BA and others (Bedoon–statelessness–risk of persecution) Kuwait CG [2004] UKIAT 00256

IMMIGRATION APPEAL TRIBUNAL

Date heard: 11 June 2003
Date notified: 15th September 2004

Before:-

DR H H STOREY (VICE PRESIDENT)
MR A R MACKEY (VICE PRESIDENT)
MRS J A J C GLEESON (VICE PRESIDENT)

Between

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances: *Mr R Bartram*, solicitor, of Luqmani Thompson & Partners for both appellants. *Mr M Davidson*, Home Office Presenting Officer, for the Secretary of State.

DETERMINATION AND REASONS

1. The appellants, each of whom claims to be a stateless Bedoon (sometimes spelt "Bidoon" or "Bidun") from Kuwait, appeal against dismissals at adjudicator level of their asylum appeals. The first appellant was refused leave to enter following refusal to grant asylum on 17 April. The second appellant was refused leave to enter following refusal to grant asylum on 1 May 1999.

2. The cases of both appellants were remitted to the Tribunal following Consent Orders. They have been joined for a legal panel to consider in a combined hearing.

3. Insofar as our determination deals with the general position of Bedoon from Kuwait, it is intended as a country guideline decision, to be followed unless there is a material change of circumstances. In reaching our conclusions we have taken account of past Tribunal decisions dealing with Bedoon, including *Alenezi* [2002] UKIAT 00924 and [2002] UKIAT 00923. Whilst we have found these of some assistance in clarifying the issues, we have to decide the appeals before us in the light of more recent background evidence, although it has to be said that neither party was able to furnish us with as much up to date information as we had hoped. The background materials we have considered include US State Department reports on Kuwait for 1999 through to 2002, the Human Rights Watch Report entitled Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression (October 2000), the Amnesty International 2001 report, the written and oral evidence of Mr Shiblak and a number of letters written in 2002 from Dr S Al-Khaldi, adviser to the Committee on Human Rights in the Kuwaiti Parliament.

4. We should record our apologies to the parties for the lengthy delay in promulgating our determination of these appeals. We learnt shortly after the hearing that a case involving a Bedoon claimant was before the Court of Appeal. We have now seen a copy of the Court of Appeal judgement in that case, *SSHD v Hamer Jasem Mohamed Al Shamri* [2003] EWCA Civ 912, 13 June 2003 (the "*Al Shamri"* case). We did consider whether to reconvene the hearing in order to invite submissions from the parties on it. However, we concluded that the principal issue before the court in that case was quite distinct: whether the Tribunal had erred in finding that intergovernmental negotiations to arrange for the claimant's return to Kuwait would necessarily involve the disclosure of his asylum claim and a breach of the assurance of confidentiality. Whilst the Court appeared to reject the position that Bedoon per se were at risk of persecution, they did not address that issue substantively. We do make later reference to something said in this case, but for reasons given there, we do not consider it of significance. On 17 February 2004, in order to ensure the parties had an opportunity to adduce more recent evidence, if any, we invited them to do so. Neither replied. Further time was taken considering whether this case should await a decision in other pending Bedoon cases: in the end it was decided this case would come first.

5. The word "Bedoon" is from the Arabic "bedoon" meaning "the without" and the term "bedoon jinsiyya" is used in Kuwait to mean "without nationality" or "without citizenship". It appears that in fact the Bedoon consist of an extended group of tribes spread across the borders between Iraq, Iran, Syria and Saudi Arabia and of course Kuwait who are largely of the Shi`ite faith. Many of these tribes have inhabited the region in or around Kuwait for centuries. The term is not to be confused with "Bedouin" which derives from the Arabic word "badawi" meaning nomad. A short resume of the recent history of the Bedoon is conveniently given

in a recent New Zealand decision Appeal No. 72635/01 [2003] INLR 629 to which we shall have need to refer later on. At paragraph 45 this decision states:

> "In the Human Rights Watch, Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression (October 2000) at 9 it is stated that there are approximately 120,000 Bedoons resident in Kuwait. An estimated 240,000 are living outside the country, many of whom wish to return to Kuwait but have not been permitted to do so by the government. Until the mid-1980s the Kuwaiti government treated Bedoon as lawful residents of Kuwait whose claims to citizenship were being considered, a status that distinguished them not only from other foreign residents but also from other groups of stateless residents, such as Palestinians from Gaza. Bedoon made up the vast majority of the rank and file of all branches of the police and military and as already noted, were eligible for temporary passports under Art 17 of the Passport Law 11/1962. Intermarriage among Bedoon and Kuwaiti citizens was and is common, and because of the vagaries of the implementation of the Nationality Law it is not unusual for a single family to have members with different citizenship statuses: original citizenship, citizenship by naturalisation, and Bedoon. However, in 1985 the government began applying a series of regulations stripping the Bedoon of almost all their previous rights and benefits. It also fired government employees not employed by the army and police and who could not produce valid passports, whether issued by Kuwait or another country and instructed private employers to do the same. Restrictions increased in the aftermath of the 1990-1991 Iraqi occupation. Bedoon government employees were dismissed en masse and only a small proportion were later rehired. Beginning in 1993 Bedoon were also required to pay fees to use healthcare centres, although those services remained free for Kuwaiti citizens. More recently, in May 2000 the Kuwaiti National Assembly passed amendments to the Nationality Law which were intended to be the final statement of which Bedoon would be eligible for naturalisation and in June 2000 the Ministry of Interior ended a nine month programme during which Bedoon who signed affidavits admitting to a foreign nationality and renouncing claims to Kuwait nationality could apply for a five year residency permit and other benefits".

The first appellant

6. We need to set out in short form the facts of each case. The basis of the first appellant`s claim was that he had been born in Kuwait and had served in the army until Iraq invaded the country. Shortly after the liberation of Kuwait Kuwaiti authorities had detained and ill-treated him between March and September 1991. He then moved to the border regions between Iraq and Kuwait, staying in a Red Cross camp until it was closed in October 1991. Subsequently he moved around, living and working illegally. When pressure was put on all Bedoon to leave by June 2000, he obtained a forged Saudi passport from Jordan and then went to the UAE in July 1999, where he worked as a taxi driver for 6 months. He then

left, concerned that his false documents would be discovered and because he could not afford the cost of living there. He claimed (1) that the Kuwaiti authorities would not re-admit him; but (2) even if they did, he would face persecution for failing to reveal his true nationality. In a determination dated 1 February 2001 the Adjudicator, Mr A W Khan, accepted he was a Bedoon from Kuwait. He then considered the position of Bedoon generally, concluding that although Bedoon as a grouping suffered measures of discriminations, these fell short of the threshold of persecution or serious harm.

7. Turning to the appellant's particular circumstances, the Adjudicator found that although he had been ill treated in 1991 and had needed to move around, he and his wife and children had in fact managed to live (and he to work) without difficulties until they left in 1999. He noted that the appellant had failed to avail himself of the opportunity to seek naturalisation before June 2000 and so receive a civil ID card and permanent residency.

8. The grounds of appeal contended that the Adjudicator erred in failing to find that the appellant had experienced past persecution and would face future persecution. They contended that the objective country materials amply demonstrated that the Bedoon faced ill treatment and serious discriminatory measures. Just because the appellant had not suffered terribly in the past did not mean that sooner or later he would not become a victim of persecution. The appellant had faced detention and deportation in 1991 and had then been forced to remain in his own country living as an illegal immigrant dependent on black market employment. In particular, it was submitted that the Adjudicator had misunderstood the objective evidence concerning the ability of Bedoon to regularise their situation in Kuwait. Whereas the Adjudicator had viewed the appellant as having failed to avail himself of opportunities to naturalise and obtain documentation and permanent residency, the real effect of the June 2000 initiative taken by the government was to permanently exclude most Bedoon from Kuwaiti nationality. Under this initiative most could only regularise their situation by obtaining a foreign passport and registering as a foreign resident, thereby renouncing claims to Kuwait nationality. Those who did not register in this way as foreigners faced prosecution and potential deportation. The fact that the appellant had chosen not to register before he left would add to the problems he would face if returned.

The second appellant

9. The second appellant`s claim was that he had been employed as a policeman since 1982. He had no problems prior to 1996 but once he began to speak out about the plight of the Bedoon, things changed. In September/October 1996, January 1997 and in April 1997 he received summonses. On each occasion he was briefly detained. From early 1997 fellow officers made threats to his life and he was given an ultimatum to prove his nationality or be dismissed from his job and have his ID/passport withdrawn. He feared arrest at any moment. He then

obtained permission to visit Jordan for which purpose he was issued with an Art 17 passport. From Jordan he made his way to the UK and claimed asylum.

10. The Adjudicator, Mr H B Trethowan, in a determination notified on 10 September 1999 accepted that the appellant was a stateless Bedoon from Kuwait. He considered that in general, whilst stateless Bedoon per se were not at risk of persecution, an appellant who is a Bedoon and can show he has been discriminated against in respect of all or a large proportion of his basic civil and human rights could be said to have experienced persecution. However, although accepting that the appellant had stood up for the rights of stateless Bedoon, he noted that he and his family had managed to "rise above the discriminatory acts practised against the majority of the Bedoon in Kuwait" by virtue of having been able to obtain and use an Art 17 passport, hold employment as a police officer since 1982, live a reasonably normal life in rented accommodation, marry a Kuwaiti citizen and obtain education to a university standard. He did not accept as credible the appellant`s claims to have received three summonses or to have been told that unless he could produce evidence of his nationality by a certain date, he would be dismissed. Noting that the appellant had remained in Kuwait until 3 months after the last summonses he claimed to have received, he considered it was unlikely he would have waited this long if he was genuinely in fear of his own safety as a result of threats he had received or if he genuinely feared persecution. He also considered that there was no evidence that the appellant would be unable to use his Art 17 passport (which was valid until February 2000) in order to return to Kuwait.

11. As regards what would happen to the appellant having returned, he concluded that the appellant and his family would be in no worse a position than his parents, his two brothers and three sisters still living in Kuwait. He accepted that he would be unlikely to be allowed to return to his job in the police force having ostensibly left the country to go on leave but then applied for asylum in the UK. Furthermore:

> "In the absence of any employment, and on the basis of the background documents, I have to accept as being reasonably likely that he would be unable to work; that he would have great difficulty in finding accommodation for himself and his family, and would certainly not be allowed to own property; that his children are likely to have problems with regard to education; and that he and his family would be denied any further right to travel, having abused the right previously given to him".

12. He further concluded that even if he had considered the measures of discrimination the appellant would face to amount to persecution, "I find that by his own actions in leaving a well paid and secure position with the police the appellant has cynically manipulated events so as to enable him to claim that he cannot return to Kuwait, thus creating a false claim for Refugee Status".

13. We should clarify straightaway that it was not in dispute that the Adjudicator's apparent reliance in the above passage on a "bad faith" principle was erroneous, as the Court of Appeal subsequently made clear in *Danian* [2000] Imm AR 96.

14. The grounds of appeal contended that in addition to his erroneous reliance on the "bad faith" principle, the Adjudicator had erred in finding there had been no past persecution: the denial to the appellant of citizenship alone amounted to persecution. The Adjudicator was also wrong, they argued, to reason that the appellant had left behind a "well paid and secure position with the police", as there was evidence that the Kuwaiti authorities had a policy of gradually reducing the number of Bedoon employed in the forces. Furthermore, the few privileges the appellant had were lost once he left the police force. Particular weight was placed on the submission that the Adjudicator erred in concluding that the measures of discrimination the appellant would face did not cumulatively amount to persecution. They pointed out that, although he accepted that in principle a Bedoon could show persecution if he was discriminated against in a "large proportion" of his basic civil and human rights, the Adjudicator failed to recognise that he had in fact found that this appellant would face measures of discrimination in most of the areas of life he had identified as material: in addition to race discrimination, he had mentioned being unable to find work, not being permitted to own property, problems for his children in receiving education and denial of any further right to travel. In these respects, the grounds contended, the appellant was in the same position as most other stateless Bedoon. Among other points raised were that the Adjudicator should have understood from the objective evidence that there were reasons to do with Kuwaiti law and policy why the appellant's superiors were pressing him to provide evidence of nationality.

15. In the grounds which accompanied the application for leave to the Court of Appeal against the original Tribunal determination on the second appellant's case, the point was made that, even if it were accepted that the Adjudicator was right to find the appellant had been able to "rise above" the discriminatory measures he faced in the past, he was wrong to conclude that would be the case in the future. We take this point as being incorporated into the present grounds of appeal.

The hearing

16. At the hearing we heard evidence from Mr Abbas Shiblak. A Research Fellow at the Refugee Studies Centre, University of Oxford since 1992, his work has included a research project on statelessness in the Arab region. He has done work for the European Union and the Council of Europe and has written for specialist journals. He gave evidence amplifying his written report addressing statelessness issues in the Arab region and the case of the Kuwaiti Bedoon in particular. That report contains the following passage:

> "[The Kuwaiti Bedoon`s] continued exclusion from nationality can only be understood in the light of the power struggle in a system which was largely

based on sectarianism and tribalism within newly emerging emirates striving to assert their legitimacy and authority. The majority of the Bedoon are in fact an extended branch of tribes across the borders between Iraq, Iran, Syria and Saudi Arabia and are largely of the Muslim Shi`ite faith".

17. His report goes on to note that the terms in which the Government issued law No 22 of 3 June 2000 dealing with naturalisation opportunities for Bedoon were very restrictive: he refers to one expert assessment that less than 20% of the Bedoon could even formally meet the criteria. His report also explains the legal basis of the Art 17 passport: so named after Art 17 of Passport Law No 11 of 1962, amended by Law No 22/1963 and later by Law No 15/1997. Art 17 states:

(a) A Kuwaiti passport is issued to those who are considered Kuwaiti citizens in accordance with nationality law at the time;
(b) If necessary, the Minister of Interior may grant passports to non-Kuwaiti civil servants working for government agencies if they are carrying out official duties abroad and only for the duration of the assigned mission".

18. In his oral evidence to us he explained that it may be that there has been a further fall in the number of Bedoon currently in Kuwait lawfully: he mentioned the figure of some 80,000 - 90,000. But whether the true figure was the previous one of some 120,000 or this lesser estimate, it was a very considerable reduction in figures for the 1990s which estimated the number lawfully resident as around 220,000. He reiterated that Law No 22 of 3 June 2000 had provided a scheme by which stateless Bedoon could naturalise but its criteria were so narrow they excluded most. Following the introduction of this law, the government had launched a nine-month programme designed to pressure Bedoon into obtaining foreign nationality and renouncing Kuwait nationality as a condition for obtaining residence permits and other benefits. This had led to what he called a "costly trade in forged passports". Less than 1,000 had been naturalised and that included not only Bedoon but also their wives and some non-Bedoon foreigners. He had seen the letter from the Kuwait Embassy dated 31 December 2002. He re-emphasised that Bedoon are recognisable from their family names which in turn identify tribal origins.

19. He explained that although Kuwait law technically defined the Art 17 passport in narrow terms covering only those who are employees of the state, in practice the authorities made wider use of it and did issue it to non-citizens, including some Bedoon, for the purposes of travel abroad, mainly to permit pilgrimage to Mecca (Haj). But, Haj apart, Bedoon found it increasingly difficult to obtain such passports. It was also the case that such documents would not be issued to Bedoon who were outside Kuwait.

20. Mr Shiblak said it was also his understanding that in certain circumstances the Kuwaiti authorities through their consulates abroad would issue emergency documents to enable persons they accepted as citizens or resident non-citizens

to travel back urgently for a death in the family or matters of this kind, e.g. when individuals have lost documents or had them stolen.

21. In Mr Shiblak`s view the Kuwaiti authorities had for some time, in particular since 1990/1991 as a result of the first Gulf War, pursued a policy of trying to drive out as many Bedoon as they could. Around 120,000 or more had left since that time and had not been allowed back. The term now used to describe them was no longer Bedoon, to denote statelessness, but simply “non-Kuwaiti”. The government had virtually equated their status to that of illegal aliens. The main effect of the 2000 law was to withdraw civil and political rights from Bedoon who had previously enjoyed them. Although those subject to prosecution under Law 22 had been granted an amnesty in 2001, there were cases of persons jailed for 7 years pending deportation.

22. In respect of the second appellant, he had noted that whilst granted an Art 17 passport in 1995, he had not sought to renew it and he did not consider that if this appellant now sought to renew it, the authorities would do so. He would no longer qualify.

23. Although much of what Mr Shiblak told us closely reflected the evidence contained in other background materials, we would record that we found his evidence in this case helpful and reliable.

The issues

24. There are five main issues raised by the cases before us:

(i) whether these appellants are stateless (the nationality issue);
(ii) whether either would be accepted by the Kuwait authorities as someone entitled to return to Kuwait (the returnability issue);
(iii) whether Bedoon as a class are per se at real risk of persecution (the persecution issue);
(iv) whether the particular circumstances of either appellant would place him at a real risk of persecution;
(v) whether Bedoon can demonstrate a Refugee Convention ground (race, religion, nationality, political opinion or membership of a particular social group).

The nationality/statelessness issue

25. Turning to the first issue, both appellants maintained they were stateless. The Adjudicator in the case of the first appellant did not clearly decide the issue of statelessness. Mr Davidson urged us to find that Adjudicator Mr Khan should have treated the appellant as a national of Kuwait since the appellant had failed to discharge the burden on him of proving he was stateless. He cited the authorities of *Bradshaw* [1994] Imm AR 259, *Revenko* [2000] Imm AR 610 and *Tecle* [2002] EWCA Civ 1358 (C/2002/1285). He highlighted a passage in which

the Adjudicator had noted the appellant`s failure to avail himself of opportunities to naturalise before June 2000.

26. We agree with Mr Davidson that the burden of proof rests on an appellant to prove his nationality or lack of it. We also agree that for a person to fail to avail himself of opportunities to acquire nationality of a country will not normally prevent him being considered for Refugee Convention purposes as a national of that country: this reflects what has become known as the “Bradshaw principle”. However, this principle has always been subject to the proviso that there must not exist serious obstacles to him doing so: see L *(Ethiopia)* [2003] UKIAT 00016 paras 44-46, which we consider to correctly state the law as enunciated in cases such as *Bradshaw*, *Revenko* and *Tecle*.

27. In our view the background evidence in these two cases demonstrates that the Kuwaiti authorities constructed their naturalisation scheme so that only a very few Bedoon could qualify and that increasingly since 1991 their policies towards the Bedoon have been designed to force most either to obtain a foreign nationality or be rendered stateless. The only passport the first appellant ever held was a forged Saudi passport and he had spent his time in Kuwait since 1991 living illegally and in fear that his false documents would be discovered. There was no evidence that this appellant possessed or would be eligible for the nationality of any other country. And, in relation to Kuwait, there was no satisfactory evidence to show he had ever had or would ever gain nationality of that country. In our view, therefore, the first appellant is also stateless.

28. The Adjudicator in the case of the second appellant made a specific finding that he was stateless. Mr Davidson argued that the Adjudicator’s underlying reasoning entailed a different finding. In this connection, he highlighted the emphasis placed by the second appellant on the fact that appellant for no good reason gave up his job in the police force and failed to avail himself of opportunities whilst still in Kuwait in 1997 to naturalise as a national of Kuwait. We were not able to accept this argument. Firstly, even assuming the Adjudicator was entitled to reject the appellant`s evidence that he had received summonses, we do not consider it was open to him to reject the appellant`s claim that his job came under threat and that the authorities gave him an ultimatum. We say this because at this point in time we know from the objective evidence that very large numbers of Bedoon found themselves faced forced out of employment: the Adjudicator himself cited a passage from the 1999 US State Department Report to this effect. No reason was shown why the second appellant would not have been affected in the same way as many other Bedoon.

29. Secondly, as regards his failure to avail himself of opportunities to naturalise, he left Kuwait well before the very limited naturalisation programme set up under Law No 22 on 3 June 2000 came into effect. Further, given that this programme was constructed in the wider context of an ongoing Kuwait policy of

discouraging Bedoon returns, it was not reasonably likely he would succeed in any future application he were to make for Kuwaiti nationality.

30. In such circumstances neither appellant can be classified as a national of Kuwait on the putative basis that he could succeed without serious obstacles in obtaining confirmation of such nationality upon application.

31. In assessing this matter we have borne in mind the fact, noted in the recent Court of Appeal judgment in *Al Shamri* that the Secretary of State has not yet entered into negotiations with the Kuwaiti government in order to secure the return of Kuwaiti Bedoon, by virtue of there being so few claimants from Kuwait. Whilst from what was said on behalf of the Secretary of State in this case it appears to be contemplated that such negotiations could take place in the future, there is nothing to suggest, even if negotiations were to be started, that they would be successful or, even if they were, that it would be in the form of an agreement to recognise Bedoon formerly resident in Kuwait as *nationals* of Kuwait (or indeed as persons entitled to civil identification documents). An outcome of this kind would presuppose a very radical reversal in policy on the part of the Kuwaiti government towards Bedoon. The objective country materials simply do not demonstrate any basis for considering it reasonably likely there will be such a change.

32. Accordingly we are satisfied that both appellants are stateless.

33. It is not in dispute that for each appellant in this case his former country of habitual residence is Kuwait. Thus risk on return in respect of both must be considered by reference to Kuwait.

34. The question then arises, would their status as stateless Bedoon from Kuwait place them at real risk on return of persecution or serious harm?

35. This question interacts to some extent with the issue of returnability and is best answered after we have clarified the latter.

The returnability issue

36. We turn to consider this issue next because there is an argument, which we need to resolve, that if the appellants would not be accepted back by the Kuwait authorities, they would not face a real risk of serious harm. The hearing before the Tribunal had been previously adjourned for the parties to consider this issue and make submissions upon it. The Tribunal had in mind that in a leading overseas case dealing with the Bedoon in Kuwait, a decision of the New Zealand Refugee Status Appeals Authority (RSAA) chaired by Mr R Haines QC, *Appeal No. 72635/01* of 6 September 2002 [2003] INLR 629, it was held: (1) that Kuwait refuses to acknowledge the right of return of, and arbitrarily denies re-entry to, most Bedoon who claim Kuwait as their own country: “Whatever the limited ability of some Bedoon travelling on Art 17 passports to return to Kuwait, it is clear that

for Bedoon like the appellant who have been expelled into Iraq and who have subsequently lived in that country for some period of time, there is no realistic possibility of being permitted to re-enter Kuwait." (paragraph 51); and (2) that where a Bedoon is not returnable, he cannot in consequence be considered as at real risk of persecution under the Refugee Convention:

> "…no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation…If, for whatever reasons, there is **no** risk of persecution in the country of origin, or if the risk is but conjecture or surmise, the fear of being persecuted is not well-founded. It follows that if the country of origin refuses to admit or accept the return of the refugee claimant, the fear of being persecuted is similarly not well-founded in that country ".

37. Mr Haines saw this approach as one entailed by Art 33 of the Refugee Convention which affords to the refugee protection from the *act* of expulsion and views the issue of whether return is possible as a matter of fact, not as a matter of law; see paragraphs 132- 157.

38. Before considering whether the New Zealand approach is one we should follow, it is first necessary to assess whether it is reasonably likely that either of the appellants of concern to us is in fact returnable to Kuwait. In this regard we have to consider the background country materials as well as the expert report and oral testimony of Mr Shiblak.

39. Whilst it does appear possible in practice for non-citizen as well as citizen Kuwaitis outside Kuwait to receive emergency travel documents from the Kuwait authorities, the strong emphasis placed in the objective country materials on the fact that the government continues to seek to reduce the number of Bedoon living in Kuwait persuades us that it would not be reasonably likely that either appellant would upon application receive travel documents of any kind, even emergency travel documents sometimes issued for family emergencies and the like. It is true that Art 17 passports have been issued *from within* Kuwait to some Bedoon and indeed one was issued in 1995 to the second appellant in this case. It is also true that Art 17 passports appear in practice to be issued to a wider category of persons than defined in the legal text. However, there is no evidence to indicate that they are issued to Bedoon *outside* Kuwait who have not been issued with one before leaving. In addition, even in the case of a Bedoon who has left Kuwait having been issued with an Art 17 passport, the evidence indicates it would not be renewed once it has expired.

40. We have drawn our conclusions on this matter principally from the evidence of Mr Shiblak, although in our view his written and oral evidence on this issue broadly reflects the objective country materials placed before us, as well as those

considered by the New Zealand RSAA in the above-mentioned case. In short, Bedoon lacking Art 17 passports which are still valid, will not be admitted or accepted back by the Kuwaiti authorities.

41. It may be that in practice a number of stateless Bedoon are able to return illegally to Kuwait via neighbouring countries (as the first appellant did in 1991), but we do not consider that it would be open to the UK authorities to countenance return by unlawful means.

42. Thus neither appellant, including the second whose Art 17 passport has expired, is at all likely to be accepted for return by the Kuwaiti authorities in the foreseeable future. They are not, therefore, returnable.

43. We come now to the legal issue we have to decide concerning returnability. Mr Bartram urged the Tribunal not to follow the New Zealand approach. We were bound, he argued, by *Saad, Diriye and Osorio* [2001] EWCA Civ 2008 [2002] INLR 34, a case in which the English Court of Appeal held that on an appeal a claimant was entitled to a decision on whether he was a refugee, notwithstanding the practicalities of whether he could be removed to his country of origin. He also contended that in assessing risk on return, it was relevant that the Home Office had operated a policy as set out in a letter of 1998 under which persons accepted as stateless Bedoon would at least be granted ELR.

44. Mr Davidson also urged the Tribunal not to follow the New Zealand approach, albeit for somewhat different reasons. He contended that the underlying logic of *Saad, Diriye and Osorio* is that practicalities, especially those relating to re-admission, should never be allowed to dictate the issue of well founded fear under the Refugee Convention, since in many cases the Secretary of State could not know in advance whether a person would be accepted for re-admission by the country of origin; indeed the duty of confidentiality owed by the Secretary of State to the asylum claimant prevented him from making inquiries concerning the claimant with the authorities of the claimant`s country, at least until the point when his claim had been finally rejected.

Our decision on returnability

45. In the appeals before us our factual starting-point is inability to return at the present time. It would be unduly speculative to find otherwise on the basis of the mere possibility in the future that the UK authorities would enter into and successfully complete negotiations with the Kuwaiti Embassy over this issue.

46. Our legal starting-point is the Court of Appeal judgment in *Saad, Diriye and Osorio* [2001] EWCA Civ 2008 [2002] INLR 34. Whilst the different New Zealand approach was briefly one which the Tribunal had previously considered should be taken in the UK also, most notably in the case of *Sensitev* (01/TH/1351), it has since been recognised that it is incompatible with this judgment: see *L (Ethiopia)* [2003] UKIAT 00016. The judgment of their lordships clearly holds that the

existing appeal structure governing appeals against refusal of asylum entitles appellants to a decision as to refugee status. In each case the decision facing the appellate authority is the hypothetical one of whether removal would be contrary to the Convention at the time of the hearing – i.e. on the basis of the refugee status of the appellant at that time. Accordingly, even if there are practical obstacles in the form of an effective policy of refusal by the authorities of the receiving state to re-admit Bedoon abroad without valid Art 17 passports, the appeals of the two Bedoon appellants on asylum grounds nevertheless require substantive consideration on the hypothetical basis of whether – if returned – an appellant would face a real risk of persecution.

47. In our view Mr Davidson is entirely right to highlight another reason why the hypothetical approach set out in *Saad, Diriye and Osorio* holds good in Refugee Convention appeals: the duty of confidentiality owed by the Secretary of State to the asylum claimant prevents approaches to the country of origin prior to the final determination of whether a claimant is a refugee. Only if he is found not to be a refugee can contact in respect of a particular case then be made with the consular authorities of the country concerned.

48. We note that both the decisions made in respect of the appellants with whom we are concerned pre-date Oct 2, 2000 (in the first appellant's case, the decision was made on 17 April 2000 and in the second appellant's case, on 1 May 1999). Thus in neither case are any human rights grounds of appeal before us. It is important to note this because our conclusions in relation to the *Refugee Convention* appeals must not be taken to imply that the position is similar in relation to the *Human Rights Convention*. It is true that as a general proposition, following the principles set out by the Tribunal in *Kacaj (01/TH/00634)* as approved in *Dhima* [2002] EWHC 80 (Admin) and subsequent cases, the position in relation to risk upon return is the same under both Conventions. However, under the Strasbourg Convention practicalities affecting return cannot be hypothetically left to one side. By contrast with the position under the Refugee Convention, success in a human rights appeal does not in itself relate to any status at the level of international law. Furthermore, Strasbourg jurisprudence considers that practicalities in relation to return are of central importance. If the threat of removal is not imminent, then there can be no violation of the Convention: see *Vijayanathan and Pushparajah v France* (1993) 15 EHRR 62. Plainly if Home Office policy or practice is either not to remove or to return to the UK persons whose country of origin countries will not accept as entitled to return, it is difficult to identify any meaningful sense in which there can be said to be an imminent threat of removal in the case of persons falling under this policy or practice.

49. We recognise, however, that in relation to human rights appeals it is also necessary to consider the way in which the statutory framework under the 1999 and 2002 Acts defines the issues which fall to be decided on appeal. *In R (app Maksimovic) v Secretary of State for the Home Department* [2004] EWHC 1026

Admin, Mr Justice Collins held that whether or not human rights grounds stood to be considered would depend on the type of appeal involved: the position was different under s. 69(2) than it was under s. 69(3) of the 1999 Act. Fortunately we do not need to resolve the issues involved in the appeals before us, since, as we have explained, the fact that in each case the decision appealed against was pre-2 October 2000 means that human rights grounds do not arise.

50. Dealing exclusively then with issues arising under the Refugee Convention, it is important that we clarify one other matter. The question still remains as to the proper extent of the hypothetical approach enjoined by *Saad, Diriye and Osorio*. More precisely, we need to address the question, does this approach wholly exclude assessment of the *likely capacity* in which appellants would be returned to their country of origin?

The "lawful return" approach

51. One possible line of argument in answer to this question - touched on in the course of the hearing - would be to say that even under the hypothetical approach it is legitimate to take into account the capacity in which someone would be returned to his country. For convenience we shall label this the "lawful return" approach. According to this line of argument, if one is to assess whether a person is at current risk of persecution, one has also, logically, to envisage him as if he were back in his country presently. That in turn entails considering not just what would happen to him as a result of his physical presence back in his country, but also in what capacity his country (in this case Kuwait) would have re-admitted him: one cannot be neutral about the capacity in which a person would be returned, since logically every returnee returns in some capacity, illegal or otherwise. According to this line of argument, individuals cannot be simply considered as if they were invisibly "parachuted" back into their country; it has to be envisaged in every case that they go through normal controls in their country of origin and in accordance with arrangements for return made by the UK authorities with embassies and consulates responsible for the individuals concerned.

52. In support of this line of argument it could also be said that the Tribunal and the courts have seen no difficulty in the context of appeals from several countries (including Sri Lanka during the 1990s, Turkey and the Democratic Republic of Congo (DRC)) in treating the issue of whether a person will be returned with or without valid travel documents as relevant to assessment of risk on return. It could also be said that the "lawful return" approach prevents the phenomenon arising of persons being found to be refugees even though in practice they are not going to be returned to their countries of persecution.

53. If this line of argument were right, it would have dramatic consequences for how we should view the two appeals before us. To explain why, we need to jump ahead for a moment to the conclusions we go on to draw as to the situation of Bedoon in Kuwait generally. We conclude below that whether a Bedoon in

Kuwait faces persecution currently, depends crucially on whether or not he lacks civil identification documents (i.e. is an “undocumented” Bedoon). In our view undocumented, Bedoon face a real risk of persecution. Since most Bedoon in Kuwait are undocumented we conclude that Bedoon generally face persecution. However, we also find below that there are a (sizeable) minority of Bedoon who have civil identification documents and that possession of these insulates them to a significant degree from serious harm. Thus, if upon return the two appellants in this case would be considered as documented Bedoon, it would seem they could not demonstrate a real risk of persecution.

54. Let us recapitulate the position of the two appellants as regards documentation. The second appellant must have been a documented Bedoon prior to receiving the ultimatum which led to his departure, since prior to that time he was a member of the Kuwait police force and was able to obtain an Art 17 passport. However, having declined to register and fled the country he was clearly someone who was no longer a documented Bedoon. The first appellant too appears to have been documented prior to the 1990/1 Gulf War, but not since; and he was clearly not documented when he left. Moreover, we have found that at present neither is reasonably likely to become a documented Bedoon (principally because Kuwait refuses to re-admit Bedoon who have left Kuwait - except for those who have current Art 17 passports).

55. Let us next consider how the present (and likely future) lack of documentation affects the appeals of these two appellants. We take the view that it means that we are to consider them as being on return persons who would fall into the category of *undocumented* Bedoon. On the above line of argument, however, it would be possible to assume they would be *documented* Bedoon since if in fact they were to be returned to Kuwait, it could only ever be as persons accepted by the Kuwaiti authorities as lawfully entitled to re-admission. Regard could be had on this line of argument to the known fact that the UK government does not seek to remove persons unless they have valid travel documents. That being the case, it could then be argued that the only capacity in which Bedoon from Kuwait who are in the UK could ever be returned would be as persons with valid travel documents. But for them to be granted valid travel documents by the Kuwaiti Consulate would necessarily require that the Kuwaiti authorities were satisfied they were Bedoon entitled to civil identification documents. This last step in the argument is arguably deducible from a combination of two factors. Firstly, there is the evidence relating to Bedoon who travel on valid Art 17 passports: they do not appear to have problems being re-admitted to Kuwait. Given the significant number of Bedoon who travel to and from Mecca for Haj on Art 17 passports, it would have come to the attention of international NGOs or country experts if there had been any significant occurrence of rejection or detention or other re-admission problems. Secondly, given the government policy of not re-admitting most Bedoon, it is reasonable to assume that they would not re-admit any Bedoon unless satisfied he or she was entitled to civil identification documents.

56. We do not, however, consider that this line of argument is viable for a number of inter-related reasons. Firstly, the argument requires standing on its head an assessment based on the *Ravichandran* [1996] Imm AR 97 principle of assessment as at the date of hearing. We have found that presently the Kuwaiti Consulate is not reasonably likely to issue either appellant with a valid travel document. Yet by assuming that for a return to take place it would have to be on the basis of a grant of valid travel documents, we are inevitably departing from assessment based on reasonable degree of likelihood and entering into contradictory speculation.

57. Secondly, it infringes the principle of hypothetical assessment set out in *Saad, Diriye and Osorio*, since it requires taking into account a factor relating to the modalities of return.

58. Thirdly, it requires taking into account a future characteristic or factor that is not reasonably foreseeable. We would accept that the approach as set out in *Ravichandran* and in *Saad, Diriye and Osorio* does not always mean confining assessment to a person`s present characteristics. It may be appropriate, for example, to expect an individual to take some future course of action (resulting in him or her acquiring a different characteristic) in order to avoid a risk of persecution (e.g. expecting a woman to obtain a divorce before returning to a country in order to prevent a violent husband persuading the authorities to pursue and harass her on his behalf) and on this basis to assume they possess the new characteristic on return. It is also appropriate in certain contexts to assume that a person is a national of country X for the purposes of Art 1A(2) of the Refugee Convention, even though his country of nationality does not accord him nationality presently: indeed we touched on this at paras 27-8 above. Thus in *Tecle* the Court of Appeal reasoned that it was right to treat the applicant as a national of Eritrea because there were no serious obstacles to his being granted it upon application. However, in both these contexts it is valid to take account of a future characteristic because it is reasonably foreseeable that it can be acquired (being a divorcee, being a national of Eritrea). The crucial factor in the *Tecle* case was that the applicant had a legal entitlement under Eritrean law to Eritrean nationality (by virtue of having an Eritrean father) and that there were no serious obstacles to the applicant being able to acquire that nationality.

59. Finally, if this line of argument were right, it would entail reading into Art 1A(2) a further qualifying condition. In addition to having to show a well founded fear of persecution for a Convention reason one would also have to show that it is not a fear which could be obviated by the modality of return. Arts 32 and 33 do address return, but they do not in our view stipulate any qualifying condition for being a refugee over and above that as set out in Art 1A(2).

60. Accordingly we reject the “lawful return” approach and find that in assessing risk on return we are obliged to consider the two appellants as undocumented Bedoon.

Whether Bedoon as a class are per se at real risk of persecution

61. We can now turn to the question whose answer we have already adumbrated.

62. Neither adjudicator in these appeals adjudged Bedoon as a class to face difficulties and hardships rising to the level of persecution. Mr Davidson asked us to uphold their judgment on this issue. Mr Bartram asked us to find that the findings of the Adjudicators on this issue were contrary to the objective evidence and therefore wrong in law. As noted earlier, part of his submission to this effect was that we should regard denial of nationality as in itself a persecutory act.

63. We have concluded that the Adjudicators` findings on this issue were indeed contrary to the objective evidence. However, before explaining why, we would emphasise that we have not reached this conclusion because of any acceptance of Mr Bartram`s submission that the appellants should succeed simply by virtue of the fact that they are being denied nationality. It may be that the right to a nationality is an emerging norm, but it has plainly not yet become part of international law. Given this state of affairs, we cannot see that denial of nationality as such amounts to persecution. To the contrary, whether denial of nationality amounts to persecution is a question of fact and depends upon the practical consequences for an individual in the country in which he is being denied nationality. At one end of the spectrum there are countries in respect of which denial of nationality may have few practical consequences for a person's civil, political, social, economic and cultural situation. At the other end of the spectrum there are countries in respect of which the consequences may be comprehensive and dire.

64. However, we do agree with Mr Bartram that as a matter of fact denial of nationality is a decisive factor in this case. That is because in Kuwait the authorities, having acted to exclude most Bedoon from Kuwaiti nationality and from lawful residence status, have then confined access to basic civil, political, social, economic and cultural rights to those having either Kuwaiti nationality or (as lawful residents) foreign nationality.

65. What it seems to us the Adjudicators overlooked is that the objective evidence relating to the position of the Bedoon in general is in particularly strong terms. The Human Rights Watch Report for 2000 identifies "widespread and systematic discrimination [resulting] in violations of civil and political rights protected by the [International Covenant on Civil and Political Rights]". The UN Human Rights Committee in its Concluding Observation of 26-27 July expressed particular concern about the denial to the Bedoon of a significant number of civil and political rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR), in particular Kuwaiti refusal to grant many Bedoon living in Kuwait any type of nationality. Concern was also expressed about provisions under the Aliens Residence Law 17/1959 for deportation of stateless persons for

failure to regularise their status. The US State Department Report for 2002 highlights similar concerns, noting that there were approximately 250 Bedoon and foreigners held in detention facilities, some of them pending deportation, some having been detained for up to 6 months. The report also notes that the government has stated that those who did not register by the June 27 shut-off date for naturalisation applications will be subject to deportation as illegal resident, albeit no such action was taken during the year. Mr Shiblak summarised matters this way:

> "They live under the most appalling conditions, denied the right to travel, free medical care, to register marriages and in some cases to have a driving license".

66. The detailed documentation of the problems facing many Bedoon in relation to their civil and political and economic, social and cultural rights, as set out in the Human Rights Watch Report and other materials submitted, has also to be considered in historical perspective. The steps taken by the Kuwaiti authorities to marginalize the Bedoon have been part of a deliberate state policy to drive large numbers of the Bedoon out of the country. The dramatic fall in the number of Bedoon in Kuwait over the past two decades – some 120,000 persons having left in circumstances often tantamount to forced deportation - speaks for itself: We bear in mind that at international law the prohibition of forced deportation is widely considered to have the status of *ius cogens*.

The position of documented Bedoon

67. As intimated earlier, we recognise that not all Bedoon in Kuwait experience persecution. On close inspection it is clear that in identifying the severity of the situation facing the Bedoon generally, analysts plainly do not have in mind all Bedoon in Kuwait. They principally have in mind undocumented Bedoon, i.e. those who do not have civil identification documents. Certainly it would appear from the US State Department Report for 2002 and the evidence of Mr Shiblak that undocumented Bedoon constitute a majority: some 80,000. But the US State Department Report for 2002 states that there are also around 35,000 Bedoon who as a result of the new law in effect from July 2000 have been documented as citizens of other countries, most having admitted to Saudi or Syrian origin. That report also notes that such persons, by virtue of being documented as citizens of other countries, have been able to obtain residency permits and other official papers.

68. We should make clear at this point that there is also a small number of Bedoon who appear to have obtained Kuwaiti nationality. However, Mr Shiblak considered their number to be negligible. Accordingly we consider they can be disregarded for the purposes of assessing the two main categories of Bedoon in Kuwait: undocumented and documented Bedoon.

69. The objective country materials also make clear in our view that documented Bedoon, i.e. Bedoon who have civil identification documents, are significantly insulated from the worst of the hardships and discriminations facing Bedoon more generally. This can best be demonstrated by noting their position in relation to the earlier catalogue identified by Mr Shiblak and others, of serious and wide-ranging discriminations most Bedoon experience as non-citizens - prevented from working with few exceptions in the public or private sectors or from receiving most basic government services and denied rights to medical treatment, housing, documentation, education and driver's licences.

70. Dealing first with employment, albeit there is reference in the background materials to Bedoon being denied public and private employment, it is clear that documented Bedoon are not excluded from employment entirely, since the same sources note that employers, presumably private employers, are able to get away with paying them one quarter of normal wages. There is also reference to some albeit very small number of Bedoon remaining in public sector employment. We can find no reference to any exclusion of self-employment, although for those who lack civil identification documents it is clear there would be added problems in any dealings with officialdom.

71. As regards health care, once again there is restricted access but not complete exclusion. The latest evidence indicates that documented Bedoon are denied free government health care, but can access medical clinics on payment of a fee. The Human Rights Watch report of 2000 notes that in April 2000 the Ministry of Health implemented a health insurance scheme that required non-Kuwaiti citizens to pay an annual fee of 50KD per head of household, 40KD per dependent spouse, and 30 KD per child: "After requests from the National Assembly's Health and Social Affairs Committee the Ministry agreed to reduced fees for Bidun holding security ID cards, non-Kuwaiti wives of Kuwait men, and foreign or Bidun children of Kuwaiti women, who each pay 20KD".

72. Bedoon children remain excluded from the state education system but previous attempts to deny them access to private schools do not appear to have been maintained.

73. Mention is made of Bedoon facing difficulties in obtaining accommodation, but the references appear to relate to Bedoon without civil identification certificates.

74. Whilst for Bedoon who have civil identification documents there is still the possibility of action being taken to deport them, it appears that, in respect of them, the grounds would be much narrower, largely confined to those who commit ordinary crimes, contravene public morals or fall into penury.

75. The difficulties faced by Bedoon in registering births, deaths and marriages again appear largely confined to those who lack civil identification documents

and who thus require letters of no objection from the Ministry of Interior Executive Committee on Illegal Residents.

76. The same situation appears to obtain in respect of driving licences.

77. It remains that (all but a very small number of) Bedoon, documented or not, are excluded from nationality. As we have already noted the 2000 naturalisation exercise led to few Bedoon obtaining nationality and was principally used to pressurise many to leave or prove another nationality. In any event, it has not been repeated, despite widespread international criticism of the lack of legal access to naturalisation. Bedoon children, documented or undocumented, are also excluded from Bedoon nationality, even if born in the territory of Kuwait.

78. It also remains that even for documented Bedoon there is a highly restrictive policy in respect of travel. Even if they are able to obtain permission to travel abroad, by means of an Art 17 passport, the authorities are not obliged to, and in practice do not, allow the holder re-entry once that passport expires. Bedoon, documented or undocumented, are also entirely excluded from the right to vote.

79. Even though being documented insulates a Bedoon from the full impact of several of the main discriminations described above, it remains the case that documented Bedoon also face societal discrimination on the grounds of extended tribal identity and family identity.

80.To summarise, whilst we would accept that documented Bedoon experience significant measures of discrimination, we do not consider, even when assessed cumulatively, that these give rise to persecution.

81. However, for reasons already given, we do not find that the situation of documented Bedoon alters the fact that most Bedoon, being undocumented and more seriously discriminated against in consequence face a real risk of persecution.

82. We have also made clear already that neither appellant in this case can be considered as a documented Bedoon or as reasonably likely for the foreseeable future to become a documented Bedoon.

The possible relevance of the particular circumstances of each appellant

83. Given these conclusions, based essentially on the position of the majority of Bedoon in Kuwait, it might appear unnecessary for us to consider the fourth question we outlined at the beginning, namely whether the particular circumstances of either appellant would place him at real risk of persecution. The first appellant was found by the Adjudicator to have no particular history in the eyes of the authorities which would make him of adverse interest, but equally his history did not indicate that he would be treated any differently to other undocumented Bedoon.

84. The position with the second appellant is less straightforward since the Adjudicator`s findings appeared to view his particular circumstances as meaning he would not face the same serious difficulties as other Bedoon. We have in mind here that he found firstly that he had been able for most of life in Kuwait to "rise above" the difficulties facing most Bedoon, by being able to obtain employment as a police officer and obtain education to a university standard etc; and he found secondly that by having family connections, he would be able to insulate himself from the difficulties other Bedoon might face – the fact that he had parents, two brothers and three sisters living in Kuwait and the fact that he is married to a Kuwaiti national.

85. However, we found earlier that whilst the Adjudicator concerned was entitled to reject this appellant`s claim to have received summonses, he was wrong to conclude that he did not face an ultimatum in relation to his employment. We note further that the Adjudicator himself accepted that in any event the position now was that it was not reasonably likely he could work, find accommodation or educate his children. In deciding whether the second appellant`s circumstances would be sufficient to insulate him from serious harm, the Adjudicator should not have ignored material changes that had taken place since he left Kuwait in 1997. The appellant`s past ability to "rise above" prevailing difficulties facing Bedoon had been displayed at a time prior to the measures introduced in 2000 designed to drive out many Bedoon and marginalize the remainder. As regards his family connections, we are not aware of any evidence to show that these are enough to prevent an undocumented Bedoon being treated as such. Accordingly we find that the second appellant also would face broadly the same treatment as faces other undocumented Bedoon.

86. Accordingly we are satisfied that the individual circumstances of the appellants neither significantly add to nor detract from the situation they would face in common with other undocumented Bedoon.

87. For the above reasons we have concluded that both appellants would face a real risk on return of persecution. The findings of the Adjudicators the other way in both cases were contrary to the objective evidence and thus wrong in law.

The particular social group (PSG) issue

88. In order to qualify as refugees, it remains necessary for the appellants to show that their persecution would be by reason of a Refugee Convention ground. At the adjudicator stage in both cases and in subsequent submissions the focus has been on whether the appellants could establish that they qualified by virtue of Bedoon being considered as members of a particular social group (PSG). This was also the focus of the analysis in the New Zealand case. However, it in our view it is not necessary for the appellants to show membership of a PSG. As Mr Shiblak`s evidence has made clear, the Bedoon have an extended tribal identity

and so cannot be reduced to persons defined simply by their statelessness. That is sufficient in our view to bring them within the meaning of the term “race” as also employed in Art 1A(2).

89. For completeness, however, we would add that we would also have no hesitation in identifying the Bedoon in Kuwait as a particular social group within the meaning of Art 1A(2) of the Refugee Convention, Applying the Tribunal summary of criteria as set out in the Court of Appeal judgment in *Montoya* [2002] INLR 399, we are entirely satisfied that by virtue of their extended tribal origins and the existence of a number of legislative and societal measures of discrimination marking them out from others, the Bedoon are a particular social group. For this reason they can be said to exist independently of, and not be solely defined by, these measures of discrimination. We recognise that this was not the view taken by the New Zealand RSAA in the case cited earlier, but, with respect, the analysis there treated the Bedoon simply as stateless persons per se. As an analysis of stateless persons in Kuwait per se, the reasoning of this decision, at least in relation to the PSG issue, is impeccable. But, it simply overlooks their tribal background and identity. On this issue, therefore, our view is the same as that taken by the Adjudicator, Mr Trethowan in the case of the second appellant.

Summary of conclusions

90. It may assist to briefly summarise our principal conclusions by reference to the five main issues identified earlier:

(i) The appellants in this case are stateless persons. Given the events of 2000, it would be rare indeed for a Bedoon who did not obtain nationality before leaving Kuwait to be considered as a national of that country by reference to *Bradshaw* principles.

(ii) It is not reasonably likely that the Kuwaiti authorities will accept either appellant as eligible for or entitled to re-admission: in practice they are not currently or foreseably returnable;

(iii) In view of the widespread and systematic nature of the discriminatory measures they experience, the majority of (but not all) Bedoon in Kuwait face a real risk of persecution in Kuwait;

(iv) The individual circumstances of the appellants neither significantly add to nor detract from the situation they would face in common with other undocumented Bedoon.

(v) Since the Bedoon have a tribal identity and are not simply a collection of (mainly) stateless persons, they face persecution by reason of a Refugee Convention ground of race. They can also be seen to form a particular social group.

91. For the above reasons both appeals are allowed.