FEDERAL MAGISTRATES COURT OF AUSTRALIA

DZABG v MINISTER FOR IMMIGRATION & ANOR *[2012] FMCA 36*

MIGRATION – Independent merits review of offshore entry person – applicant stateless Bidoon whose previous permanent place of residence was Kuwait – applicant claims refugee status on basis of religious persecution – claim reviewer failed to consider integer of applicant's claim for asylum namely right to practise his religion in community with others – applicant found by reviewer to have suffered discrimination on the basis of his ethnicity in Kuwait – whether possibility that applicant will be refused re-entry to Kuwait can be considered to amount to persecution pursuant to Refugees Convention when taken into account with findings of discrimination – no legal error established – application dismissed.

Migration Act 1958 (Cth), ss.5, 36, 46A,476, 477

Plaintiff M61/2010E v Commonwealth of Australia (2010) 272 ALR 14
Htun v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 244
SZQGP v Minister for Immigration [2011] FMCA 701
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2) (2004) 144 FCR
Diatlov v Minister for Immigration & Multicultural Affairs (1999) 167 ALR 313
Wang v Minster for Immigration & Citizenship & Multicultural Affairs (2000) 105 FCR 548
Liu v Minister for Immigration & Multicultural Affairs [2001] FCA 257
SPZF v Minister for Immigration & Citizenship [2008] FCA 1486
MZXLB v Minister for Immigration & Citizenship [2007] FCA 1588
MZXIV v Minister for Immigration & Citizenship & Multicultural & Indigenous Affairs [2006] FMCA 145
S395 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
Re Minister for Immigration & Multicultural & Indigenous Affairs and Anor; ex parte applicants S134/202 (2003) 211 CLR 441
Dranichnikov v Minister for Immigration and Multicultural Affairs [2000] FCA 1801
Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs [2003] 75 ALD 630
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Rishmawi v Minister for Immigration & Ethic Affairs (1997) 77 FCR 421
Minister for Immigration and Multicultural Affairs v Savvin (2000) 98 FCR 168

Applicant:	DZABG
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	JILLIAN BARTLETT IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER
File Number:	DNG 41 of 2011
Judgment of:	Brown FM
Hearing date:	13 December 2011
Date of Last Submission:	13 December 2011
Delivered at:	Adelaide
Delivered on:	25 January 2012

REPRESENTATION

Counsel for the Applicant:	Mr Gibson
Solicitors for the Applicant:	Northern Territory Legal Aid
Counsel for the First Respondent:	Mr Anderson
Solicitors for the First Respondent:	Australian Government Solicitor

ORDERS

(1) The application filed 12 August 2011 is dismissed.

(2) The applicant pay the first respondent's costs fixed in the sum of $5,850.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT DARWIN

DNG 41 of 2011

DZABG
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

JILLIAN BARTLETT IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant arrived by boat, at Christmas Island, on 26 March 2010. Prior to his arrival at Christmas Island, the applicant was a resident of Kuwait. However, he claimed to be a stateless Bidoon, who was excluded from the benefits of Kuwaiti citizenship.

2. The applicant did not have valid travel documents. As Christmas Island is excised from the Australian migration zone, he is to be regarded as an *"offshore entry person"* as defined by section 5 of the *Migration Act (1958) (Cth)* hereinafter referred to as ("the Act").

3. The applicant was interviewed by officers of the Department of Immigration & Citizenship on 15 May 2010. He claimed that Bidoons are persecuted in Kuwait and there is *"a campaign to eradicate or eliminate them"*.[1] The applicant claimed to be entitled to the protection of Australia because he was a refugee.

4. The applicant's claim for refugee status depends on him satisfying the definition of *"refugee"*, provided by Article 1A(2) of the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees ("Refugees Convention") which provides that a *"refugee"* is a 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."*

5. Given the mode of the applicant's arrival in Australia and his classification as an offshore entry person, the applicant is designated under the applicable legislation as an *"unlawful non-citizen"*. As such, he is not authorised to make an application for a visa to remain in Australia via the orthodox channels administered by the Department of Immigration & Citizenship.

6. However, pursuant to section 46A(2) of the Act, the Minister for Immigration & Citizenship is granted a discretion to grant an offshore entry person a visa, if the Minister *"thinks that it is in the public interest to do so … ."* The nature of the ministerial discretion, contained in section 46A(2) and the constraints on its exercise, where considered by the High court in *Plaintiff M61/2010E v Commonwealth of Australia.*[2]

7. As a result of the legislative discretion invested in the Minister pursuant to 46A(2), an administrative protocol was devised by the Department of Immigration & Citizenship, which was intended to provide specific advice to the Minister as to whether Australia's

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[1] See casebook at page 11
[2] See *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14

protection obligations, arising under the Refugees Convention, to which Australia is a signatory, were engaged in the case of each person who arrived in Australian territory, at an excised offshore place (such as Christmas Island) and claimed to be a refugee.

8. This protocol envisaged two distinct and independent steps. Firstly, each such arrival would be subject to a Refugee Status Assessment ("the RSA") by officers of the department. Secondly, if the RSA determined that the person seeking refugee status was not in fact a refugee, there would be an Independent Merits Review ("the IMR") of each such refugee status assessment.

9. The purpose of the IMR was to make a recommendation, to the Minister, about whether Australia had protection obligations to any persons claiming so. If the reviewer concerned did conclude that Australia did owe a protection obligation to any such claimant, advice would be provided to the Minister in such terms so that the discretion arising under section 46A(2) could be properly exercised.

10. In *Plaintiff M61/2010E* the High Court held that reports made to the Minister pursuant to the IMR process attracted judicial review as a result of the operation of section 75(v) of the Constitution. In particular, the High Court held that in conducting an IMR, the reviewer concerned was bound to afford procedural fairness to the person whose claim was being reviewed and was further bound to act according to law by applying relevant provisions of the Act to the case under review.

11. On 15 September 2010 the RSA assessment in respect of the applicant's claim for protection in Australia resulted in a finding that he did not meet the definition of refugee set out in the Refugees Convention.

12. As a result of this decision, the applicant sought an IMR. The IMR was conducted by Ms Jillian Bartlett. On 10 July 2011, Ms Bartlett recommended to the Minister that the applicant be not recognised as a person to whom Australia owed protective obligations under the Refugees Convention.

13. Following the completion of the IMR, on 12 August 2011, the applicant commenced proceedings in this court seeking a judicial review of Ms Bartlett's decision. In his application, the applicant seeks a declaration that Ms Bartlett's report is affected by legal error and injunctive relief to prevent the Minister and officers from the department from relying upon it.

14. These reasons for judgment are directed to providing the judicial review of Ms Bartlett's decision as sought by the applicant. Pursuant to section 476 of the Act, the Federal Magistrates' Court has the same original jurisdictional, in relation to migration decisions, as does the High Court pursuant to paragraph 75(v) of the Constitution. This provision grants the High Court original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

15. In his application to the court, the applicant claims that the decision of Ms Bartlett is vitiated by legal error in two distinct areas. Firstly, it is asserted that Ms Bartlett failed to address the applicant's claims for refugee status on the basis that he was not able to practice his religion openly, with others or worship in public, as a Bidoon living in Kuwait.

16. Secondly, it is asserted that Ms Bartlett, whilst accepting the applicant had no legal right to re-enter Kuwait failed to consider that this factor, when coupled with the discrimination to which he would be subject as a Bidoon in Kuwait, could amount to persecution in the sense defined by article 1A(2) of the Refugees Convention.

17. Essentially, it is the applicant's position that Ms Bartlett has failed to properly consider two essential components or integers of his claim for refugee status. A failure to consider a claim raised expressly or implicitly on the material before a tribunal is a clear jurisdictional error.

18. In *Htun v Minister for Immigration & Multicultural Affairs* Allsop J described the nature of the review function as follows:

> "*The requirement to review the decision* [pursuant to the provisions of the Act] *requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the jurisdiction embarked*

> *upon. The claims or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration… It is to be distinguished from errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act … make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant."* [3]

19. It is the function of the court to consider whether Ms Bartlett's report reveals any error of law in its reasoning or in the procedures followed before its making. The relief sought in the application can only be granted if I am satisfied that Ms Bartlett made such an error or errors. It is not my function to engage a merits review or make my own findings as to the applicant's refugee status.[4]

20. The Minister's position is that Ms Bartlett did respond property to the case which the applicant advanced. The Minister further contends that the IMR was not required to consider any claim for asylum, which was *"not expressly made or does not arise clearly on the materials before it."*[5]

The RSA process

21. In his entry interview, the applicant indicated he was a Shia by religion and an Arab by ethnicity. He gave his date of birth as 15 July 1975.

22. He further indicated that he left Kuwait by air, using a Kuwaiti passport, travelling to Jakarta via Dubai. He then travelled from Indonesia to Christmas Island by boat, throwing his passport into the sea whilst in transit.

23. In a statutory declaration completed by him on 6 June 2010, the applicant indicated that he was a Bidoon.[6] He asserted that Bidoons had no rights in Kuwait. In particular he stated that he was not able to register the births of his children or immunise them. In addition, his

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[3] *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244 at [42]
[4] See *SZQGP v Minister for Immigration* [2011] FMCA 701 per Smith FM at [4]
[5] See *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No2)* (2004) 144 FCR at [61]
[6] The Arabic word "bidoon" meaning "without" is used to denote long term residents of Kuwait who are stateless. Many are descendants of Bedouin Tribes who freely crossed the borders of the modern states which now occupy the Arabian Peninsula.

children were ineligible to receive adequate education or health treatment in Kuwait.

24. He stated that he himself was not permitted to work legally or own property in Kuwait. The applicant further indicated that neither he nor other Bidoons had political rights and were not eligible to take part in the electoral process in Kuwait. In short, the applicant asserted that he was subject to a systematic level of discrimination by the Kuwaiti State.

25. In the context of his religious orientation, he stated as follows:

> *"I can however practice my religion however only behind closed doors. I did not have a place to practice my religion. There are no public places for Bidoons to practice our religion, only in our private homes."*[7]

26. In the context of ground one of the applicant's application for judicial review, this passage is critical, as it is asserted by Mr Gibson, counsel for the applicant that in the passage in question, the applicant has raised a ground to found his refugee status, namely that he has been deprived of his fundamental human right to practice his religious beliefs, in community with others.

27. The applicant also stated, in his statutory declaration, that he feared being imprisoned and tortured if he returned to Kuwait because of the criticisms of that country, which he had made in his claim for asylum. In addition, he feared rejection and ostracisation, because of his status as a Bidoon, if he returned to Kuwait.

28. The Bidoons were traditionally nomadic farmers and shepherds. As a consequence, when the countries of the Arabic peninsula, including Kuwait, assumed their current borders, the Bidoons were not afforded citizenship rights because they were not deemed to be citizens of any particular country.

29. In the RSA, reference was made to country information, regarding Kuwait, which indicated that Bidoons faced systematic discrimination and ill treatment in that country and so faced an uncertain future. It was further noted that Bidoon children may not attend public schools

[7] See Casebook at page 48

and did not qualify for subsidised health care, which other Kuwaiti citizens received.

30. As such, the reviewer accepted that there is substantial discrimination against Bidoons in Kuwait. However, it was also noted that the present applicant had received ten years of education in Kuwait and his children had also attended school.

31. It was also found that, as the applicant acknowledged he had left Kuwait on a form of passport authorised by the Kuwaiti Authorities and legitimately issued to him. As such, he was to be regarded as a *"documented Bidoon"* as opposed to an *"undocumented Bidoon"*.

32. In all these circumstances, the RSA found that the applicant did not have a well founded fear of being subject to serious harm, amounting to persecution, in Kuwait. It was found that he had been able to work in that country in the past, provide education and healthcare for his family and obtain an official passport. Rights which were afforded to documented Bidoons.

The IMR decision

33. Prior to the formal IMR commencing, the applicant, through the agency of a migration agent, provided a lengthy written submission. This submission indicated that *"the heart of the applicant's claims … centre on his inability to qualify or be conferred citizenship from Kuwait …"*.[8]

34. The submission laid further emphasis on the difficulties facing non-citizen Bidoons in Kuwait, whose civil, economic, social, cultural and political rights were severely curtailed because of their inability to qualify for Kuwaiti citizenship;

35. This submission did not allude specifically to issues relating to the applicant's religious practices, particularly the mode and place of his religious observances. It did however make reference to difficulties arising to the applicant, if he returned to Kuwait, given his current lack of a passport. The submission indicated as follows:

[8] See Casebook at page 75

> *"The quandary facing the applicant is that if he is not found to be a refugee he would not be able to return to any other country including his country of last habitual residence because he does not have the necessary documents to return to Kuwait."*[9]

36. In interview with Ms Bartlett, the applicant indicated that he had left Kuwait on a passport which was different to the passport issued to Kuwaiti citizens and was not one that could be replaced overseas. It was also his evidence that the type of passport issued to him restricted the number of countries which he could legally visit.

37. On this basis, it was submitted on the applicant's behalf that he should be considered an *"undocumented Bidoon"* because his passport was no longer in existence and could not be replaced by him. Further, it was submitted that if the applicant returned to Kuwait, he would be persecuted by the *"highest authority"* because it would be believed that in applying for asylum overseas he had been critical of Kuwait and its government. This would render him and his family liable to imprisonment and torture.

38. In her decision, Ms Bartlett had access to country information regarding Kuwait. This information indicated that there were two categories of Bidoons in Kuwait – documented and undocumented. Documented Bidoons have residence rights in Kuwait and are entitled to obtain temporary driver's licenses and passports from the Kuwaiti authorities.

39. Undocumented Bidoons are labelled as *"illegal aliens"* and are subject to penalties. However, Ms Bartlett noted that documented Bidoons also experienced strong discrimination in employment and do not have the rights of Kuwaiti citizens, when using state medical facilities or in regards to accessing education at school and university.

40. Under the heading *findings and reasons*, Ms Bartlett found as follows:

- The applicant was a documented Bidoon because he had been issued with a residence card and passport;

[9] See Casebook at page 83

- On the basis of his own evidence, the applicant had been in paid employment, in Kuwait, since 2003. Accordingly, Ms Bartlett concluded that the applicant would not be deprived of the opportunity of earning a livelihood if he returned to Kuwait;

- The applicant himself had finished the first year of high school;

- The applicant's children had restricted opportunities to undertake tertiary education and were liable for fees for primary and secondary schooling. However, Ms Bartlett found that this limitation did not entail serious harm;

- Ms Bartlett accepted that the applicant was liable to pay for medical services in Kuwait. However, she did not find that either he or his family had been denied access to basic medical services;

- The applicant would not be able to obtain an ordinary driver's licence, issued to Kuwaiti citizens, but would be able to obtain a temporary driver's licence, which is valid for two years;

- The applicant had no entitlement to birth or death certificates;

- The applicant was not able to take part in the political process through voting, membership of a political party or direct representation.

41. In terms of the matters raised by the applicant, in his statutory declaration, regarding his religious observances, Ms Bartlett found as follows:

> "[The applicant] *states he can only practice his religion behind closed doors. He does not have a place to practice his religion. There are no public places for Bidoons to practice their religion, only in their private homes. The reviewer accepts these claims and finds that whilst [the applicant] must practice his religion at his home as there are no public facilities available, the lack of public facilities does not involve serious harm to him."*[10]

42. Ms Bartlett ultimately concluded that Australia did not owe the applicant protection obligations under the Refugees Convention. She found as follows:

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[10] See Casebook at page 95

> *"The reviewer has made findings regarding [the applicant's] circumstances as a documented Bidoon pertaining to his employment, access to health services and education, and car driver licensing. Taking into account the other restrictions he faces, such as inability to register a car, avoid liability for car accidents he may be involved in, to publicly practice his religion, his lack of entitlement to birth and death certificates and to formally participate in political processes, the reviewer finds [the applicant] has not experienced disadvantage or adversity amounting to him suffering significant economic hardship, being denied basic services or of being denied the capacity to earn a livelihood. As it has been found [the applicant] has undertaken past employment and he is able to obtain a work permit for public and private employment, the reviewer does not accept his inability to access government health and education, his need to renew his car driver's licence every two years and the other restrictions he faces, when assessed cumulatively, amount to serious harm as provided for in subparagraphs 91R(2)(d), (e) and (f) and/or subsection 91R(1) of the Migration Act 1958, now or in the reasonably foreseeable future."*[11]

43. In addition, Ms Bartlett did not accept that the applicant would be liable to either imprisonment or torture if he returned to Kuwait. She also accepted that, as he no longer possessed his passport, he was unable to legally return to Kuwait and so might be refused re-entry to that country. However, following the decision of *Diatlov v Minister for Immigration & Multicultural Affairs*[12] she found that a refusal of re-entry to a person by the authorities of the country in which such person had previously resided on the basis of statelessness does not, of itself, constitute persecution in the sense envisaged by the Refugees Convention.

Ground One – failure to consider claim for refugee status on the basis of denial of religious practice in community with others

a) The applicant's contentions

44. It is the applicant's contention that Ms Bartlett fell into a clear jurisdictional error, when she failed to consider, in any way, his clearly

[11] See Casebook at page 96
[12] See *Diatlov v Minister for Immigration & Multicultural Affairs* (1999) 167 ALR 313

articulated claim that he was not permitted to practice his religious beliefs, in community with others of his faith, in Kuwait. This claim is said to arise as a consequence of the applicant's statement, in his statutory declaration of 6 June 2010, that he could practice his religion *"only behind closed doors"*.

45. Mr Gibson, counsel for the applicant, submits that Ms Bartlett has misconceived his client's claim and regarded it as essentially a complaint that the Kuwaiti state does not fund the provision of mosques or other religious institutions for Bidoons, rather than a complaint regarding an essential element of religious freedom.

46. It is Mr Gibson's submission that this claim is clearly articulated in his client's statutory declaration, in the sense that he (the applicant) states that the practice of his religious faith is significantly restricted within Kuwait. He clearly states that Bidoons are only able to practice their religion in their private homes. In the alternative, Mr Gibson argues that this claim is at least implicit. It being the implication of the applicant's statement that he and other Bidoons are unable to practice their religious beliefs communally.

47. In support of this contention, the applicant relies on *Wang v Minster for Immigration & Citizenship & Multicultural Affairs.*[13] This case was concerned with the issue of whether a person's fear of practising his religion, in a manner rendered unlawful by the laws of that person's country of nationality, is a fear of persecution by reason of that person's religion and is therefore a ground for protection pursuant to the Refugees Convention.

48. In *Wang* the applicant was a Chinese national. He was a practising Christian belonging to a Protestant denomination. He met secretly with other members of his denomination for prayer. In so doing, he came to the notice of the authorities.

49. Officers of the Chinese Religious Affairs Bureau came to Mr Wang's shop and told him that, as his church was not approved by the authorities, if he continued to attend it, he would be imprisoned. However, the original decision maker found that it was open to Mr

[13] See *Wang v Minster for Immigration & Citizenship & Multicultural Affairs* (2000) 105 FCR 548

Wang to worship at Protestant churches, which were registered as being *"official"* churches by the Chinese government.

50. In this context, the RRT did not consider that the requirement for churches in China to be registered was persecutory of people of that religious persuasion – essentially it was found such persons could practise their religion, albeit not in the mode of their choosing. Accordingly, the RRT was satisfied that the applicant could practice as a Protestant Christian, in China, at an official church and, as such, he had not been deprived of his right to worship.

51. In *Wang*, Merkel J (with whom Wilcox & Gray JJ agreed) said as follows:

> *"… while religion is primarily a manifestation of a personal faith and of doctrine, it also has a congregational or community aspect [this] is consistent with article 18 of the Universal Declaration of Human Rights … which states:*
>
> > 'everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion in belief in teaching, practice, worship and observance.'"[14]

52. Accordingly, Merkel J concluded that there were two elements to the concept of religion for the purposes of the Refugees Convention – the first pertains to the actual manifestation or practice of personal faith or doctrine, and the second pertains to the manifestation or practice of that faith or doctrine in a like-minded community with others.

53. In this context, Merkel J considered that the RRT had fallen into error by concluding that as Mr Wang could practice his religion at a registered church, in China, any consequences flowing from him to his potential practice of his religious faith at an unregistered church did not constitute a persecution for a convention reason. In particular, Merkel J said as follows:

[14] Ibid at page 564

> *"Further, the RRT considered the religious practices, beliefs and freedom of the appellant solely by reference to the first element of religion as that word is to be interpreted in Art 1a(2), being the personal manifestation or practice of religious faith and doctrine. The RRT erred in law in failing to regard the second element, being the manifestation or practice of that faith or doctrine in community with others, as falling within Art 1a(2). The RRT posed for itself the question of "whether the applicant has been or would be deprived of his right to worship by acceding to the government regulations". By answering that question in the affirmative by saying he can practice as a Protestant Christian at a registered church it is plain that the RRT, erroneously, was disregarding the community or congregational element of religious practice. As a result of the RRT's erroneous approach it did not consider whether persecution of the appellant by reason of his past and intended practice of his religion at an unregistered church, being the practice of his religion in a like-minded community, constituted persecution for reasons of religion."*[15]

54. *Wang* was applied by Cooper J in *Liu v Minister for Immigration & Multicultural Affairs.*[16] In that case it was held that the decision maker in question had adopted an unduly narrow interpretation of the word *"religion"*. The correct question which should be addressed, in cases where persecution on the basis of religious practice was raised, was:

> *"…whether the applicant could expect to face persecution for the practice of his Christian religious beliefs in the way which he wishes to practice them if he returns to the PRC in the future?"*

55. In his submissions, Mr Gibson places significant emphasis on *SPZF v Minister for Immigration & Citizenship.*[17] He asserts that it is clear from his client's statement in his statutory declaration that he is not able to practice his religion in Kuwait in the way he wishes to do so – he is able to worship only *behind closed doors*. The implication which it is asserted clearly arises from this statement being that the applicant's desire is to practice his religion in a way other than in private.

56. The applicant in *SPZF* was a Muslim of Uigher ethnicity, who originated from Xinjiang Province, in China. She claimed she was not permitted to practice her religion or any religious rituals. Country

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[15] Ibid at page 569-570
[16] See *Liu v Minister for Immigration & Multicultural Affairs* [2001] FCA 257 at [22]
[17] See *SPZF v Minister for Immigration & Citizenship* [2008] FCA 1486

information, available to the RRT, indicated that Uighers in Xinjiang Province were *"deliberately persecuted for practising and preserving their culture and religion."*

57. In acceding to the applicant's contention that the RRT had fallen into error by failing to deal properly with her claims of feared persecution because of her religious beliefs, Lander J said as follows:

> *"There was significant evidence put before the Tribunal as to the manner in which the appellant was restricted by the Chinese state in the practice of her religion, and also as to the manner in which she wished to practice her religion, namely in public with other members of the Muslim community. Despite this, the Tribunal held that '[T]he applicant has not claimed … that she was effectively prevented from practising her religion on private. She made no claim that she suffered persecution or came to the attention of the authorities on the basis of her religion'.*
>
> *… for the Tribunal to simply state that the appellant was not prevented from practising her religion in private in my opinion was in error. The Tribunal failed to properly address the appellant's claimed restrictions on her ability to practice her religion openly with others, and whether those restrictions amounted to persecution under the Convention."* [18]

58. It is Mr Gibson's submission that Ms Bartlett has failed to give either express or implicit consideration to the concern raised by the applicant that he is unable to practice his religion openly with others of like belief. In so doing, she has fallen into jurisdictional error.

59. It is Mr Gibson's contention that Ms Bartlett has not considered this particular integer or component of the applicant's case. In this respect, he relies on what was said by Finkelstein J in *MZXLB v Minister for Immigration & Citizenship*[19] where His Honour found that a decision maker had fallen into error, notwithstanding otherwise comprehensive and detailed reasons, because of a failure to deal with an integer of a claim which was clearly identified in the material available to the decision maker but which was not expressly dealt with in the decision concerned.

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[18] *SPZF v Minister for Immigration & Citizenship* (supra) at [54]
[19] See *MZXLB v Minister for Immigration & Citizenship* [2007] FCA 1588 at [18] – [19]

60. In Mr Gibson's submission, the current matter is analogous to the situation in *MZXLB* in the sense that Ms Bartlett's reasons are comprehensive and do allude specifically to the issue of the applicant's religious observances. However, Ms Bartlett fails to deal expressly with the second aspect of religious observances identified by Merkel J in *Wang*, namely the entitlement to practice religious beliefs in community with others.

61. Mr Gibson submits that the applicant has raised the issue of communal religious practice for Bidoons in Kuwait and has indicated, at the very least impliedly, that he desires to practice his religion with other like minded Bidoons, which is not possible for him, by reasons of the actions of the Kuwaiti state. An issue which Ms Bartlett has simply not considered and certainly not one which she has either accepted or rejected.

62. Mr Gibson would categorise the process of consideration required of Ms Bartlett, in respect of the issue of the applicant's ability to practice his religion in community with others in Kuwait, as being characterised by an active intellectual process, which is not satisfied by a mere regurgitation of material or recital of facts, or simple referral to the issue.[20]

63. Mr Gibson submits that Ms Bartlett accepted that the applicant *"could only practice his religion behind closed doors"*. She said so explicitly when she considered and accepted the various form of restrictions to which the applicant, as a Bidoon was subjected to in Kuwait, one of which was the inability *"to publicly practice his religion"*.[21]

64. Having made such a finding, thereafter Mr Gibson submits that she was obliged to consider the second element of what may potentially amount to religious persecution in *Wang*, namely the practice of religion in community with others, which the applicant had raised. In failing to do so, she either misunderstood the applicant's case or failed to deal with it properly and in so doing fell into legal error.

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[20] See *MZXIV v Minister for Immigration & Citizenship & Multicultural & Indigenous Affairs* [2006] FMCA 145 at [41] – [44] per Riley FM

[21] See Casebook at page 96

b) The respondent's submissions

65. Counsel for the Minister, Mr Anderson, asserts that the applicant has not *"squarely"* or *"clearly"* articulated a claim for refugee status based on the deprivation from him of the right to practice his religion in community with others. As such, Ms Bartlett was not required to consider this aspect of his claim, which has arisen only at a later stage of the decision making process.[22]

66. Mr Anderson submits that the reviewer considered the case advanced by the applicant at both the RSA and IMR stages, namely that the Kuwaiti State discriminated against him and other Bidoons by failing to provide the *public facilities* in which he and others like him could worship. The complaint being not about the ability of the applicant to practice his religion either alone or with others but regarding the provision of a publically funded locale in which to do it.

67. Ms Bartlett considered this articulated claim and determined that it was insufficient to found a claim for refugee status because it did not involve any prospect of the applicant suffering harm. Having considered this portion of the applicant's claim for refugee status, which arose in the context of other complaints regarding the provision of services and facilities to Bidoons by the Kuwaiti authorities, Mr Anderson submits that Ms Bartlett was not required to consider any further issues concerning the applicant's practice of his religious beliefs in Kuwait. Certainly not the matters currently being argued on his behalf by Mr Gibson concerning religious community, as these issues can not be characterised as having *clearly emerged* either from the applicant's statutory declaration or elsewhere in other material advanced by him.

68. Mr Anderson further submits that *SZBF* is distinguishable from the circumstances prevailing in the current matter, as there was evidence in that case that the applicant concerned was not able to practice her religion or other rituals pertaining to her beliefs either in public or at all and these claims were supported by country information regarding the

[22] See *S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 quoted in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* at [62] per Gleeson CJ

People's Republic of China, which was not the case so far as Kuwait is concerned in the current matter.

Conclusions on Ground One

69. A reading of the recommendation made to the Minister indicates that the reviewer did not consider any aspect of a claim for refugee status in this case on the basis that the applicant concerned had been denied the opportunity by the Kuwaiti State to practice his Shia faith, in the community of like-minded believers, in the sense envisaged by the Full Court of the Federal Court in *Wang.*

70. It is, I think clear, from an examination of both Article 18 of the *Universal Declaration of Human Rights* and *Wang* that it is a fundamental aspect of religious freedom that every person has the freedom to adhere to the religious belief and practice arising from his or her conscience and this freedom encompasses the entitlement to practice such a belief either in private or in *community with others*. This entitlement includes the entitlement to *manifest* one's religious beliefs *in teaching, practice, worship and observance.*

71. In the current case, the applicant has not stated that he is forbidden from practising his Shia faith absolutely. He has not raised any claims that he will suffer any serious harm as a result of personally adhering to the tenets of the Shia Islam in Kuwait. In addition he has not specifically asserted that he will come to some form of harm if either he or others of a like-mind attempt to manifest or display their religious beliefs in the public sphere in Afghanistan.

72. In addition, this was not an issue which was specifically raised in the country information concerning Kuwait which was before the reviewer. That information delineated the difficulties arising for both documented and undocumented Bidoons in Kuwait. These difficulties were secular in nature being centred on discrimination which Bidoons suffer in accessing health and education services in Kuwait, taking part in the political process and documenting their identity.

73. The applicant's claim is that he and other Bidoons like him can only *practise* their religion *behind closed doors.* No information is provided by the applicant as to what he fears might happen to him if he practises

his religion openly or in a manner which is not effectively in private. Rather the explanation as to why he cannot practice his religion, other than behind closed doors, is that *there are no public places for Bidoons* as such they must practice their religion in *our private homes.*

74. The circumstances of this case are, in my view, different to those which pertained in *Wang.* Mr Wang was forbidden to practice his Christian religious beliefs in the manner of his choosing – that is with like minded adherents in a setting which was not state authorised. It was accepted that he would be liable to arrest by the Chinese authorities if he defied the direction given to him to restrict his religious practices to the locale nominated by the those authorities that is a state authorised protestant church.

75. That is not the case in this matter. The applicant does not delineate any specific harm, which may come to him, in respect of the practice of his religion in any manner whatsoever. He does not state specifically that there are any actual prohibitions placed upon him, in the practice of his religion, by the agents of the Kuwaiti State. Any potential prohibition is tacit in nature, arising from the absence of a specific place which he can use with other Bidoons. No specific motivation is ascribed by him to the Kuwaiti authorities for failing to provide such a locale, which is related to either his ethnicity as a Bidoon or his religion as a Shia.

76. The difficulty or ambivalence in the case arises, I think, by the use of the phrase *"behind **closed** doors"* by the applicant. A door which is closed obviously is not open to others who do not know what goes on behind it or who have not been specifically invited to enter it or been told what does go on there.

77. Traditionally both mosques and churches and indeed temples are open to all adherents of the religion concerned and the function of such buildings is readily apparent from their design and architecture to the wider populace (including co-religionists) – they are to be used for religious observances and all devotees of the faith concerned are impliedly welcome to come in and practise their faith, either individually or with others, in them.

78. Such churches, temples and mosques are open to all and do not depend on explicit invitation for their use. Their form demonstrates their function – they are a resource for all of a similar belief to use. Necessarily the form of such buildings suggests community. A community founded upon like belief.

79. The use of the adjective closed suggests that, in the current matter, the applicant's religious beliefs must be practised clandestinely or secretly. They are not open to other believers or co-religionists. However the applicant does not delineate why this is so. Certainly he does not go the further step arising from both *Wang* and *SZBF* that it is because of the disapprobation of his personal religious tenets by the Kuwaiti State.

80. After the use of the adjective *closed* in respect of the locale of his religious observances, the applicant deposes to the lack of *public places for Bidoons* to worship. Because of this lack he goes on to indicate that Bidoons are necessarily restricted to practise their religion in *their private homes* because of a lack of public places. No specific complaint is made that such places are in themselves either forbidden or proscribed by the Kuwaiti State.

81. Private, as an adjective, when applied to the homes where necessarily Bidoons must follow their religious observances is used in contrast to the earlier adjective public. It does not specifically suggest that the Bidoons are, in some way, compelled to practice their religion underground. Rather, it seems to me that the suggestion or complaint is such locations are, by default, the only locale in which Bidoons may practise their religion.

82. An error which goes to the jurisdiction of an administrative body was described in these terms by the High Court in *Minister for Immigration & Multicultural Affairs v Yusuf*:[23]

> *"What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the*

[23] See *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323

decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it."

83. It is the applicant's contention that the reviewer has ignored a central aspect of his case concerning his pursuit of religious freedom in Kuwait, namely his entitlement to a public practice of his beliefs in community with other co-religionists in an open (as opposed to a closed) setting. In so doing she has not exercised the jurisdiction conferred upon her and, as such her jurisdiction is vitiated by jurisdictional error.

84. The High Court has held that it is a jurisdictional error for a decision maker to misconstrue or overlook a visa criteria arising under the Act. In particular, "*a decision maker cannot be said to be satisfied or not satisfied if effect is not given to those criteria because, for example, they have been misconstrued or overlooked.*"[24]

85. The central issue is whether the applicant did in fact raise this issue as a basis on which to found his claim for refugee status at either the RSA or IMR stage or whether the ground arises now as a result of some artificial or creative process at this judicial review stage. If the issue was raised the reviewer was required to deal with it.

86. In *Dranichnikov v Minister for Immigration and Multicultural Affairs* the Full Court of the Federal Court held as follows:

> *"The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made."* [25]

87. The implication arising from the case being that applicants for asylum invariably make their claims for protection under a significant level of disadvantage. They may lack documentation to support their claims; they may have to make their claims through an interpreter; they may be placed in a cultural milieu which is unfamiliar to them; above all, they may be unaware of the precise formulation of the Refugees Convention and the legal principles surrounding it.

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[24] See *Re Minister for Immigration & Multicultural & Indigenous Affairs and Anor; ex parte applicants S134/202* (2003) 211 CLR 441 at [85]

[25] *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2000] FCA 1801 at [49]

88. In this case, I do not consider that it can be said that the applicant has raised explicitly a claim for refugee status on the basis of a denial of his right to practice his religious beliefs in community with others. For the reasons provided, I consider that the statement made by him, on which this integer of his claim is said to rise is hedged with ambivalence and uncertainty. Accordingly the question arises whether the claim is impliedly made but nonetheless, according to the dictum in *Dranichnikov* requires the active consideration of Ms Bartlett.

89. The applicable principles, which apply to cases where it is asserted a jurisdictional error arises because it is said an administrative tribunal has failed to deal with an aspect of a claim which is said to be impliedly rather than expressly put are enunciated by the Full Court of the Federal Court in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*[26] as follows:

> *"The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised on the material before it…There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case are not articulated…It has been suggested that an unarticulated case must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it…The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal."* (citations omitted)

90. From this passage, I take it the reviewer is required to consider all claims which appear expressly *on the face of the material* before him or her whether they are specifically articulated or not. However the reviewer is not required to seek out such a ground in a creative manner. He or she is not required to consider a case which is not expressly made out or which does not arise *clearly* on the materials before him.

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[26] *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [58]

91. The failure of a reviewer to consider a claim raised by the evidence (whether or not articulated) amounts to a failure of procedural fairness and therefore leads to a jurisdictional error. However a judgement that a reviewer has failed to consider a claim not expressly advanced is not one which should be lightly made.[27] If such a claim is required to be considered it must emerge *clearly* from the materials available to the reviewer.

92. The important distinction is that although the reviewer is required to consider claims which although not articulated arise clearly on the face of the material, it is "*not obliged to deal with claims which are not articulated and which do not clearly arise from the material before it.*"[28]

93. The emphasis being on whether such claims arise *clearly.* Each such case must be judged on its own circumstances to determine whether an error of jurisdiction has arisen. In *NABE* the Full Court of the Federal Court said as follows:

> *"…a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and it is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances. Errors of fact, although amounting to misconstruction of an applicant's claim, may be of no consequence to the outcome. It may be 'subsumed in findings of greater generality or because there is a factual premise upon which [the] contention rests which has been rejected.'"* [29]

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[27] See *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] 75 ALD 630 at 641
[28] *NABE* (supra) at [60]
[29] Ibid at [63]

94. Has Ms Bartlett misconstrued or misunderstood the applicant's claim for asylum on the basis of the material clearly advanced before her? From *NABE* it is clear that this question must be considered by reference to all the circumstances arising from the case. It is not to be done in a creative or artificial manner. In addition the Full Court in *NABE* further indicated that a determination that a decision maker had failed to consider a claim not expressly advanced was not a judgement which was to be *lightly* made.

95. In this context, the Full Court had regard to the following comments of Gleeson CJ (albeit in dissent) in *S395 v Minister for Immigration and Multicultural Affairs*:[30]

> *"Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process."*

96. In this case, as the his advisers put it, the applicant's claim for protection in Australia arose on the basis of his fears for persecution as a consequence of his inability to qualify for citizenship in Kuwait and the consequential deprivations which arose there from.[31] These were all matters referred to by Ms Bartlett in her recommendation to the Minister.

97. In this particular case, I am not persuaded that the tests in *NABE* of an *"articulated"* or *"clearly raised"* claim of persecution, for a Convention reason, as a result of the applicant being deprived of his entitlement to practice his religion in community with others in the *Wang* sense is made out in this case. To the contrary, I am of the view that it would be an exercise in artificiality or creativity for me to construe such a claim at this stage.

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[30] *S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 quoted in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* at [62]

[31] See Casebook at page 75

98. Certainly I am not of the view that such a claim *clearly emerges* from the material before the reviewer. In my opinion, it cannot be said that the applicant's claim, in this regard, is a *model of clarity.*[32] To the contrary, for the reasons provided above, the claim currently advanced by the applicant can only said to arise when latent ambiguities or uncertainties in his statement are disregarded. In addition the claim made by the applicant, at this stage, is not supported by any other factual assertion – the main omission being whether the public practice of his religion is actually proscribed by the Kuwaiti authorities.

99. I agree with Mr Anderson's submission that a possible interpretation of the applicant's statement is that his concern hinges upon the lack of provision of a place for Bidoons to worship communally by the Kuwaiti Government. This being a criticism which can be placed in the same category as his other concerns regarding the failure of the state to provide free education and health services for Bidoons.

100. The distinction being that the reviewer found that such services are accessible by Bidoons provided they pay for them. Similarly, in the absence of evidence that the Kuwaiti Government has taken active steps to prevent it occurring, it may be open for Bidoons to construct their own place of worship but again only if they provide the necessary funds. In a practical sense this may not be possible and the Kuwaiti Government may be criticised for the discrimination arising from this act of deprivation but this, of itself, does not amount to persecution for a Convention ground, as Ms Bartlett found it. This aspect of the decision is not criticised by the applicant.

101. Accordingly, I accept that the contention advanced by Mr Gibson may be said to arise from the material before Ms Bartlett but it cannot be said to clearly arise. The distinction is central. In this regard the following comments of the Full Court in *NABE* appear apposite in regards to how it categorised the ground for asylum, which it was asserted impliedly arose on the material before the decision maker concerned:

[32] The expression used by the Full Court in *NABE* to describe the claims for asylum which were the subject of the case.

> *"Although such a claim might have been seen as arising on the material before the Tribunal it did not represent, in any way, "a substantial clearly articulated argument relying upon established facts" in the sense in which that term was used in* Dranichnikov*."*[33]

102. In this case, the applicant has not provided an argument regarding any consequence of the denial of his entitlement to practise his religion in community with others which can be regarded as either substantial, clear or based upon established facts. As such, in my view, the submission that the reviewer fell into jurisdictional error by failing to consider this unexpressed claim is not established because of these threshold criteria.

103. In addition, given the lack of clarity arising from this aspect of the applicant's claim, as currently advanced, I must bear in mind the oft cited monitory principles set out in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang*[34] namely:

> *"… the reasons of an administrative decision-maker are meant to inform and not to be scrutinised under over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the decisions-maker, upon proper principles into a reconsideration of the merits of the decision."*

104. For all these reasons, I am not satisfied that ground one of the appeal in this matter is made out.

Ground Two – the prospect of the applicant being refused re-entry to Kuwait and its implications when considered in conjunction with findings of discriminatory behaviour against the applicant in Kuwait

a) The applicant's submissions

105. Ground two again turns on the contention that Ms Bartlett failed to consider an essential integer of the applicant's case in the sense

[33] See *NABE* (supra) at page 68
[34] *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272

envisioned by Allsop J in *Htun*[35] and has so failed to exercise the jurisdiction conferred upon, which entails the requirement for her to consider all aspects of the case for refugee status advanced by the applicant.

106. Mr Gibson asserts that it was a central component of the applicant's case that he was an undocumented Bidoon, who at the time of the RSA and IMR neither had access to a Kuwaiti passport nor the ability to procure one. As such, his ability to re-enter Kuwait was doubtful and, in the absence of being offered protection by Australia, it was apparent that he had no other place of domicile.

107. The applicant's advisers, in a written submission to Ms Bartlett, categorised this situation as a *quandary* which confronted the applicant, as if he was found not to be a refugee in Australia, he would not be able to return to his country of *last habitual residence* as he did not have the necessary travel documents to return to Kuwait.[36]

108. At the IMR hearing, it was further submitted that the applicant no-longer held his *Article 17* Kuwaiti passport.[37] Ms Bartlett also had access to country information, which indicated that a Bidoon without a passport or other travel document would not be permitted entry into Kuwait, but most likely the holder of an *Article 17* passport would be, provided the authorities were not aware of an earlier claim for refugee status.[38]

109. In her recommendation, Ms Bartlett accepted that without his *Article 17* passport, which he used to depart Kuwait, the applicant did not have any legal right to return to Kuwait. However, she further determined that this discrete factor – the refusal of re-entry to the applicant to Kuwait because he was stateless – did not constitute persecution in the sense envisaged by the Refugees Convention.[39]

110. It is Mr Gibson's submission that the reviewer was required to consider this aspect of the applicant's case (which Ms Bartlett accepted) in aggregate with the other components of his claim for asylum, namely

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[35] *Htun v Minister for Immigration & Multicultural Affairs* (supra) at [42]
[36] See Casebook at page 83
[37] The type of passport issued to *documented Bidoons* by the Kuwaiti Authorities.
[38] See Casebook at page 90
[39] Ibid at page 98

the systematic discrimination perpetuated against Bidoons (again which Ms Bartlett accepted) to assess whether in totality the applicant's various claims satisfied the test for persecution within the Refugees Convention.

111. It is in this context that it is submitted the failure of Ms Bartlett to consider the discrete integer of the applicant's claim, regarding his alleged inability to re-enter Kuwait, was particularly significant as, if this aspect of the case had been properly considered, it might have *"tipped the balance"* in favour of the applicant being granted refugee status, when all his other claims for protection were considered cumulatively with it.

112. Mr Gibson submits that this interpretation of the application of the Refugees Convention to the circumstances of his client is *theoretically viable* on the basis of dicta enunciated by Sackville J in *Diatlov v Minister for Immigration & Multicultural Affairs,*[40] a case to which Ms Bartlett referred when she determined the refusal of re-entry to a stateless person alone did not constitute persecution in the sense required to satisfy the Refugees Convention.

113. Mr Diatlov was an ethnic Russian who was born in the former Soviet Union but outside the borders of Estonia. However he had resided in what became Estonia for the vast majority of his life. Estonia became an independent state in 1991, after the dissolution of the Soviet Union. He claimed that he was subject to persecution because of his ethnicity in Estonia and was ineligible to live in Russia, in whose territory he had been born. He also claimed that his inability to speak Estonian precluded him from obtaining Estonia citizenship.

114. Mr Diatlov arrived in Australia in 1996 and claimed refugee status. After this date, in 1997, the Estonian Government enacted legislation which deprived previous residents of that country to re-apply for a residency permit if they had been absent for more than 183 days. Mr Diatlov contended that this legislation rendered him stateless, as the legislation precluded him for applying for such a residency permit. The original decision maker (the RRT) accepted that he was stateless.

[40] *Diatlov v Minister for Immigration & Multicultural Affairs* (1999) 167 ALR 313

115. Mr Gibson relied on the following passage from the case:

> *"As I understood Mr Braham's alternative argument, the doubt as to whether the applicant could re-apply for a residency permit was relevant to the first of the two cumulative conditions.*[41] *That is, the inability of the applicant to re-enter Estonia (assuming he was unable to do so) was an element in the discrimination visited upon ethnic Russians in Estonia, including the applicant, by reason of their inability to gain citizenship…".*[42]

It should however be noted that Sackville J did not specifically determine this issue. He determined that the RRT had not fallen into legal error in its finding that Mr Diatlov did not satisfy the first such condition because it was not satisfied he was outside his country of former habitual residence owing to a well founded fear of persecution.

b) The Respondent's submissions

116. Mr Anderson submits that there is no such principle arising from *Diatlov.* Even if it does, the applicant has not clearly articulated such a claim as is required by principles set out in *NABE*. Essentially the reviewer was not required to consider whether the applicant's inability to re-enter Kuwait, as a result of his own destruction of his passport, contributed or aggregated to the discrimination to which the applicant claimed to be subject in Kuwait.

Conclusions on Ground Two

117. I accept that the applicant in the present case faces many general difficulties as result of being both a Bidoon, who in common with many other Bidoons, is subject to systematic discrimination within Kuwait arising from his lack of entitlement to Kuwaiti citizenship. I also accept that the applicant faces a specific individual difficulty resulting from the destruction of his Kuwaiti issued travel document and the inability for it to be replaced. This latter situation renders his re-entry to Kuwait problematic.

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[41] These two conditions were firstly the applicant concerned was outside his country of habitual residence owing to a well-founded fear of persecution and secondly such a person was unwilling to return to that country because of such fear. Both, axiomatically, are concepts taken from Article 1A(2) of the Refugees Convention.

[42] Ibid at [35]

118. It is also in my view clear from her recommendation that Ms Bartlett was aware of and sympathetic to those difficulties, which were also enumerated in the submissions made to her by the applicant's advisors. However, Ms Bartlett's task was to make a recommendation to the Minister as to whether or not the applicant satisfied the definition of refugee provided by the Refugees Convention.

119. In my view, *Diatlov* is a case which must be considered by reference to its own circumstances and, as such, I should take care to avoid either unduly or artificially extending its import and application. The case (and others cited within it) highlight the difficulties arising from the historical context of the Refugees Convention and its interplay with a subsequent and significant international convention to which Australia is a signatory namely the *Convention Relating to the Status of Stateless Persons*.[43] A stateless person is not necessarily a refugee.

120. In *Diatlov* Sackville J accepted the conclusions of Cooper J, as expressed in *Rishmawi v Minister for Immigration & Ethic Affairs,* [44] where he said as follows:

> *"A literal interpretation of Art 1A(2) of the* [Refugees] *Convention in its original form, or as amended by the Protocol, would mean that a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee. Such a result would be unintended on the part of the framers of the Convention and inconsistent with the object of dealing only with persons who have been or who are being persecuted for a Convention reason or who have a well founded fear of such persecution. It would also treat stateless persons in a substantially more favourable way in respect of obtaining refugee status than persons with a nationality and thus would be inconsistent with the object of equality of treatment to all who claim refugee status.*
>
> *The approach to the interpretation of Art 1A(2) contended for by the applicant is wrong in principle. It ignores the totality of the words which define a refugee. It is in breach of the requirements of Art 31 of the Vienna Convention because it divorces the interpretation of the words from the context, object and purpose*

[43] *Convention Relating to the Status of Stateless Persons* done at New York on 28 September 1954 which came into force on 6 June 1960.
[44] *Rishmawi v Minister for Immigration & Ethic Affairs* (1997) 77 FCR 421

of the treaty. And, it also seeks to give the [Refugees] Convention a scope of operation beyond its object and purpose." (Citation omitted.)

121. Both Cooper J and Sackville J rejected any such literal interpretation of the latter part of Article 1A(2) of the Refugees Convention - *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*. There must be more to satisfy the Convention than merely being outside one's country of former habitual residence and an inability to return there.

122. Accordingly, Sackville J took the view that the reason for a stateless person's absence from his country of former habitual residence was necessarily an essential element of the definition of refugee. Therefore it needed to be established by such a person, irrespective of whether he either had a nationality or was stateless, that he was outside his country of origin by reason of *fear of persecution* of a type identified by the Refugees Convention.

123. His Honour also referred to the academic writings of Professor Hathaway[45] as follows:

> *"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."*

124. Sackville J was of the view that the Stateless Persons Convention proceeded on the basis that only stateless persons who are refugees are covered by the Refugees Convention. Necessarily many stateless persons are not refugees and as such are not entitled to the protection of the Convention. They do however have the protection available under international law provided by the Stateless Persons Convention.

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[45] Hathaway J C, *The Law of Refugee Status*, (1991) at [18] in *Diatlov* (supra)

125. Accordingly His Honour found it difficult to construe the Refugees Convention as providing protection to a stateless person who was unable to return to his country of former habitual residence because such a construal may *"render superfluous much of the Stateless Persons Convention"*.[46]

126. In *Diatlov* reference was made to the very many serious problems which may confront a stateless person for which no solution is offered by the Refugees Convention. These were categorised as being examples of discrimination against stateless persons *"falling short of persecutory conduct and the denial of travel documents to such people"*. These were also issues which the Stateless Persons Convention was designed to address.

127. These comments appear apposite to the present case. Ms Bartlett accepted that the applicant did indeed face many serious problems but she did not find that the applicant had been persecuted per se by the failure to provide him with a travel document. To the contrary, she found that as a *stateless documented Bidoon* the applicant had been provided with an Article 17 passport. The evidence available to her also indicated that it was the action of the applicant which had resulted in the destruction of this passport.

128. In addition she found that the applicant, in common with many other Bidoons, had been subject to discriminatory conduct but this did not amount to harm in the sense envisaged by the Refugees Convention. However importantly she found that the applicant's subsequent statelessness and lack of Kuwaiti citizenship were not matters which came within the scope of the Refugees Convention.[47]

129. In *Diatlov* it had been accepted by the RRT that the applicant had been taunted in Estonia because of his Russian ethnicity. It did not accept that he had been targeted by a paramilitary force connected to the Estonian Government or that he had been a member of a human rights group in Estonia. It was accepted that he would not be able to obtain Estonian citizenship because he did not speak Estonian to a required standard. However this was considered not sufficient to amount to

[46] See *Diatlov* (supra) at [29]
[47] See Casebook at page 98

persecutory conduct. These findings led to the RRT's determination that Mr Diatlov was not a refugee.

130. On appeal, Sackville J said as follows:

> *"I do not think that the RRT was obliged, having regard to its findings on the language requirement for Estonian citizenship, to make a specific finding as to whether the applicant could re-apply for an Estonian visa. It had found that the language requirement for Estonian citizenship was not sufficiently serious to amount to persecutory conduct and was in accordance with international norms. In the light of the finding, it was hardly central to a resolution of the applicant's case that the disabilities to which he was subjected (or to which he might become subjected while out of the country) included a possible inability to return after 183 days' absence. That limitation or possible limitation on his right to re-enter Estonia was merely one of a number of disadvantages that doubtless would apply to non-citizen residents of Estonia compared with the position of Estonian citizens. It was not a substantial issue on which the case turned.*
>
> *The real significance of the 1997 Estonian law and the possible inability of the applicant to re-apply for renewed Estonian residency is that he may be unable to return to that country. But on the authorities, whatever significance the applicant's possible inability to return to Estonia may have for the application of the Stateless Persons Convention, it does not enable him to satisfy the definition of "refugee" in article 1A(2) of the Refugees Convention."* [48]

131. In this case, Ms Bartlett found that the conduct of which the applicant complained within Kuwait did not amount to persecutory conduct within the parameters provided by the Refugees Convention. This was her central and essential task. Apart from the criticism made by the applicant regarding the practice of his religion, which is the subject of ground one of the appeal, no exception is taken to those findings. I can find no legal error within them.

132. The behaviour of which the applicant complains, which has befallen him previously in Kuwait and which may arise for him in future, is not persecution as defined by Article 1A(2). Having made this central finding, in my view, it would be erroneous for the applicant's

[48] See *Diatlov* (supra) at [39]-[40]

subsequently arising statelessness to be regarded as in some way adding to his disadvantageous circumstances so that he can be regarded as a refugee rather than as a stateless person. To do so would be to adopt a literal reading of the latter part of the Article – an approach which has been rejected by the Federal Court, in part because of its potential to render the Stateless Persons Convention nugatory.

133. As in *Diatlov,* in my view, the reviewer was not obliged to consider the *quandary* which the applicant faced because of his statelessness. His situation is not a result of any persecutory behaviour on the part of the Kuwaiti authorities. His current state of statelessness is undoubtedly a significant disadvantage to him but it was not an issue on which his status or otherwise as a refugee turned.

134. In my view, as the law currently stands, *Diatlov* is authority for the following proposition: for a stateless person to come within the definition of refugee provided by Article 1A(2) of the Refugees Convention such a person must satisfy two cumulative conditions. Firstly the person must be outside his or her country of former habitual residence owing to a well-founded fear of being persecuted. Secondly he or she must be unable to return to that country, or owing to such fear be unwilling to return to it.

135. Essentially the loss of nationality per se is not sufficient to satisfy the requirements arising from the Refugees Convention for protection. Article 1A(2) of the Convention should be construed as including the requirement that a stateless person, outside of his or her country of habitual former residence, must also hold a well-founded fear of persecution. That is an absolute consideration. It cannot be aggregated by some subsequently arising factor, no matter how disadvantageous to the person concerned.

136. In this regard the Full Court authority of *Minister for Immigration and Multicultural Affairs v Savvin* [49] is relevant. In that case it was held that statelessness, of itself, is insufficient to satisfy the definitions arising from the Convention. In particular Spender J described the fear of being persecuted for a Convention reason as being the *"talisman of the definition"* and as such applied to both categories of persons

[49] *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168 at 169

coming within the purview of Article 1A(2), namely persons with a nationality and stateless persons. Katz J was untroubled at the separation of the two categories of person within Article 1A(2) by a semi-colon.

137. In my view, Ms Bartlett did not misapply the applicable authorities (including *Daitlov)* to the circumstances of the applicant. She found that he was not outside his country of former habitual residence for a Refugees Convention ground. Accordingly she did not need to consider the circumstances which might arise on his return to Kuwait, as a consequence of the absence of his Article 17 passport, which he had used to exit Kuwait and transit through Dubai and Indonesia and subsequently discarded.

138. For these reasons, I am not persuaded that the recommendation of Ms Bartlett manifests any failure to address an element in the applicant's refugee claims, the absence of discussion of which would show a material error of law. It must follow therefore that ground two of the appeal should be dismissed.

139. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment. It further follows that the applicant should pay the first respondent's costs, which I assess at $5,850.00.

I certify that the preceding one hundred and thirty-nine (139) paragraphs are a true copy of the reasons for judgment of Brown FM

Date: 25 January 2012