

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 74467

AT AUCKLAND

<u>Before:</u>	V J Shaw (Member)
<u>Counsel for the Appellant:</u>	R Chambers
<u>Appearing for the NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	11 March 2003 & 12 February 2004
<u>Date of Decision:</u>	1 September 2004

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, who was born in Kuwait though is stateless.

INTRODUCTION

[2] The appellant arrived in New Zealand in March 2002 and filed an application for refugee status in April 2002. He was interviewed by the refugee status officer on 27 August 2002 and advised that his application had been declined in a decision dated 25 November 2002.

[3] The refugee status officer found that the appellant had a well-founded fear of being persecuted if returned to Kuwait. However, in accordance with the reasoning in *Refugee Appeal No 72635/01* (6 September 2002), he determined that the feared persecution was because of the appellant being stateless rather than because of one of the five Convention grounds. The appellant's refugee claim was

therefore declined.

[4] At the time of the appeal hearing, *Refugee Appeal No 72635/01* was subject to judicial review proceedings, so that determination of this appeal was delayed pending the outcome. In the event, those judicial review proceedings were withdrawn. Judicial review proceedings were subsequently filed in respect of two further decisions of this Authority, *Refugee Appeal No 74451* (26 August 2003) and *Refugee Appeal No 74449* (26 August 2003) in respect of stateless Kuwaitis which followed the reasoning of *Refugee Appeal No 72635/01* that the persecution feared by the claimants had no nexus to any of the five Convention grounds.

[5] In October 2003, those proceedings were dismissed as without jurisdiction, the proceedings apparently having been filed by the appellants themselves without legal representation. Mr Chambers, who acted for all three appellants before this Authority, although he did not act in any of the judicial review proceedings, advised the High Court in respect of the later two decisions that he was preparing judicial review proceedings which he hoped to file shortly.

[6] The Authority briefly recalled the appellant on 12 February 2004 to clarify certain evidence and confirm with counsel the situation concerning the proposed judicial reviews. He advised that the proceedings had not been filed as intended because the appellants had both left New Zealand.

THE APPELLANT'S CASE

[7] The appellant is a single man aged 22 years. His parents and eight younger siblings remain living in Kuwait. He and his family are *bidoons* meaning "without nationality". His grandparents, he believes, and their forebears were desert-dwelling beduins who moved with their flocks of sheep within the area between Jahra and Al-Ahmadi some 50 kilometres south of Kuwait city. He understands from his father that his grandparents had a permanent house – the location of which he is uncertain – though they would move with their sheep during springtime, living in their tents. They sold their sheep in Kuwait city. His parents, from the time of their marriage, have lived a settled life in the city though his father has always traded in sheep.

[8] The appellant believes his paternal grandfather would have applied for citizenship under the 1959 Citizenship Law. However, as there was a limited period in which to do so and the grandfather was an illiterate nomad, possibly with little appreciation of the significance of such legal requirements, he cannot be certain of the actual situation.

[9] The appellant's father supports the family by trading in sheep, although as a *bidoon* he is not legally entitled to work and must therefore be careful to conceal his activities from the authorities. According to the appellant his father's income is modest and the family have survived in recent years because of handouts from various family and friends.

[10] The appellant completed secondary education. Throughout his schooling his parents were required to pay fees which were not required of Kuwaiti citizens. The appellant's younger siblings have all had to cease their education after primary or intermediate school because of the family's inability to meet the fees levied against *bidoons*. An exception was made for the appellant because he was the eldest son and because he showed particular ability.

[11] The appellant and his family have also been denied access to free medical care in public clinics and hospitals because of their *bidoon* status.

[12] The appellant achieved very high marks so his secondary school allowed him to undertake a four-month course in computer studies. However, as a *bidoon*, he could not access state-subsidised university study and his father could not afford to pay tertiary education fees.

[13] From 1999 onwards the appellant remained at home. He endeavoured to find employment in the private sector (the public sector being closed to *bidoons* particularly in the computing field). Mostly his applications would be ignored or, if a response was received, it would be to the effect that employing a *bidoon* was too problematic. According to the appellant, the authorities put pressure on private companies not to employ *bidoons* and those discovered doing so risk being penalised.

[14] During 1999 the appellant became engaged to a *bidoon* woman. Should they eventually marry their marriage could not be legally registered nor would any

children be issued with birth certificates.

[15] The appellant, because of his being a *bidoon*, was also excluded from holding a driver's licence.

[16] From the time the appellant completed secondary school, he largely spent his days confined to the house rarely going out because of the risk of being apprehended by the police. There were many checkpoints in the district often manned by officers in civilian clothing. He estimates he probably left the house no more than twice a month.

[17] The appellant was arrested in September 1999. His mother was ill at the time and he had gone to a pharmacy late at night to purchase medicine. On his way home he was stopped by two plainclothes officers who requested to see his identification. Realising from this that the appellant was a *bidoon*, the officers took him to a local police station. There an altercation ensued after the officers ignored the appellant's pleas to be allowed to deliver the medicine to his mother. One officer punched the appellant on his head, the ring on his finger causing a bleeding wound. The appellant was held throughout the following day and night and released after Kuwaiti citizen friends of his father approached the police.

[18] During his detention the appellant was interviewed by an officer who tried to persuade him to sign a declaration that he undertook to buy foreign citizenship. He refused to agree considering this would be tantamount to an admission that he was not Kuwaiti and that the government would undoubtedly use this as an excuse in the future to make him leave Kuwait.

[19] Thereafter, up until he left Kuwait in 2002, the appellant was stopped approximately every two to three months at police checkpoints and asked to present his identification card. He would be taken to a local police station and harassed as to why he had not obtained foreign citizenship. When he would insist that he was a Kuwaiti, the police would laugh and swear at him. He would normally be detained for several hours. His father would realise, if he had not returned home, what had happened and would arrange for Kuwaiti citizen friends to go to the police station to secure the appellant's release. He was never charged with any offence.

[20] The appellant's father was also detained on two occasions in the period from mid 2001 to early 2002. On both occasions he was detained for two days and harassed over his refusal to buy foreign citizenship.

[21] The appellant understands that his father did endeavour to register during 2000 in accordance with the government's offer to consider citizenship for *bidoons*. He filled out a form with details of the family and was asked to supply a telephone number of a friend. However, his father refused to sign any acknowledgement that he was not a Kuwaiti. As yet there has been no official response.

[22] In early 2002 the appellant applied for a passport. He approached the passport office and spoke to an official who advised that a passport would only be issued if the appellant signed a declaration undertaking not to return and acknowledging that he would be held legally responsible if he did so. He agreed to this condition because of his desire to escape the many problems of living in Kuwait, nor did he regard this as an admission that he was not a Kuwaiti.

[23] Prior to going to the passport office, a Kuwaiti citizen friend of his father had advised that he knew of an official who, for a small bribe, would be able to expedite the processing of the appellant's application for a passport.

[24] The appellant was issued with a passport on 13 February 2002. It is what is known as an Article 17 passport, a type only issued to *bidoons*. The passport is valid to 12 February 2007.

[25] The appellant legally departed Kuwait without incident in early March 2002.

[26] In the month following his arrival, the appellant was able to speak to his father who would use the telephone of a friend. However, these calls ceased after the friend became uncooperative. According to the appellant, his father is not able to register a telephone in his own name because of his being a *bidoon*. During the period when the appellant was communicating with his father, he learned that his father had continued to come under official pressure to purchase foreign citizenship and that he had been taken to the police station at least once.

[27] The appellant says he is afraid to return to Kuwait as he considers that he is likely to be arrested and even ill-treated for attempting to return, contrary to the

undertaking he signed as a condition of being granted a passport. He also says that he will once again face discrimination amounting to persecution, including denial of employment, access to further education and denial of access to free health care.

[28] In support of his claim, the appellant produced a copy of his Kuwaiti identification or green card issued to *bidoons* by the Executive Committee for the Affairs of Illegal Residents and copies of his school certificates.

[29] Counsel provided written submissions and country information which has been taken into consideration.

THE ISSUES

[30] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

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

[31] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[32] The Authority must first address the question of the appellant's credibility.

His testimony was consistent, spontaneous and plausible when considered against the country information referred to below. His account, as outlined above, is therefore accepted in its entirety.

STATELESSNESS

[33] The Authority must first address the question of the appellant's nationality. The appellant holds what is known as an Article 17 Kuwaiti passport. It is apparent though that possession of such a passport does not equate with citizenship. Such passports are issued to non-nationals, including *bidoons*, merely to facilitate travel abroad. Further, the notation "undefined/ Kuwait" in the appellant's passport signifies his status as a non-Kuwaiti (refer Research Directorate, Canadian Immigration and Refugee Board KWT38608.E 15 March 2002).

[34] The Authority therefore accepts that, in accordance with the current position of the Kuwaiti government, the appellant is not a citizen of Kuwait. As he is not considered a national by any other state, he is a stateless person.

[35] In terms of Article 1A(2) of the Refugee Convention, a stateless refugee claimant, that is, someone without nationality, must establish a well-founded fear of being persecuted in his or her country of former habitual residence.

[36] As the appellant was born in and has only ever resided in Kuwait up until coming to New Zealand in 2002, his claim should therefore be assessed in respect of Kuwait as his country of former habitual residence.

[37] In *Refugee Appeal No 72635/01*, it was held, at [157], that where, as a matter of *fact*, a stateless claimant cannot be returned to a country of former habitual residence in relation to which a fear of being persecuted is being 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 refugee claim.

[38] The appellant's Article 17 Kuwaiti passport is valid until 2007. It would seem that, in general, holders of Article 17 passports are able to re-enter Kuwait;

see Australian Country Information Service 1999 *Situation of the Beduins* (24 November 1999) KWT19991124 (CISINFO-CX38717) and Canadian Research Directorate, Immigration and Refugee Board KWT31124.E (12 February 1999).

[39] It is noted that the United States Department of State *Country Reports on Human Rights Practices 2002: Kuwait*, (31 March 2003) states that *bidoons* who returned “without proper authorisation” may be refused entry and arbitrarily detained. Because of the difficulties of effecting the deportation of stateless *bidoons*, such returnees reportedly risk prolonged detention.

[40] Presumably the appellant’s possession of an Article 17 passport would not be considered “without proper authorisation”. However, his evidence that he was granted the passport only after giving a verbal undertaking that he would not return to Kuwait, is noted. Whether this would cause him any difficulties in re-entering Kuwait despite his Article 17 passport is uncertain. Irrespective of what difficulties he might face on return, the appellant’s possession of a valid Article 17 passport would *prima facie* make it possible for the NZIS to effect his removal from New Zealand to Kuwait. Applying the benefit of the doubt, it cannot be said that it is a *factual* impossibility for the appellant to be returned to Kuwait.

THE DEVELOPMENT OF KUWAIT AND THE *BIDOONS*

[41] Before turning to the framed issues, it is helpful to first gain some understanding of the historical background to the presence in Kuwait of a group who came to be known as the *bidoons* and their present predicament.

[42] The situation of the *bidoons* of Kuwait has been well documented in a number of reports; see particularly Human Rights Watch *The Bidoons of Kuwait: Citizens Without Citizenship*, August 1995 and *Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression*, October 2000. It was most recently reviewed by this Authority in *Refugee Appeal No 72635/01* (6 September 2002) at [41] – [50]. The Authority has also examined academic writing to further its understanding of Kuwait’s political and social development.

[43] Anh Nga Longva, in her book, *Walls Built on Sand: Migration, Exclusion and Society in Kuwait*, Westview Press (1997), records that Kuwait’s population in 1904 – when Kuwait was still officially part of the Ottoman Empire – was only

35,000. The largest group was the Arabs, among them the Kuwaitis proper, that is, the original Utab migrants from Najd who founded Kuwait in the early 18th century, including the *Al Sabah* who were to acquire pre-eminent status, and the local tribes of Kuwait. The balance of the Arab population consisted of tribes and families from the lower Gulf and southern Iraq. Persians made up the largest non-Arab group.

[44] Referring to the social-cultural system in pre-oil Kuwait, Longva notes:

“Pre-oil Kuwait was not a homogeneous socio-cultural system, if only because of the coexistence of the sedentary and the nomadic cultures. The Arabians have traditionally conceptualised the difference between the two as being intrinsic and involving fundamental values. Among the most basic divergences was each group’s perception of trade activities. While the economic and social existence of the settled communities revolved around these activities, the Bedouins looked upon trade with contempt and stooped to selling and buying for a livelihood only in the most dire situations (Al Essa 1981). For Bedouins, it was the desert raid, elevated to the rank of a national institution, that lay at the base of the economic structure (Hitti 1970), and the settled communities of Arabia lived in constant fear of such raids. In Kuwait the townspeople had always been familiar with the money economy through trading across the Indian Ocean. But with the Bedouins the exchanges were made on a barter basis, with the nomads coming to town during their *musabila* (seasonal visits) with their pastoral products to pay for the manufactured goods they had acquired the previous season and to acquire new ones (Dickson 1951). Another major difference between the sedentary merchants and petty traders and the nomads was the former’s attachment to the town of Kuwait. To the nomads, the town had its pragmatic utility as a market place, but it was the desert that was vested with the expressive and symbolic significance. To the sedentary community, on the other hand, the town of Kuwait was not only an important source of livelihood but also the very locus where communal life arose and unfolded. The town also provided its inhabitants with a much needed physical security in a permanently hostile environment. ...

Although united against outside enemies, pre-oil Kuwait was also a stratified society: among the people of *al hadhar* (the sedentary), asymmetric power relations separated the mainly Sunni, Najdi merchant elite and the predominantly Shia labourers (Ismael 1982). Likewise, the hierarchical structure of the tribal world clearly distinguished the noble (*shareef*) camel-herding tribes from the semi-sedentary, sheep-breeding ones... There was a formal prohibition of marriage between the elites and their subordinates.” (pp23-24)

[45] Jill Crystal, author of *Oil and politics in the Gulf: rulers and merchants in Kuwait and Qatar*, Cambridge University Press, 1991, commenting on the social stratification in pre-oil Kuwait states:

“The merchants at the apex of the economic pyramid were distinguished from their fellow Kuwaitis not only by wealth and influence but also by social origins. The leading trading families were a homogeneous lot; Kuwaiti society as a whole was not. Politically salient sectarian and ethnic cleavages defined a number of relatively autonomous social communities within Kuwait. These communities and cleavages in turn reinforced the homogeneity and isolation of the old Sunni Najdi

elite. The most important cleavage was sectarian: Sunni-Shia, Kuwait's Shia community consisted of four groups: descendants of the putative original inhabitants of Bahrain; emigrants from eastern Arabia's Hasa province; Arab Shias who had migrated to Persia from Arabia and back (there were also Sunni Arabs from Persia); and, largest, Persians originally from Iran.

The Sunni-Shia division was more than religious. It was economic. There was a sectarian division of labour – the local water-carrying trade, for example, was exclusively in Shia hands. It was social – the communities did not intermarry and they organised social services at schools separately. It was also political. Unlike the Sunnis, who enjoyed a series of informal but direct links to the ruler, the Shias could only make their case to the Shaikh indirectly, through his secretary, Mullah Salh. In the 1930s even this line of communication would come under attack by the leading Sunni merchants, increasingly seen by the Shia community as actively and partisanly Sunni.

The final important social dichotomy was between long-settled families and tribal families, clans still predominantly nomadic in the early part of this century. This distinction was not as sharp as the sectarian rift, as Lindt observed in 1939: “as most of the influential families of the town have sprung from beduin tribes and as they have maintained contact with the life of the desert there is not that deep cleft between town-dwellers and nomads which is so great an obstacle to national unity in other Arab countries” (1939: 625). There was less tension between the beduin and the settled families because there was more social and political interaction. The beduin were then, as today, a second stratum, a recruitment source for the leading families.” (Crystal pp39-40)

[46] Crystal describes the traditional Kuwaiti elite in the following terms:

“Well before oil, clearly by the first decades of the twentieth century, Kuwait had a narrow and well-established elite: wealthy families who were linked by marriage and shared economic interests. They were long-settled, urban, Sunni families, most of whom claimed descent from the original thirty or so Bani Utub families. In a mosaic society stratified by origin, sect and historical occupation these families formed homogeneous elite: sedentary not nomadic, Sunni not Shia, *asil* (original, i.e. noble descendants) of the first migrants. They married each other and, sometimes, the Sabahs, whom they considered their peers. The patriarchs of these wealthiest families were merchants by trade, men who had acquired their fortunes from pearling, shipbuilding, and long-distance commerce.” (*ibid* p37)

[47] The merchants' pre-eminent economic position – they generated the income on which the ruling family depended – translated into a degree of political power which they sought in the 1930s to expand through an initially successful demand for an elective council. However, the enormous oil revenues generated by the oil industry from the mid-1940s guaranteed the ruler's financial independence from the merchants and enabled him to limit their political participation – effectively by buying them out of politics through guaranteeing their wealth and seeing that they received a sizeable portion of the new oil revenue. The old merchant families, in consequence, “rose as modern contractors” maintaining “a strong corporate sense of themselves”; see Crystal pp73-77.

[48] Throughout the 1950s, the political ascendancy of the *Al Sabah* was further consolidated through the ruler, Sheikh Abdalla, sharing greater power with his relations. Decision-making became centralised in the royal family fusing sheikhly and bureaucratic forms. The ruling family, now increasingly wealthy and defined in terms of formal state allowances and hierarchical ranks, began to turn inwards, rejecting historical intermarriage with the merchants and beduin. Oil had produced a society even more politically and economically hierarchical; see Crystal pp62-66.

[49] Maintenance of the fundamental division in Kuwaiti politics between the ruling family and the rest of the population required the careful management of potential opposition. Wary of the merchants' capacity for dissent despite their guaranteed wealth, Sheikh Abdalla sought to develop other allies and broaden his support base. He first "tried to buy the support or least acquiescence of the poorer Kuwaitis through mass based distributive policies" including free or state subsidised education, health and other services and, most importantly, the creation of state employment; Crystal p78.

[50] Fear of Arab nationalist ideologies amongst the disproportionately large number of foreign Arab workers – 45% of the population by 1957 – was a further catalyst to this new policy. The government was "anxious to use social policy and nationality laws to create as much as rift as possible between expatriate Arabs and Kuwaitis".

"To maintain an aura of privilege around these new entitlements, in the 1950s the government institutionalised preferential treatment based on nationality through a series of nationality laws. State benefits and services were available exclusively or preferentially to Kuwaitis. Other policies reinforced this national awareness. At the government's insistence the 1951 plan, through the new residential areas, segregated Kuwaitis and non-Kuwaitis. Public housing segregated non-nationals. Given the number of foreigners, preferential treatment based on nationality was becoming a privilege. By 1957 there were, according to Kuwait's first census that year, 92,851 non-nationals, about 45 per cent of the population..."

As the expatriates grew, the government enacted stricter nationality laws to regulate the special treatment of Kuwaitis. In 1948 two decrees established the first legal basis for nationality. In 1959 a stiffer nationality decree was issued which broadened the definition of "originally" Kuwaiti, to descendants of those in Kuwait since 1920 (previously 1898), but tightened naturalisation. A 1960 amendment allowed some naturalisation after long residence, but the clock started at 1960 and the limit was fifty per year. The Civil Service Law of 1960 held higher posts and pensions exclusively for Kuwaitis. The benefits available to Kuwaitis had grown significantly. Nationality now had real economic worth." (Crystal p79)

[51] One consequence of such policies, coupled with the curtailment of political

rights was, according to Longva, that:

“...in Kuwait, citizenship is understood primarily in terms of access to social rights. The political dimension of citizenship is somewhat underplayed because the exercise of one of the most basic political rights, participation in parliamentary elections, has been granted to Kuwaiti citizens only sporadically since independence. Although Kuwait officially adopted a constitutional regime after independence in 1961, the elected National Assembly has been suspended twice, once in 1976 and again in 1986. The first suspension lasted five years and the second six years. Besides, suffrage was the privilege of only male citizens twenty-one years old or over, who belonged among the so-called “original” or “first category” Kuwaitis – i.e., those whose forefathers were residents in Kuwait in 1920, the year of the Battle of Jahra. This event, it is often claimed, saw the birth of an explicit Kuwaiti “national” awareness by creating a nucleus of hard-core citizenry encompassing those who had taken part in the events and their descendants. These people qualified as full-fledged “first category” Kuwaitis. Suffrage was thus denied to the majority of the Kuwaiti nationals – all the women, the naturalised Kuwaiti males, and their sons. Before the Iraqi invasion, the proportion of men with full political rights was estimated at less than 5 per cent of the total population.” (Longva pp48-49)

[52] Crystal makes the point that following the formal grant of independence from Britain in 1961, the ruler (now known by the title “amir”) extended the search for new, reliable domestic allies outside the old merchant elite to the newly established National Assembly where, despite a ban on political parties, a clear opposition soon developed centred on Nasserist progressives.

“The rise in opposition convinced the government that it had to develop new allies. It now turned to groups outside the old trading elite: beduins, Shias, lesser-known Sunni families.

The beduins were the first. The process of incorporating tribes as political allies was already underway. In 1961, with the Iraqi threat looming, the government granted beduins citizenship in large numbers, offering social services, housing and all the advantages of citizenship and more in exchange for joining the army (historically a beduin occupation), paying tribal sheikhs to encourage members to join. The response was so overwhelming the state was unable to meet the housing demand and beduin shanty towns sprang up. (*ibid* p88) By 1975 Kuwait had a shanty population of 1301275, 80% beduin (al-Hadad 1981:110). The government took the housing crisis as an opportunity to institute policies to strengthen tribal identification for political purposes while simultaneously weakening the tribes’ historical internal social political coercion. It settled beduin away from grazing land....

The amir demanded one favour – electoral loyalty. As a result, a process of political detribalisation occurred. The state encouraged tribes to run assembly candidates, whom they selected through tribal primaries.

In the 1967 election the government undertook a mass naturalisation programme, enfranchising tens of thousands of beduin. In exchange for voting loyalty, they again received low income housing and jobs in the police and army. The electoral power of the beduin rose, from 21 per cent of the electorate in 1963 to 45 per cent in 1975, their seats from fourteen in 1963 to twenty in 1967 to twenty-three in 1975 (al-Haddad 1981: 143). In exchange for these economic benefits, the beduins voted loyally and conservatively. The government had acquired a new set of

allies.” (Crystal pp88-89)

[53] Despite the amir’s best efforts to contain or co-opt opposition following the 1975 election, “a vocal opposition soon formed over a variety of domestic and foreign policy issues” which led the government to dissolve the Assembly in 1976. Its reconvening in 1981 was, Crystal suggests (pp00-102), driven by the regional instability generated by the Iranian revolution and the ensuing Iran/Iraq war. The government in 1980 responded, as in the past, by re-establishing the National Assembly in an endeavour to broaden its support base and encourage a rift between Kuwaiti nationals and expatriates in the hope of containing the importation of regional ideologies. Ultimately the Assembly failed to end the political opposition, especially from the newly politicised Shia community. The growing political violence culminated in May 1985 with an almost successful attack on the amir himself followed by a spate of bombings in popular cafés.

“With these two incidents, the state’s concern with security became an obsession. After each incident the government deported several thousand non-nationals. Identity cards and fingerprints were now required of all adults. The government outlawed gatherings of over three people. Military reserve service was increased from one month to three.” (*ibid* p104)

[54] In July 1986 the amir closed the Assembly, replacing a policy of representation with one of repression relying increasingly on the security forces. Shias were the initial target.

“At the beginning increasingly, the Shias were the target of this force. Before the 1983 bombings the states’ official position had been at political violence in Kuwait with largely, even exclusively, due to outside provocation. Unofficially, an informal policy of discrimination against Shias in key state positions had been in effect since the war. From the early 1980s on, high ranking Shias were eased out of key military and police posts. Other Shias were restricted to non sensitive posts. In 1986, following the Assembly dissolution, Isa al-Mazidi, the only Shia minister, was demoted from communications minister to minister of state for social services. The government now also began deporting large numbers, perhaps thousands, of Kuwaiti Shias (*The Economist*, 123 June 1984: 46; *Christian Science Monitor*, 7 December 1987: 11.). Shias complained of tight security surveillance in Shia neighbourhoods, of tightening quotas at Kuwait University, of vanishing job opportunities in both the public and private sectors, and of growing restrictions on communal and religious life. These complaints increased the Shias’ sense of political isolation. Soon even the established Shia families were beginning to identify with Shia opposition.” (*ibid* p106)

[55] As will be seen, the *bidoons* were to suffer a similar fate, their ambiguous status making them an easy scapegoat in the face of renewed Iraqi claims to sovereignty over Kuwait.

[56] The existence of the *bidoons*, suggests Longva, is a facet of the politics of citizenship – and ultimately exclusion – which acquired such significance in Kuwait.

“Those in power made use of citizenship not only to exclude the expatriates but also to organise and define the internal power relationships. The clearest illustration was the distinction made between the enfranchised “first category”, or “original Kuwaitis” (whose forefathers had settled in Kuwait since 1920), and the disenfranchised “second category”, or naturalised Kuwaitis.” (Longva p52)

[57] The *bidoons* fell neither under the category of Kuwaitis or non-Kuwaitis in the sense of expatriates. They consisted largely of the nomads who had never had any formal citizenship previously.

“The stateless nomads did not register with the authorities at the time the 1959 Nationality Law came into force, due to a combination of failure to understand the importance of the newly introduced concept of citizenship and an attempt to hold on as long as they could to their traditional pattern of cyclical migration. Also, initially, the young state of Kuwait went a long way to permit and facilitate the survival of this tradition by leaving its borders open to the nomads’ comings and goings. In the 1960s they were allowed to settle permanently in Kuwait without, however, being formally granted the status of citizens. Until 1986 they could enjoy the free health and educational services offered by the state on a par with the Kuwaitis. In return they were expected to provide the country with its rank and file recruits for the army and the police under the command of officers who were Kuwaiti nationals. With their background as fighters and marauders from the desert, most nomads, unlike the urban Kuwaitis, willingly entered the armed forces, all the more so as this occupation was generally considered as the best way of gaining access to nationality. Service in the armed forces also allowed them to benefit from the free housing scheme that was otherwise an exclusive privilege of the citizens. Since they benefited from the free education offered to the Kuwaitis but were excluded from ownership rights (hence from owning a trade business in the private sector), most of the educated *bidoon* nomads who did not opt for a career in the army or the police chose to enter the technical professions (e.g., engineers, medical workers) and academia. Similar to the Kuwaitis in outlook, dialect, and tradition, their status as stateless was often apparent only to the informed natives. Before the war, many expatriate residence in Kuwait were unaware of their existence as a separate social category, especially as the official census regularly counted them as Kuwaitis, a fact to bear in mind when we read the population and labour statistics. Besides, the boundary between “Kuwaiti” and “*bidoon*” was porous in the case of the nomads due to nationalisation and intermarriage.” (*ibid* pp50-51)

[58] The *bidoons* served an important function:

“In the *bidoons* the Kuwaitis thought they had found a solution to their predicament: they had at their disposal a population part of which (the nomads) were, for all practical purposes, native, yet, through lack of citizenship, were willing to perform the necessary tasks in the armed forces. Moreover, the *bidoons* helped to inflate the demographic data but without, at the same time, having full access to all the socio-economic benefits.” (Longva *ibid* p51)

[59] Like the Shia, they became a casualty of external political developments.

“When Khomeini’s revolution swept across Iran and war broke out between Iran and Iraq, much of the Kuwait’s’ concern for the country’s internal security found its concrete expression in the existence of the *bidoons*: their ambiguous status as an unacknowledged population provided a human pool into which Iraqi refugees, draft dodgers, and infiltrators as well as absconding workers and illegal aliens could easily blend after getting rid of their identity papers.

In 1986, the authorities abruptly changed their policy: the *bidoons* lost access to education and health services. From that time on they were to be viewed and treated in the same way as the non-Kuwaiti expatriates. Gradually it became more difficult for them to get jobs.” (*ibid* p51)

[60] Suspicion of the *bidoons* was exacerbated following Iraq’s invasion of Kuwait in 1991.

“Clearly there was a widespread opinion by the late 1980s that many Iraqis tried to pass as “Kuwaiti stateless” and, in certain areas of Kuwait, *bidoon* and Iraqi was used interchangeably. This accounts for the predicament of the *bidoons* after liberation in 1991, since they were automatically suspected of sympathy, if not actual collaboration, with the occupying forces. ...” (*ibid* p73)

[61] Before looking at the treatment of the *bidoons* from the late 1980s, it is relevant to mention the discussion in the August 1995 report from Human Rights Watch at pp28-33 concerning the critical role of Kuwait’s citizenship legislation in the creation of the *bidoons*. Human Rights Watch concludes that discrimination aimed at denying citizenship to all but an elite group of original Kuwaiti city inhabitants underlies both the law’s formulation and implementation. It is worth quoting at some length from the report.

[62] In respect of the 1948 and 1959 legislation Human Right Watch states:

“In December 1948, Shaikh Ahmed al-Jaber, then-ruler of Kuwait and father of the current Emir, issued a decree on citizenship, believed to be the first issued by Kuwaiti authorities defining citizenship. Prior to that, loyalty to the Emir was the primary requisite for de facto citizenship. The borders of Kuwait were ill-defined and residents of the areas outside the city of Kuwait were nomads who for centuries travelled feely between the countries of the region. The ancestral lands of these tribes extended across modern day borders of Kuwait, Saudi Arabia, Iraq, Jordan and Syria. As the ruler of the city of Kuwait, with military assistance of Great Britain, the Emir extended his rule beyond the walls of the city to several thousand square miles; the ancestral lands of many tribes became parts of the territory of Kuwait. However, the Kuwaiti authorities were reluctant to extend Kuwaiti citizenship to these nomads and citizenship legislation clearly reflects this position. Only those who *settled* in Kuwait prior to 1920 were considered citizens by law. Nationality laws thus excluded from the beginning nomads who did not live a settled life.

Although the 1948 law put stringent conditions on acquiring citizenship, compared to the legislation that followed it remains the most liberal of Kuwait's citizenship regulations. In 1959, this law was superseded by Law No. 15, which made it more difficult to obtain citizenship. Law 15 continues to serve as the legal basis for Kuwait's citizenship legislation. Later amendments adopted in 1966, 1980 and 1986 added further obstacles to that process. (p29)

Immune to judicial review, the government freely amended citizenship regulations to make obtaining citizenship progressively more difficult or deny it altogether to those it deemed not suitable to be citizens. Once more restrictive amendments were adopted, the government denied citizenship to those residents who had qualified under previous laws despite the fact that it was usually government inaction which resulted in their not obtaining citizenship. In response to the pressure of a growing number of applicants fulfilling legal requirements for citizenship, the government repeatedly amended the law make it successively more difficult to qualify.

Holding to an unusual understanding of the origin of the right to citizenship, the government maintains that this right is established by government decree conferring citizenship. It rejects the notion that the right to citizenship is vested by the law itself and not by the governmental action implementing it. The government consequently maintains that these amendments, which strip individuals of vested rights, were in fact not applied retroactively, since there were no rights vested before they were adopted." (p30)

"Classes of Citizenship

Kuwaiti law recognizes eligibility for full citizenship (in contrast to a right to citizenship *per se*) to only a small group of individuals who satisfy an elaborate set of conditions. Others may be granted a lower grade of citizenship with circumscribed rights that may be stripped fairly easily.

Under Article 1 of the 1959 Citizenship Law Kuwaiti citizens (of the first class) are those who had settled in Kuwait prior to 1920, and their descendants, provided that the father is a Kuwaiti citizen of the first class. Children of Kuwaiti mothers and foreign or stateless fathers are not considered citizens of Kuwait. According to the official interpretation of the Citizenship Law, the year 1920 was chosen because in that year, residents of Kuwait erected a wall around the city to defend it against nomadic militias (supported at the time by Ibn Saud, King of Saudi Arabia). The interpretation reveals the government's belief that those who lived outside the walls of the city, but within the territory of the country, were not entitled to full Kuwaiti citizenship.

The requirement of settlement, instead of simple residence, is in contrast to most citizenship laws of the region. It was also a departure from the 1948 law, which required only residence. While continued residence could be relatively easy to demonstrate, settlement requires a more complicated proof, as it is related to intention. This distinction, which was emphasized early on by the Legal Bureau of the Cabinet, resulted in the rejection of many applicants because, although petitioners could prove continued residence in Kuwait, they were nomadic, moving around in the desert, following the annual pasture cycle. Others were rejected because they could not prove that they *intended* to settle in Kuwait. The decisions were made by a committee in the Ministry of Interior whose decisions were final. According to former committee members, the committee relied on informal methods such as quizzing applicants about the names of their neighbours or the imams of their mosques. If the applicant could not remember or appeared to have been coached, he was turned down. This arbitrary method resulted in anomalies whereby one man was accepted as citizen of the first class, his brother received

second class citizenship and a third was rejected for citizenship altogether. Similarly, some individuals were accepted as citizens but their adult children were born in Kuwait and lived with their fathers all their lives.

Applicants were informed if they were approved. If they did not satisfy the committee, they were either declared foreigners or issued documents stamped "*Bedoon Jinsiyya*" (without citizenship). By virtue of this classification (shortened later to Bedoon, or without), Bedoons were permitted to live in Kuwait and treated as citizens regarding residence, employment, travel and military service. They were also treated as citizens in receiving free education, health care and welfare.

Procedures for Citizenship Applications

Since 1960 the government has formed ad hoc committees to consider applications of citizenship. While the structure of these committees changed several times, their basic mandate and authority has remained unchanged. Under current regulations, applications for citizenship are submitted first to the Minister of Interior who has full discretion whether to refer the application to a committee to examine the application. If this committee deems the applicant deserving of citizenship, it issues a recommendation to another committee headed by the Minister of Interior, whose decision is final. While the lower committee reportedly concentrates on evidentiary and legal aspects, the higher committee examines political and security considerations. Regulations governing these committees given the near complete discretion and shield them from any form of judicial review. The first committee was formed by the Emir's Decree No. 5 of March 1960, which has been amended several times. A significant amendment issued in 1980 (still in effect) stipulated that applications should be submitted first to the Minister of Interior, who was given full discretion to reject the application or refer it to the advisory committee. Other than during brief periods in 1960 and 1980, these committees have been inactive. Most applications were simply received by the Ministry of Interior and shelved." (p31)

[63] Large groups of residents were progressively stripped of their right to citizenship through the frequent amending of the nationality law.

"Successive Amendments to Limit Eligibility

Had the 1948 Citizenship Law or the more restrictive Citizenship Law of 1959 been implemented in good faith, without successive amendments aimed at denying qualified applicants their right to citizenship, most of today's Bedoons would probably have been naturalized a long time ago:

C Before it was amended, Article 3 of the 1959 law gave first class citizenship to those born in Kuwait or abroad to Kuwaiti mothers, when the father was stateless or of unknown citizenship. This provision, which apparently was never applied before it was repealed in 1980, would have recognised the right of a large proportion of the Bedoon community to citizenship.

C Article 4 would probably have provided for the naturalization of most of the Bedoons had it been implemented before it was amended. Originally, a foreign resident could qualify for citizenship of the second class if he maintained residence in Kuwait for fifteen years, reduced to eight years for an Arab resident. Since there was never a dispute that most Bedoons had resided far longer than the periods stipulated, they could have qualified easily, had this provision been put in force. Instead, when it was found that many Bedoons could qualify under Article 4, the conditions were made more difficult and, starting in 1966, naturalization under Article 4 was stopped altogether.

C Article 5, which regulated “exceptional” naturalisation could have benefited thousands more Bedoons. Instead, its provisions were first only sporadically applied, then amended several times to prevent this outcome. For example, Section 3 of Article 5 gave the government discretion to grant citizenship to “those born in Kuwait who maintains their normal residence in Kuwait until they reach the age of majority, provided that they complete secondary education in Kuwaiti schools, are of good character and reputation and possess no other citizenship. “However in 1980, after 294 Bedoons were naturalized under its terms, section 3 was repealed altogether. To justify its repeal, the government cited “serious ill effects resulting from this provision.

C Article 5(2) authorised conferring citizenship on children of Kuwaiti mothers who were widowed or divorced. According to a Kuwaiti academic who has studied this phenomenon, this provision was rarely applied – a fact confirmed by Human Rights Watch interviews with many Bedoons who are children of Kuwaiti mothers.” (p32)

[64] Political rights of naturalised citizens are extremely limited:

“Naturalised citizens, i.e. those who acquire citizenship according to articles 3, 4, 5, 7 or 8 of the Citizenship Law, may not vote in any parliamentary election post before thirty years from the date they obtained Kuwaiti citizenship (or July 6, 1966, whichever comes later). ¹⁴⁸ An amendment to the Citizenship Law further stipulated that naturalized citizens may not be appointed or elected to any parliamentary position, regardless of how long they have had Kuwaiti citizenship. This has been understood to mean a complete and indefinite ban on naturalized citizens from ever holding a seat in the parliament, the cabinet or municipal bodies of the country. ¹⁴⁹ The unrestricted language of Article 6, stipulating the curtailment of political rights, includes those who are not usually thought of as naturalized citizens, such as foundlings or children of Kuwaiti mothers whose fathers are unknown.”

[65] Human Rights Watch further identifies gender discrimination as an important element in the perpetuation of statelessness:

“Under Kuwaiti law a woman’s right to citizenship is limited and contingent: She acquires it through her father or husband and may not pass it on to her offspring or spouse.¹⁵³ Decree No. 5 of March 1960, issued pursuant to Article 20 of the Citizenship Law of 1959, explicitly excluded married women from applying directly for citizenship. Only after they were widowed or divorced could they apply. Kuwaiti citizenship law, while largely based on the *jus sanguinis* principle, recognizes only the right of male citizens to pass on citizenship to their offspring. Similarly, while a foreign woman may be naturalized when she marries a Kuwaiti husband, a Kuwaiti woman may not petition to have her foreign or stateless husband naturalized.

Article 2 considers as a citizen a child “born in Kuwait or abroad to a Kuwaiti father”. However, children of Kuwaiti mothers and foreign fathers are not considered Kuwaiti citizens. Citizenship (of the second class) may be conferred, under stringent conditions, on these children only if the marriage is dissolved. Article 5, as amended, authorizes the conferring of citizenship to “a child of Kuwaiti mother, who maintained residence in Kuwait until the age of majority, if his foreign father has died or divorced his mother.”¹⁵⁴ In practice, as many who were interviewed by Human Rights Watch testified, Article 5 was frequently ignored; children of Kuwaiti mothers were denied citizenship even if their parents’ marriages

were dissolved. Some interviewed admitted that they chose to divorce in order to protect the children, only to find out that this legal rule was not honoured by government agencies.

The rule sanctioning a different treatment for the offspring of female citizens imposes a special hardship for children of Kuwaiti mothers and stateless fathers. Until 1980, Kuwaiti law gave those children the right to be citizens. Before it was amended, the original Article 3 of the 1959 Citizenship Law, provide for a child born to a Kuwaiti mother to be considered a citizen "if the father is unknown, his paternity unproven, *of unknown nationality or stateless.*"¹⁵⁵. Although this rule did not eliminate all aspects of discrimination against women in citizenship rights, it provided citizenship rights to those children born to stateless fathers and Kuwaiti mothers. Although in practice before 1980 this right was recognized selectively, those children were in general treated as citizens. After Article 3 was amended in 1980, omitting the phrase "of unknown nationality or stateless," the government gradually began to treat children of Kuwaiti mothers and stateless fathers as foreigners." (p34)

DISCRIMINATORY TREATMENT OF *BIDOONS* POST 1985

[66] The institutionalised discrimination of the *bidoons* since 1985 aimed ultimately at forcing them to leave Kuwait is described in detail by Human Rights Watch, in its August 1995 report. Until 1985 the *bidoons*, although not granted the formal status of citizens, enjoyed many state benefits on a par with Kuwaiti citizens and were counted as Kuwaitis in all official census held up to 1988. In 1990 they were estimated to number approximately 250,000 or around a third of the native population. They also made up around 80% of the military and police forces.

[67] From 1986 onwards, *bidoons* were progressively stripped of their former rights. They were denied travel documents, sacked from employment in both the private and public sectors (apart from the military and police), denied driver's licences and the right to register cars, denied access to public education at all levels (and restrictions placed on their entry into private institutions) and dismissed from professional organisations. These measures reduced many *bidoons* to abject poverty living under the threat of deportation.

[68] During and after the Iraqi invasion, although (according to Human Rights Watch) one third of those killed by the Iraqi occupiers were *bidoons* and many *bidoons* in the military and police were taken prisoner, *bidoons* were collectively branded as collaborators by many Kuwaiti officials and citizens alike. While most Kuwaitis sought refuge in Saudi Arabia during the seven-month occupation, entering Saudi Arabia was largely denied to *bidoons*, the Saudi authorities permitting entry only to those *bidoons* approved by the Kuwaiti reception

committee set up by the Kuwaiti government in exile. In consequence, many *bidoons*, in order to flee the fighting, had little option but to enter Iraq as this did not require travel documents. At the war's end, Kuwait refused to allow their repatriation, including even of some *bidoon* prisoners of war. It was estimated that from 130,000-160,000 *bidoons* were left stranded outside Kuwait. To date, Kuwaiti authorities have denied their re-entry, including former soldiers and spouses of Kuwaiti citizens.

[69] Throughout the 1990s, repression of *bidoons* continued unabated despite international criticism. All *bidoons* still in government service, including soldiers and security personnel, were dismissed retroactively from the date of the Iraqi invasion, 2 August 1990. However, of necessity, a percentage were rehired for military service on substantially reduced terms and conditions (in 1995 estimated at 25 percent of the military) pending "Kuwaitization" of the military.

[70] In the early 1990s, the Ministry of the Interior issued some 24,000 deportation orders against *bidoons*, largely administrative orders issued without due process and exempt from judicial review. Security officers enjoyed wide discretionary powers to arrest and detain non nationals. *Bidoons* found themselves regularly harassed and arrested at the security checkpoints inhibiting their movements. Many deportation orders could not be enforced due to their being no country to deport *bidoons* to. In consequence, some *bidoons* were reportedly detained in deportation facilities for lengthy periods of up to several years.

[71] Having been declared illegal residents, *bidoons* may not register their marriages, nor do they have access to state health services and welfare.

[72] Piecemeal legislation passed in the latter part of the 1990s resulted in naturalisation of a very small number of *bidoons*. The government also offered a residence visa and legal status to those *bidoons* who presented a foreign passport, regardless of the circumstances of its issuance. The US Department of State *Country Reports on Human Rights Practices – 2002: Kuwait*, (31 March 2003) reported that a law passed in June 2000 required *bidoons* to register by June 27 2000 to begin the process under which they could be documented as citizens. Those who could prove the presence of their forebears in the country prior to 1965 were eligible to apply for citizenship directly. The government is said to have

122,216 *bidoon* cases on file. However, the law only allows for up to 2,000 registered *bidoons* to be naturalised each year. During 2003, citizenship was granted to only 1,647. In its 2004 report, the Department of State refers to citizenship having been granted to around 1600 *bidoons*.

REAL CHANCE OF PERSECUTION

[73] Against this background, I turn now to consider whether the present appellant faces a real chance of persecution for a Convention reason.

[74] The appellant contends that he is a Kuwaiti. He says that the Kuwaiti government's actions in categorising him as a *bidoon*, denying him citizenship, stigmatising him as an illegal resident and actively discriminating against him in all walks of life – effectively rendering him a non-person – constitute breaches of his fundamental human rights which cumulatively amount to persecution.

[75] The appellant's and his family's experiences in Kuwait very much accord with Human Rights Watch's depiction of many *bidoons* living "under virtual house arrest". He was denied access to free education, health care and other social benefits, barred from employment, denied basic official documentation, including a driver's licence, was vulnerable to arrest and the threat of deportation and was restricted in his ability to leave and return to Kuwait. The curtailment of the right of *bidoons* to take up employment in the public or private sector or otherwise earn a living, in particular, condemned the appellant's family to economic hardship. It further renders remote any prospect of the appellant being able to lead a normal life in Kuwait, in the sense of marrying and independently supporting a family of his own.

[76] The 2003 and 2004 reports from the US Department of State suggest that little has changed for *bidoons* in Kuwait since the October 2000 report from Human Rights Watch. In the event of the appellant returning to Kuwait, his situation would be no different to what he has experienced in the past. Indeed there is even the possibility that he might be considered in breach of his undertaking not to return to Kuwait and, in consequence, detained indefinitely pending his family being able to arrange his travel to a third country or being able to persuade the Kuwaiti authorities to release him, perhaps through the intercession of Kuwaiti friends and/or by means of a bribe.

[77] Until *Refugee Appeal No 72635/01* (6 September 2002), this Authority had held that the predicament of *bidoons* such as the present appellant, including their exclusion from formal citizenship, was the product of systemic institutionalised discrimination amounting to significant breaches of fundamental human rights, which in certain individual cases, cumulatively could amount to persecution; see *Refugee Appeal No 71687/99* (27 September 1999).

[78] The refugee status officer held that if he returned to Kuwait the appellant faced a real chance of persecution. However, applying *Refugee Appeal No 72635/01*, he went on to find that the harm feared by the appellant would be by reason of his statelessness and was not based on any of the five Convention grounds. It is therefore necessary to examine the reasoning in *Refugee Appeal No 72635* on this point in some detail.

[79] The appellant in *Refugee Appeal No 72635/01* was a Kuwaiti *bidoon* who, in the aftermath of the Iraqi invasion, had been dismissed from his police-related employment with the Ministry of the Interior. In August 1993, he was detained at a checkpoint and, because of his status as a *bidoon*, held in custody for two months prior to his expulsion - along with his family - to Iraq. It seems that during the 1980s he was issued with an Article 17 passport which he used to travel to a number of countries. While not expressly stated in the decision, it would seem to be implicit from the finding that the appellant could not return to Kuwait, that his Article 17 passport had expired.

[80] The appellant's claim to have suffered persecution in Iraq was rejected as not credible. With respect to his fears of being persecuted in Kuwait, the panel's primary finding, following a lengthy discussion of the legal concepts of "nationality", "statelessness" and "country of former habitual residence" was stated at [159]:

"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 a predicament of a stateless person, not of a Convention refugee."

[81] The finding that the well-foundedness issue could be resolved *solely* on the basis of the factual impossibility of the appellant's return to Kuwait, meant that there was no critical analysis of the origins and application of Kuwait's citizenship laws to determine whether or not discriminatory notions were instrumental in the creation of a group excluded from formal citizenship as the appellant in *Refugee Appeal No 72635/01* contended. Nor did the panel find it necessary to address

the question of whether the Kuwaiti government's treatment of stateless *bidoons* contravened the non-discriminatory principles of the International Bill of Rights.

[82] Even so, at [160] an alternative finding was made should the panel have been wrong on the point of returnability.

"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."

[83] At this stage, a discussion of New Zealand's jurisprudence concerning causation ensued as a preliminary to the adoption of the *Michigan Guidelines on Nexus to a Convention Ground* – the conclusions of an academic colloquium held at Michigan University in March 2001 – which, it was held at [179], "properly identify the principles to be applied in New Zealand when issues of causation are determined".

[84] Returning to the case at hand, the panel then recorded the following reasons for the finding that the causation element was lacking:

"[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."

[85] The panel further dismissed the submission that their appellant's feared persecution was by reason of his membership of the social group of *bidoons* and his nationality as involving circular reasoning.

[86] With respect to the panel in *Refugee Appeal 72635/01*, I do not find their reasoning persuasive:

- (a) The finding reflects an unduly theoretical focus on one aspect only of Kuwait's citizenship law, namely the *jus sanguinis* principle. Yet the operation of the *jus sanguinis* principle is not the sole or even the primary mechanism in the creation of statelessness amongst a section of Kuwait's population.
- (b) The finding as to the absence of any evidence of discriminatory elements in the adoption or implementation of Kuwait's citizenship law is simply asserted. The "extensive evidence" on which the finding is said to be based is not discussed. The finding is perplexing in the face of the historical evidence to the contrary.

[87] For the reasons explained in *Refugee Appeal No 72635/01* at [82], the operation of the *jus sanguinis* principle (nationality by descent as opposed to place of birth, *jus soli*), can sometimes give rise to inherited statelessness. However, this hardly explains the extraordinary situation that arose in Kuwait where, by 1988, up to *one third* of the population was allegedly "stateless" – a situation not encountered in other Middle Eastern countries which, as *Refugee Appeal No 72635/01* notes, commonly employ the *jus sanguinis* principle as a basis for nationality. Clearly something more was operative in the creation of statelessness in Kuwait beyond the neutral operation of the *jus sanguinis* principle.

[88] As the above discussion of the country material demonstrates, the statelessness of the *bidoons* is intimately linked to the fact that discriminatory notions have informed both the content and implementation of Kuwait's Citizenship Law.

[89] A central feature of the Kuwaiti Citizenship Law 1959 is the notion of classes of citizenship. Pursuant to Article 1, eligibility for citizenship of the first class is restricted to those who had settled in Kuwait prior to 1920 and their descendents. As Human Rights Watch notes (see [62] above), the reliance on "settlement" rather than the more usual "residence" was in contrast to most other citizenship laws of the region. Article 1 aimed to restrict full citizenship and hence political rights to a small elite group of "original Kuwaitis" who comprised the

settled inhabitants of Kuwaiti city. The Citizenship Law thus excluded from the beginning nomads who did not live a settled life.

[90] Gender discrimination in the Citizenship Law has also worked to perpetuate statelessness. As Human Rights Watch notes, women's right to citizenship in Kuwait is limited and contingent. Pursuant to Article 2 of the 1959 law, citizenship passes only to those children "born in Kuwait or abroad to a Kuwaiti father". One exception giving the right to become a citizen to the children of Kuwaiti mothers and stateless fathers was selectively implemented then repealed in 1980. Another exception, which could have worked in favour of the children of *bidoons*, was provision for the grant of citizenship on the death of a foreign father or divorce of the parties, if the child had remained resident in Kuwait until the age of maturity. According to Human Rights Watch, this provision was frequently ignored by government agencies.

[91] The extracts from Human Rights Watch set out above detail the arbitrary and unreasonable methods of implementation employed, including the law's frequent amendment, so as to preclude many nomads and others from acquiring citizenship. Decision-making was politicised, highly discretionary and free from any form of judicial review. As Crystal noted, nomads were naturalised largely to meet the amir's desire to create conservative allies amongst tribal leaders in the National Assembly and/or if willing to join the police or military.

[92] Kuwait remains an intensely hierarchical society where, even today, only 14.8% of males over the age of 21 years enjoy the vote; US Department of State, *ibid*, 2003. The creation of a "stateless" group known as the *bidoons* is the result of a complex pattern of historical discrimination against certain groups in the Kuwaiti population, in particular the rural semi-settled or nomadic beduin and the Shia – traditionally the labourers for the urban elite. The discretionary conferring and withholding of citizenship and the distinguishing between classes of citizens to the disadvantage of those groups outside the traditional elite, has served to preserve the social and economic hierarchy and foster the political ascendancy of the ruling family through divide and rule strategies.

[93] One consequence of this legacy, as Longva points out (*ibid* p45), is that while on the surface the dichotomy between Kuwaiti – non-Kuwaiti, in principle, is purely descriptive and value neutral, in reality, the definition of "Kuwaiti" is hotly

disputed amongst the Kuwaitis themselves. The appellant's forthright assertion that he and his family are Kuwaiti, irrespective of the current policy of the Kuwaiti government, reflects this state of affairs.

[94] Once this pattern of historical discrimination is appreciated and in particular, the manner in which citizenship has been used by the ruling elite "to organise and define the internal power relationships", the historical nexus between the status of *bidoon* and one or more Convention grounds is apparent. These grounds embrace race and nationality (tribe/ clan/ geographical origins/ settled/ nomadic, religion (Sunni/Shia) and gender (social group).

[95] It is worth recalling the causation principle highlighted in *Refugee Appeal No 72637/01* at [181] namely, that the Convention 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.

[96] Similarly, consideration of the country material does not, in my view, support the finding in *Refugee Appeal No 72635/01* at [185-6] that *bidoons* do not constitute a social group for the purpose of the Convention. This, it was suggested, would involve the circularity of the group being defined by the persecution there being "no evidence to suggest that this is one of the rare cases ... in which the persecution may serve to identify or even cause the creation of a particular social group".

[97] With respect, this ignores the historical reasons behind the creation of the *bidoons* already discussed and the dynamics of their eventual marginalisation and persecution. Up until the mid-1980s, the designation *bidoon* was not excessively burdensome. As Longva explains, citizenship in Kuwait was understood primarily in social rather than political terms. *Bidoons* were able to access, with some exceptions, much the same social benefits as other Kuwaitis. Indeed, they were officially categorised as Kuwaiti up until the 1988 census. They were similar to Kuwaitis in outlook, dialect and tradition and, according to Longva, outsiders would have been unaware of their existence as a separate social category. Human Rights Watch notes that even within one family, some individuals might be classified as *bidoons* and others not, reflecting official arbitrariness and/or the gender bias of the law. It is possible, therefore, that amongst ordinary Kuwaitis,

bidoons were regarded more as a statistical category than as a distinct social group.

[98] The perception and position of the *bidoons* was to change dramatically in response to external threats in the form of radical Iranian Shism and Iraq's renewed claim to sovereignty over Kuwait. From 1985, the Kuwaiti state's concern for security became "an obsession" which "found its concrete expression in the existence of the *bidoons*". "*Bidoon*" became equated with "Iraqi" and following Iraq's invasion, *bidoons* as a group were a ready scapegoat. They were branded as sympathisers and collaborators and progressively stripped of all rights, including being rounded up and deported.

[99] This official stigmatising and punishment of *bidoons*, while not the reason for the creation of the group, would undoubtedly have served to reinforce in the wider society the perception of *bidoons* as a distinct social group with negative attributes.

[100] As for the discussion of the circularity of the nationality ground found at [187] to [189] of *Refugee Appeal No 72365/01*, my prior comments also apply. My reasons for rejecting the finding that the statelessness of *bidoons* is merely the result of the neutral operation of the *jus sanguinis* principle absent any Convention element, have been well covered. The conclusion at [188] that "the evidence simply does not show manipulation of nationality laws" is at odds with the historical evidence. Importantly though, it does seem that the panel in *Refugee Appeal No 72635/01* accepted that where there is evidence of the manipulation of nationality laws with a view to excluding certain groups, Convention grounds are engaged. Our divergence is not one of principle so much as a different perspective on the historical/factual background.

[101] When one considers the discrimination that has informed the Kuwaiti Citizenship Law, there can be little doubt that Kuwaiti *bidoons* have experienced systemic discrimination amounting to significant breaches of their human rights.

[102] As the policies instituted in the late 1980s aimed at stripping *bidoons* of all rights have been officially justified in terms of the *bidoons*' statelessness – or more particularly their lack of Kuwaiti nationality – and because the *bidoons* form a particular social group – reinforced by their pariah status – it is legitimate to speak

of their more recent discriminatory treatment as by reason of the Convention grounds of nationality and particular social group. Our earlier approach should not be discarded. As always though, each case will need careful determination on the basis of its specific facts.

[103] Summarising my conclusions in respect of the present appellant, he is descended from beduin who lived and grazed their flocks of sheep outside Kuwait city in the Jahra-Al Ahmedi area. He knows of no ancestral connection to any country other than Kuwait. He regards himself as a Kuwaiti. His background is typical of that of many *bidoons*. The cumulative harm of the past discriminatory measures against him – which effectively rendered him a non-person in his own country – reached such a serious degree as to amount to persecution. If returned to Kuwait his circumstances would be little changed. His fears of being persecuted are therefore well-founded.

[104] The persecution feared by the appellant is by reason of the Convention grounds of nationality and his membership of the social group of *bidoons*.

CONCLUSION

[105] For the reasons discussed above, the appellant is a refugee within the meaning of Article 1A (2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

.....
V J Shaw
Member