted be ... for reasons of race, religion, nationality, membership of a particular social group or political opinion... In other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention requirements. Whether treated as an independent definitional factor or as part of a general understanding of refugee status, the existence of a nexus to a Convention ground must be assessed in the light of the text, objects and purposes of the Refugee Convention and Protocol.

3. It is not the duty of the applicant accurately to identify the reason that he or she has a well- founded fear of being persecuted. The state assessing the claim to refugee status shall decide which, if any, Convention ground is relevant to the applicants well-founded fear of being persecuted.

4. The risk of being persecuted may sometimes arise only when two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.

5. An individual shall not be expected to deny his or her race, religion, nationality, membership of a particular social group, or political opinion in order to avoid coming to the attention of the State or non-governmental agent of persecution.

Nature of the required causal link

6. The causal connection required is between a Convention ground and the applicants well- founded fear of being persecuted (in French, ... d'être persécutée...) The focus on the applicants predicament follows both from the passive voice employed in the official texts of the Convention and from the Conventions fundamental purpose of defining the circumstances in which surrogate international protection is warranted. This understanding is consistent with the commitment of the Convention to conceive refugee protection in social and humanitarian terms, rather than in a way that might become a cause of tension between States.

7. Because it is the applicants predicament which must be causally linked to a Convention ground, the nexus requirement is not satisfied simply by showing that the applicants subjective fear of being persecuted is based on a Convention ground.

8. The causal link between the applicants predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicants country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.

9. A causal link may be established whether or not there is evidence of particularized enmity, malignity, or animus on the part of the person or group responsible for infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.

10. The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the

Convention ground contributes to the applicants exposure to the risk of being persecuted.

Standard of causation

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.

13. In view of the unique objects and purposes of refugee protection, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

Evidence of causation

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.

15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicants race, religion, nationality, membership of a particular social group, or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.

16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicants predicament, irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

> **17.** Applicants who come from a country in which many or all persons face the risk of oppression or violence are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.
>
> **18.** Refugee status is not restricted to persons who are members of a political, religious or other minority group. While members of minority groups are in practice more commonly exposed to the risk of being persecuted than are persons who are part of majority populations, the only requirement for recognition of refugee status is demonstration that a Convention ground is a contributing factor to the risk of being persecuted.

Michigan Guidelines on Nexus to a Convention Ground and New Zealand refugee law

[177] As may be seen, there is a close congruence between existing New Zealand refugee law and the *Michigan Guidelines on Nexus*. See especially the key question of causation in the context of the bifurcated understanding of "persecution". In this regard *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112] and para 8 of the *Michigan Guidelines on Nexus* are in accord. Likewise, there is congruence on the equally significant question of causation in the civil war context. In this regard *Refugee Appeal No. 71462/99* [2000] INLR 311 at [67] and [68] is in accord with para 17 of the *Michigan Guidelines on Nexus* and reference should be made to Michael Kagan & William P Johnson, "Persecution in the Fog of War: The House of Lords Decision in *Adan*" (2002) 23 Mich. J. Int'l L 247. On the decisive question of the ***standard*** of causation, we accept that as a matter of principle the only proper conclusion to be drawn from the language, object and purpose of the Refugee Convention is that the Convention ground need not be shown to be the sole, or even a dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status should not be recognised. The *Michigan*

Guidelines on Nexus, para 13 uses the phrase "need not be recognised". We respectfully depart from this wording because we as an Authority are required by ss 129C and 129D of the Immigration Act 1987 "to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention", whereas the *Michigan Guidelines on Nexus* tacitly recognise Recommendation E of the Conference of Plenipotentiaries which states:

> "**THE CONFERENCE,**
>
> *Expresses* the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

[178] While as a matter of ***policy*** State parties are thereby encouraged to exceed their contractual obligations, this Authority is, as a matter of law, precluded from travelling outside the terms of the Convention. If causation is not established by the refugee claimant, the claim to be recognised as a refugee in New Zealand must fail.

[179] This insignificant qualification apart, and without repeating what we said about guidelines in *Refugee Appeal No. 71684/99* [2000] INLR 165 at [63], we are of the view that given the congruence of the New Zealand refugee law on causation and the *Michigan Guidelines on Nexus to a Convention Ground*, the guidelines properly identify the principles to be applied in New Zealand when issues of causation are determined.

[180] We now address causation in the context of the present facts.

APPLICATION OF CAUSATION PRINCIPLES TO THE FACTS

[181] Applying the causation principles to the appellant's case, the causal link will be revealed by the reasons for the appellant's statelessness, his expulsion from Kuwait and his inability to return to that country. We accept that he does not have to establish

malice or animus on the part of the Kuwaiti authorities or indeed an intention to harm. All that is necessary to be established is that a Convention ground contributed to his risk of being persecuted. That ground need not be the sole or dominant cause of the risk of being persecuted. It need only be a contributing factor, provided it is not remote to the point of irrelevance.

[182] Our finding on the extensive evidence is that the appellant is stateless for one reason only, namely because Kuwaiti citizenship law is based on *jus sanguinis*. See para [44] above. There is no evidence that the *jus sanguinis* principle was adopted by Kuwait with a view to withholding nationality from any identifiable group such as the Bedoons. The *jus sanguinis* model is common throughout the world, and the Middle-East in particular. See para [49]. Nor is there any evidence that the *jus sanguinis* principle is applied by Kuwait in a discriminatory fashion. There is nothing to suggest that in its implementation it is directed against Bedoons as opposed to all persons in Kuwait or who have Kuwaiti nationality or indeed all those who wish to acquire such nationality. The adoption of the *jus sanguinis* principle by Kuwait does not have any Convention "reason" nor is there any such Convention reason in the application of that principle to the appellant. On the evidence before us, the fact that the appellant is a Bedoon is a not a contributing factor to a risk of being persecuted.

[183] As *A Study of Statelessness* notes at 5, statelessness is a phenomenon as old as the concept of nationality. There are a number of circumstances in which statelessness is or can be created. The difficulty faced by the appellant is that his status of "stateless" under Kuwaiti law is the result of the operation of the *jus sanguinis* principle, not his race, nationality or membership of a particular social group.

[184] Further comment is, however, required in relation to the two grounds advanced by the appellant.

The social group ground

[185] In relation to the social group ground the group is said to be "Bedoon". The submission is that because stateless persons have no right to be in a country, are expelled and barred from re-entry, the individuals concerned are members of a particular social group and that the cause of their problem is their membership of the group. This is an artificial, if not circular construct and refugee law in this regard is clear. A social group must exist independently of, and not be defined by, the persecution: *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [101]. As stated by Dawson J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 242:

> There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)'.

[186] There is no evidence to suggest that this is one of the rare cases adverted to by McHugh J in *Applicant A* at 264 in which the persecution may serve to identify or even cause the creation of a particular social group.

Nationality

[187] The circularity of the appellant's argument is equally visible under this Convention ground. It surely cannot be argued that a stateless person fears statelessness because he or she is stateless.

[188] Further, as found earlier, there is no evidence that the *jus sanguinis* principle was adopted by Kuwait with a view to withholding nationality from any identifiable group such as the Bedoons. The *jus sanguinis* model is common throughout the world, and

the Middle-East in particular. See para [49]. Nor is there any evidence that the *jus sanguinis* principle is applied by Kuwait in a discriminatory fashion. There is nothing to suggest that in its implementation it is directed against Bedoons. It is applied to all persons in Kuwait, to those who have Kuwaiti nationality and to all those wishing to acquire such nationality. While we necessarily accept that States cannot plead provisions of internal law in justification of international wrongs, the evidence simply does not show manipulation of nationality laws or other delictual conduct of the kind described in Brownlie, "The Relations of Nationality in Public International Law" (1963) 39 BYIL 284, 327-328, 343-344.

[189] The statement by this Authority in *Refugee Appeal No. 1/92 Re SA* (30 April 1992) at 84-85 that the nationality ground of persecution includes lack of nationality must not be read out of context. A person who is stateless will, for that very reason, suffer considerable hardship. The Convention relating to the Status of Stateless Persons, 1954 underlines the "rights" stateless persons ***do not*** have. They do not possess what Hannah Arendt in *The Origins of Totalitarianism* at 296 called the right to have rights. Her discussion of statelessness at 269 to 302 provides, along with the UN *A Study of Statelessness*, a sobering analysis of the sometimes devastating consequences of statelessness. See also Carol A Batchelor, "UNHCR and Issues Related to Nationality" (1995) Refugee Survey Quarterly Vol 14, No 3 91, 96-97. This context was well known to the drafters of both the Refugee Convention and the Convention relating to the Status of Stateless Persons, 1954. It is simply not possible to argue that because the nationality laws of a country do not confer nationality on all those born in the state, and because such persons are expelled and prevented from returning, such persons are refugees. Otherwise it would mean all stateless persons who are expelled and prevented from returning are refugees. This is precisely what the drafting history and all the jurisprudence says is ***not*** the position.

[190] The statement that the nationality ground of persecution includes statelessness anticipates a situation in which the risk of serious harm or the failure of state

protection is "for reason of" the person's statelessness. An analogy can be drawn with the Jewish shopkeeper postulated by Lord Hoffmann in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 654A (HL):

> A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threatened to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business". But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew".

If for "Jew" one substituted "stateless" it will be seen in this example, applying the formula Persecution = Serious Harm + Failure of State Protection, that there is no Convention reason for the harm inflicted by the business competitor, but where the state elects to afford no protection to those shopkeepers it identifies as stateless, connection to a Convention ground is established.

[191] But the facts of the appellant's case are very different. He is stateless because Kuwait applies the *jus sanguinis* principle and there is no Convention element to this circumstance. His expulsion and inability to return are simply consequences of his condition. Any other conclusion would mean that the expulsion of a stateless person for reason of his or her lack of nationality of the expelling state is persecution for a Convention reason. For the reasons already given, this is an untenable claim.

[192] The decision in *Refugee Appeal No. 71687/99* (27 September 1999) in which a Bedoon from Kuwait was recognised as a refugee does not address any of these issues. It was a custody case, the decision being delivered three days after the hearing. Time did not allow the complex issues of statelessness to be considered. It is not a case which on any realistic basis constitutes a precedent.

Causation - conclusions on the facts

[193] Our conclusion is that there is no detectable Convention ground for the appellant's plight, and his refugee claim as analysed on this alternate basis must fail.

[194] We now turn to the issue of exclusion. On one view it may be superfluous for us to do so, but it is best that all issues be dealt with, particularly given that we have had an opportunity to fully explore the facts with the appellant and further given that the exclusion provisions of the Convention relating to the Status of Stateless Persons are very similar to those of the Refugee Convention.

EXCLUSION

The appellant's evidence

[195] Neither in his initial statement nor at the Refugee Status Branch interview did the appellant say anything meaningful about his day to day activities in the Ministry of Interior. In fairness, he appears not to have been asked.

[196] At the appeal hearing the appellant described his duties as largely clerical, he being responsible for the paperwork for persons sent to prison by the Kuwaiti courts. His duties included escorting the individuals to prison. He said that he had no involvement in the execution of prisoners. This was done by officers at the prison. However he said that he was frequently present during the torture of prisoners and he described in some detail witnessing electric torture, beatings with sticks, sexual violation of prisoners with bottles, pain inflicted to genitalia and water torture carried on for one or two weeks bringing on seizures and epileptic fits. During his eight years employment in the Ministry he would observe these acts often, sometimes once a week, sometimes once a month, depending on when his duties took him to the prison. He described his role as one of watching and said that he used to beg his colleagues to

allow him to see such things as usually they were only seen in movies. He admitted that this went on throughout the years that he was in the Department. He said that he never helped his colleagues to torture anyone.

[197] As the questioning progressed the appellant clearly sensed that his evidence was causing the Authority some concern and a noticeable attempt was made by him to dilute his admissions. An earlier statement that sometimes he was not allowed into the torture room (which is a tacit admission to being present in the room on occasion) was amended to an assertion by the appellant that he would only look through a small window which had bars on it and that he was never in the same room as the victim. He claimed that he had frequently asked the torturers to stop but without effect as he was told that they were carrying out orders. He never intervened to stop the torture as this would have resulted in him being punished. He did not think of resigning from the Department even though he admitted that it was routine for people to be tortured in the prison system administered by the Ministry for which he worked. He accepted that if he had not asked to witness the acts of torture he would not have faced punishment.

[198] The appellant's evidence appeared to catch counsel by surprise and counsel was given leave to make submissions on the exclusion issue and to submit further evidence. As mentioned in the introduction to this decision, those submissions of 3 August 2001 (and the material enclosed) have been taken into account.

Assessment

[199] Our finding is that the appellant voluntarily placed himself in the torture chamber for no good reason other than to satisfy his curiosity. Our view of his credibility is that he voluntarily associated himself with gross violations of human rights and showed a knowing, and willing association with extreme acts of torture, and no doubt his presence encouraged those engaged in those acts of torture and added to

the intimidation of the victim. There is good evidence to establish that he intended to give encouragement and there was encouragement in fact.

The exclusion clause

[200] Article 1F of the Refugee Convention provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[201] On the facts of the present case, the applicable clause is "crime against humanity" in Article 1F(a).

[202] It is generally accepted that the applicability of the exclusion clause does not depend on whether a claimant has been charged or convicted of the acts set out in the Convention. There need only be "serious reasons for considering": UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 149 and *Cabrera v Canada (Minister of Citizenship and Immigration)* (FC Imm-4657-97, 23 December 1998, Pinard J) (FC:TD) at [5]. In *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306, 311 (FC:CA) it was held that the term "serious reasons for considering" establishes a lower standard of proof than the balance of probabilities. See also *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298, 308 (FC:CA). Both *Ramirez* and *Moreno* were cases involving torture, an offence with "the additional component of barbarous cruelty": see *Equizabal v Canada (Minister of Employment & Immigration)* (1994) 24 Imm LR (2d)

277, 284 (FC:CA) and *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433, 442-444 (FC:CA).

[203] With regard to complicity, it is settled refugee law that it essentially depends on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Those who become involved in an operation that is not their's, but that they know will probably lead to the commission of an international offence, lay themselves open to the application of the exclusion clause in the same way as those who play a direct part in the operation: *MEI v Bazargan* (1996) 205 NR 282, 287-288 (MacGuigan JA) and *Cabrera v Canada (Minister of Citizenship and Immigration)* at [6]. But it is recognised (as it is at common law) that mere presence at the scene of an offence is not enough. See *Ramirez* at 317 and 319:

> In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants.

[204] Complicity rests on the existence of a shared common purpose. See *Ramirez* at 317-318:

> Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation (nor would it amount to liability under section 21 of the Canadian *Criminal Code*), though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply bystanders with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group ***may*** be rightly considered to be personal and knowing participants, depending on the facts.
>
> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law (eg, subsection 21(2) of the *Criminal Code*), and I believe is the best interpretation of international law.

[205] In *Ramirez* at 319 it was accepted that a "mere" watcher is just as culpable a torturer as the actual physical torturer if the shared common purpose is present:

> No doubt in the circumstances of that case [*Naredo v Canada (Minister of Employment & Immigration)* (1990) 11 Imm LR (2d) 92 (FC:TD)], where four members of a police force who had freely chosen their occupation, were isolated in a room with a victim with no other purpose than collectively to apply torture to the victim, guards, witnesses and watchers were all equally guilty of personal and knowing involvement in persecutorial acts.

[206] Also relevant in the assessment is whether the individual protested against the crime or tried to stop its commission or attempted to withdraw: *Sivakumar v Canada (Minister of Employment and Immigration)* [1994] 1 FC 433, 440 (FC:CA), a decision applied in *Refugee Appeal No. 1248/93 Re TP* (31 July 1995).

[207] Finally, the fact that the appellant shows remorse does not exonerate him from culpability for the commission of an international offence. See *Liu v Canada (Minister of Citizenship and Immigration)* (1996) 124 FTR 74 (FC:TD) where the applicant, a citizen of China, was a member of the Public Security Bureau and in that capacity had participated in the arrest of pro-democracy students. Detainees were sometimes tortured and the applicant admitted that he had personally participated in torturing suspects. He testified, however, that he protested against the repression of the students and as a result had been imprisoned and tortured. The Court applied *Ramirez* at 328:

> As for the remorse he no doubt now genuinely feels, it cannot undo his persistent and participatory presence.

[208] The nearest New Zealand domestic analogy to these principles is *R v Schriek* [1997] 2 NZLR 139, 150 (CA) read with *R v Clarkson* [1971] 3 All ER 344, 347 (C-M AC) and s 66 of the Crimes Act 1961 (NZ).

[209] We are not required by the Refugee Convention to make a final determination whether the appellant has committed a crime against humanity. We are only called upon to decide whether there are serious reasons for considering that he has. We are satisfied that as a matter of law torture is a crime against humanity. We are further satisfied on the facts that the appellant has, over a period of eight years voluntarily

placed himself at the scene of torture and that he thereby intended to encourage and did in fact encourage those perpetrating the crime of torture. There was personal and knowing participation, a shared common purpose and a failure to dissociate or withdraw at the earliest safe opportunity. It follows that by virtue of Article 1F(a) he is excluded from the provisions of the Refugee Convention. His claim to refugee status must fail irrespective of the inclusion clause issues earlier considered.

CONCLUSION

[210] In summary, for the following reasons the appellant is not a refugee within the meaning of Article 1A(2):

(a) As to Kuwait, Bedoons for whom Kuwait is a country of former habitual residence and who are similarly placed to the appellant are denied re-entry and are refused admission. As a matter of fact the appellant will not be allowed or permitted by the Kuwaiti authorities to return to Kuwait. It follows that his fear of being persecuted in Kuwait is not a well-founded fear. The predicament he faces is the predicament of a stateless person, not of a Convention refugee.

(b) As to Iraq, the appellant does not have a well-founded fear of being persecuted for a Convention reason in that country. There is no risk of his being returned by Iraq to Kuwait.

(c) In any event, the appellant's fear of being persecuted in Kuwait is not for one of the five Convention reasons.

(d) Finally, there are serious reasons for considering that the appellant has committed a crime against humanity. As a result he is excluded from the Refugee Convention by virtue of Article 1F(a).

[211] The appeal is dismissed.

	.....
	[Rodger Haines QC]
	Chairperson