

0808284 [2009] RRTA 454 (21 May 2009)

DECISION RECORD

RRT CASE NUMBER:	0808284
DIAC REFERENCE(S):	CLF2008/126043 OSF2005/040552 OSF2005/041110
COUNTRY OF REFERENCE:	Stateless (Kuwait)
TRIBUNAL MEMBER:	Jennifer Ellis
DATE:	21 May 2009
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be stateless and formerly resident in Kuwait, arrived in Australia [in] February 2007 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2008. The delegate decided to refuse to grant the visa [in] November 2008 and notified the applicant of the decision and his review rights by letter dated [the same date]. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] December 2008 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's files relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

20. [In] September 2005 the applicant first entered Australia as the holder of a subclass 570 student visa. He was outside Australia between :

- [date deleted: s431(2)] January to [date deleted: s431(2)] February 2006; and
- [date deleted: s431(2)] January to [date deleted: s431(2)] February 2007.

21. After he arrived in Australia he was granted a number of further student visas. [In] April 2008 he was granted a subclass 572 visa valid until [date deleted: s431(2)] May 2009.

Evidence before the delegate

22. [In] September 2008 the applicant applied for a protection visa. He stated in his application that he was a Palestinian Muslim who had been born in Kuwait [date of birth deleted: s431(2)] 1976 and lived there until he came to Australia as a student. His parents had migrated to Kuwait before he was born and he was never registered with Palestinian authorities. He had travelled to Australia as the holder of an Egyptian refugee travel document issued in Kuwait. He had completed 17 years of education including undertaking a Diploma [course] from [an educational] Institute in Kuwait in 1994. He had been employed in a sales and marketing position in Kuwait from 1995 until 2005.

23. In his accompanying statutory declaration the applicant declared that:

1. I am the declarator herein above named.
2. I was born in Kuwait in [date of birth deleted: s431(2)] and I lived all my life there. However, I am not Kuwaiti citizen.
3. My father was born in the Gaza Strip in 1942 and he studied at [institute name deleted: s431(2)] He graduated in the mid-sixties and came back to Gaza Strip.
4. After the Israeli invasion and occupation to the Gaza Strip in 1967, my parents immigrated to the State of Kuwait as refugees.
5. My father worked as a teacher at the Education Ministry in 1970. Throughout his tenure in Kuwait, we were treated as refugees and did not have the right of citizenship
6. After the Iraqi invasion of Kuwait 1991. My father was dismissed from the Education Ministry, because all Palestinians who lived in Kuwait were sacked due to

the position of PLO who backed the Iraqi invasion and from the Kuwaiti perspective no longer trusted Palestinian.

7. After that, the law became very strict towards refugees. For example, we have no right to attend any University of whether governmental or private because the priority of local citizens.

8. In addition, in order to the residence laws, which prevent over-21s from leaving the country and stay more than 6 months without employer approval.

9. I came to Australia on [date] September 2005 as a overseas student.

10. I came to further my qualifications.

11. After that, I returned to Kuwait in January 2006 due to my father death. During my stay in Kuwait, I took the employer approval (which my employer agreed to) to stay abroad for a year without coming back to Kuwait after 6 months as the Kuwaiti law requires, under the employer approval as I am on a working visa and not dependent one, (see internet page from Kuwaiti Embassy re residence requirements) which issued to those who are under 21 years old.

12. I returned to Australia for the whole 2006, and I returned to Kuwait in January 2007. The main reason this time that was seeing my sick mother, obey the residence rule and also my employer requirement that I return every 12 months. During my visit period there, my employer gave me agreement in principle to stay another year overseas and I returned to Australia to complete my studies and started correspondence for the Kuwaiti Embassy here to get the permission of absence. I was shocked when I found out that my employer dismissed me from my work.

13. Therefore, I could not have absence permission, as the employer approval is the main condition to issue that.

14. Since my home country Palestine does not recognise me as citizen or as a Palestinian, and the country I grow up in and suffered four wars there with bad memories, and will not allow me to return or live there, I now believe that I am stateless.

15. I find myself in this country, in which I am studied in, and which have found I love, and I learned the meaning of equality and human rights.

16. I know the facts herein declared to be true of my own knowledge.

24. The applicant also submitted the following documents:

- Certificate from the State of Palestine General Delegation of Palestine [date] July 2008 stating that the applicant is not allowed to enter or stay in the Palestinian territories including the Gaza Strip;
- Death Certificate of the applicant's father [date] December 2005;
- Copy of the applicant's Egyptian refugee travel document.

Primary Decision

25. The delegate refused the applicant a protection visa [in] November 2008. The delegate accepted that the applicant was a stateless Palestinian and that he did not at that time hold the right to enter and reside in Kuwait. The delegate accepted that he had no access to Egypt or Palestine. Whilst the country information supported a finding that Palestinians were discriminated in Kuwait the delegate was of the view that this did not amount to persecution.

Evidence before the Tribunal

26. The applicant applied for review [in] December 2008. The applicant was invited to appear at a hearing [in] February 2009. [In] February 2009 the applicant's representative requested an adjournment due to the illness of the applicant's previous migration agent. This request was acceded to and the hearing adjourned [to] March 2009.

27. [In] March 2009 the Tribunal received the following documents:

- Submission;
- Statutory declaration made by the applicant [date] February 2009;
- Letter from the applicant's employer in Kuwait to him, [date] May 2007 terminating his employment;
- Emails between the applicant and the Kuwait Embassy;
- Document issued by the Kuwait authorities in relation to entry to Kuwait.

28. In his statutory declaration made [in] February 2009 the applicant outlined how his employer had failed to renew his residency permit and how he attempted to contact the Kuwaiti authorities to see whether he could be eligible for another visa. He also explained why he had not applied for a protection visa at an earlier time. He declared that he had suffered ongoing discrimination in Kuwait as a stateless Palestinian and had faced serious disadvantage in terms of education, employment and freedom of movement. He stated that he feared imprisonment if he returned to Kuwait and stated that prison conditions in Kuwait were very bad and sexual assault was common. He believed he would be imprisoned indefinitely and badly treated if he returned to Kuwait.

29. In the accompanying submission it was stated that:

1.1 The applicant is a stateless Palestinian and a former habitual resident of Kuwait. He claims a well founded fear of persecution due to his race, along with his membership of a particular social group: non Kuwaiti citizens whose residence rights have expired. He is outside of his country of former habitual residence (Kuwait) and is unable and unwilling to avail himself of the protection of that Country.

1.2 The applicant has clarified his claims since his initial protection visa application was lodged on [date] September 2008. It is unfortunate that a great deal of this information was given to his previous migration agent but not included in the original application. He has now sworn an additional statutory declaration (attached with this submission) and makes the following claims:

- He was born in Kuwait to Palestinian parents who fled Gaza in 1967;
- He is recognised neither as a citizen of Palestine nor as a citizen of Kuwait;
- He faced substantial discrimination amounting to persecution while resident in Kuwait including but not limited to discriminatory laws pertaining to refugee, a lack of access to the higher education system and strict residency and employment laws with severe penalties for their breach.
- If returned to Kuwait, he claims a well founded fear of persecution as a non-citizen whose residence rights have now expired. He specifically fears indefinite imprisonment, possible sexual assault and ill-treatment in extremely harsh conditions.

2. DIAC DECISION

2.1 The application for a protection visa was refused on [date] November 2008.

The decision maker accepted that:

- The applicant was a stateless Palestinian and former habitual resident of Kuwait;
- The applicant has no right to enter and reside in a safe third country not have effective protection in a third country under s36 (3) of the Migration Act;
- DFAT advice states that 'Kuwaiti authorities are not likely to readmit into a country a Palestinian holding an Egyptian travel document, who was born in Kuwait and lived there for a long period of time, because he was not a Kuwaiti citizen';
- As a result, the applicant does not at present hold the right to enter and reside in Kuwait.

The decision maker additionally found that:

- Statelessness alone was not enough to bring the applicant within the refugee Convention;
- The applicant had not submitted any claim of having experienced serious harm or mistreatment or faced discriminatory practices in Kuwait;
- The applicant had not provided any evidence that he had sought to resume his residence in Kuwait;
- While the applicant had stated that he had sought permission from his employer to remain in Australia until January 2008, he did not submit his application for a protection visa until September 2008, some eight months after he was to have returned;
- The applicant had not provided any evidence in support of his claim to have been dismissed from his employment in Kuwait;
- While some discriminatory practices may be implemented by Kuwait organisations, this was not serious enough to amount to persecution;
- The applicant had not submitted any claim of having faced serious harm or mistreatment at the hands of the Kuwaiti authorities;

- The applicant's fear of return related to his claim of having been dismissed from his employment and his nullified residency status in Kuwait;
- Overall, the claims made by the applicant were generalised and did not constitute a real chance of serious harm of mistreatment amounting to persecution were he to be returned to Kuwait.

SECTION 3: MIGRATION AGENT SUBMISSION

3.1 The applicant's dismissal from employment

The applicant clarifies in his most recent statutory declaration of [date] February 2009 that he was dismissed from employment with [his former employer] in May 2007, despite a previous oral agreement between them that his employment would continue until January 2008. A copy of the termination of service letter, [date] May 2007 accompanies this submission. The applicant submits that his employer changed his mind about his ongoing employment due to the strict employee quotas imposed by the Kuwaiti Ministry of Worker Affairs, and the fact that the applicant would have had an adverse impact upon his business by his inclusion in this quota without being present in Kuwait to actually work.

3.2 The applicant's delay in seeking protection and attempts to resume residence in Kuwait

The original decision maker noted particularly that the applicant did not seek protection in Australia until September 2008, some eight months after he was originally to have returned to Kuwait. The applicant has explained (and provides evidence with this submission) that his attempts to have his employment and residency reinstated delayed his eventual decision to seek protection in Australia significantly. Furthermore, as his claim of persecution as an illegal non-citizen in Kuwait relates directly to his lack of residency rights, his claim to protection in Australia did not exist until he had exhausted all avenues to avoid his present situation.

Initially, the applicant posted his employer in Kuwait his Certificate of Enrolment from TAFE South Australia on [date] March 2007. He also arranged and sent a money order made Embassy of Kuwait for processing fees at this time. The relevant Australia post receipts are enclosed with this submission.

Following his dismissal from employment in May 2007, the applicant tried to contact his employer to convince him to change his mind, without success. In the intervening period, the applicant also made enquiries of the Kuwaiti Embassy in Canberra and the Ministry of the Interior in Kuwait during July 2008. The relevant emails between the applicant and the Kuwaiti authorities accompany this submission.

While he was aware that his residency had lapsed, the applicant delayed his application for a protection visa intentionally. He was aware that his student visa was valid until May 2009, and had been told by various members of the international community in Adelaide that once he sought protection he would be likely to be placed in immigration detention. Particularly due to his opportunity to study in Adelaide at this time, he sought to delay this detention for as long as possible.

3.3 Serious harm, mistreatment and persecution

As noted above, the applicant's fear of persecution relates specifically to his lack of residency rights there following his dismissal from employment, and his likely treatment were he to be returned as an illegal non-citizen. The original decision maker found correctly that the threshold to the applicant to be entitled to protection under Australian law is 'serious harm'. The degree of suffering or deprivation contemplated by Section 91R (2) of the Migration Act specifies 'threat to the person's life or liberty' as satisfying the definition of persecution. The applicant's and mistreatment by the Kuwait authorities therefore meets the criteria for persecution.

3.4 Well-foundedness

It is clear that the well-foundedness of an applicant's fear is a constituent element of the refugee definition and must be established through some objective basis. Commentators and the courts alike have noted that past events are a relevant but not necessarily determinative consideration in regarding whether an individual has well-founded fear of persecution. As Vrachnas et al conclude, 'where there have been considerable changes past events may be of virtually no relevance.' We would submit that while the applicant has not necessarily met the 'serious harm' threshold in relation to his past treatment by Kuwaiti authorities, his status upon return as an illegal non-citizen has the consequence that likely future actions are difficult to judge based upon past events.

It is an accepted proposition in Australian refugee law that a well founded fear of persecution is constituted by a 'real chance' of the harm occurring, that this chance does not express probability but only possibility, and that a fear may be well-founded despite the chance of it materialising may well be less than 50 percent. As Justice Dawson comments:

'It is also clear enough that a fear can be well-founded without any certainty, or even probability, that it will be realised.'

We would submit that in the applicant's case, available country of origin information indicates that there is a substantial and not remote chance that he would be imprisoned if able to return to Kuwait, that prison conditions may be very poor and that he may be subject to arbitrary and indefinite detention. Given this real chance of the applicant's claims being realised, his fear of persecution is therefore well-founded.

SECTION 4: COUNTRY OF ORIGIN INFORMATION

The longstanding mistreatment of Palestinians in Kuwait is well-documented, and has been previously recognised by the Refugee Review Tribunal in cases such as V95/033776. The UK Home Office Report on Kuwait 2008 states:

Before the 1990 Iraqi invasion there were some 400,000 Palestinians living in Kuwait. Palestinians had originally gone to Kuwait to find work after the war in 1948. At that stage Palestinians were a clear asset to an under-developed Kuwait, which was in need of teachers, labourers and civil servants. Whilst it was hard to acquire citizenship, this was not necessary for longterm work and residency. The numbers of Palestinian children were restricted within the Kuwaiti education system...

The Palestinian leadership was seen to Support Iraq following the invasion in 1990 and, after Kuwait's liberation, non-Kuwaitis, including Palestinians, were subject to many legal restrictions. By 1992 it was estimated t only 30,000 to 40,000 Palestinians remained in Kuwait Around half of this number had Egyptian travel documents, but

because they did not have Israeli identity cards, were not allowed to return to the Gaza Strip, and did not have access to citizenship in Kuwait.'

The US State Department Report on Human Rights for 2008 notes that non-nationals in Kuwait are sometimes subject to arbitrary arrest. Furthermore, a number of laws and regulations discriminate against non-nationals, and 'Police and security forces were more likely to inflict such abuse on non-citizens, particularly non-Gulf Arabs.' It commented that no developments had been made on the 2006 of two non-nationals who died in police custody.

The World Refugee Survey 2008 notes the detention of 259 workers for violating residency laws in January of that year.⁹ The UK Home Office Operational Guidance Note on Kuwait (released 3rd May 2007) comments upon prison conditions in Kuwait as follows:

In their 18 April 2005 report, the National Assembly's Human Rights Defense Committee (RDC) reported severe overcrowding, poor sanitation, inadequate containment of infectious diseases, and lack of sufficient medical staff as common problems in the old prison complex.... There were reports in 2006 that the authorities mistreated prisoners and failed to prevent inmate-on-inmate violence, including rape.

We submit that available country of information corroborates the applicant's claim of imprisonment and mistreatment upon his return to Kuwait.

SECTION 5: CONCLUSION

The applicant claims, and has been able to corroborate, a well founded fear of persecution on the basis of his nationality (Palestinian) and membership of a particular social group (illegal non-citizens of Kuwait). We submit that his treatment upon return to Kuwait by local authorities would be severe enough as to constitute persecution.

While the applicant is stateless, he additionally has claims as a legitimate refugee. The original decision maker placed significant over-emphasis on statelessness as not satisfying the Refugee Convention, and arguably overlooked the applicant's more relevant claims. As demonstrated through numerous recent Australian cases such as Al-Khafajl, there are sound policy grounds for recognising these claims insofar as is possible as they arise, and avoid the inevitable waste of court and Government resources expended in ongoing appeals and ministerial intervention processes that ultimately grant the applicants permanent protection in Australia.

We submit that the applicant's is such a case and that he needs and deserves the protection of the Australian Government. We ask the Tribunal to find in his favour and allow the applicant to rebuild his life here in peace and dignity.

30. In the document from the Kuwaiti authorities it stated that:

Director General of the Directorate General of Immigration

Facilitation of the Residents Entrance in the Cooperation Council States

The Ministry of Interior in the State of Kuwait commenced allowing the residents of the Arab Gulf Cooperation Council States to enter the State without any prior visa and this, as per the last meeting held by their Excellencies the Ministers of Interior of the Cooperation Council States; the Directorate general of Immigration elaborated some rules in this respect.

In this regard, the Interior magazine held a meeting with Brigadier General Abdullah Al Rouwayh, Director General of the Directorate General of Immigration. I

Regarding the Conditions that should be Provided in Residents Wishing to, Enter Kuwait. Brigadier General Abdullah Al Rouwwavh said:

1. The profession of the visitor should not be of the marginal professions.
2. The visitor should have one of the following professions: ((Doctor - Lawyer - teacher - Consultant - Judge - Public Prosecution Members - University Teacher - Journalist - Media means - Systems Analyst Pilot - Pharmacist - Computer Programmer - Businessman Manager - Diplomatic member - Owners, managers and delegates of commercial companies and establishments - University graduates)).
3. The wife, children and servants of the abovementioned categories shall be allowed to enter the country provided that a resident with their guarantee be available.
4. The resident should not be of those holding travel documents or tickets of all kinds.
5. No security restrictions should be registered regarding them in the State of Kuwait, preventing them from entering or leaving it.
6. No security restrictions should be registered regarding them in the State of Kuwait, preventing them from entering or leaving it.
7. They should hold passports and residence permits whose validity is not inferior to six months issued by one of the Cooperation Council States.

Brigadier General Abdullah Al Rouwayh, Director General of the Directorate General for Immigration explained that upon the instructions of the First Deputy of the Prime Minister, the Minister of Interior and the Minister of Defense, Sheikh Jaber Al Mubarak, it has been allowed that the residents of the Arab Gulf Cooperation Council States enter to the State of Kuwait without a prior visa, and this through one of the land, marine or air outlets, starting from May 13, 2006.

Furthermore, the said resolution allows the entrance of residents, provided that the passport be valid along with a valid residence. The resolution excluded the Iraqi nationality due to the non-stability of the security conditions in Iraq, since it is important to obtain a prior approval confirming that this procedure is temporary and it shall cease upon the end of the causes.

-Visitors should be holding a 'return' ticket, regarding the visitors using the public means of transport.

- Should be mentioned in the visa his address of residence in Kuwait regarding the employee competent in issuing the entrance visa upon the arrival thereof.

Brigadier General Al Rouwayh also mentioned that the visitors of the State of Kuwait who are wishing to visit the Gulf States, according to the instructions of the Ministers of Interior of the Cooperation Council States during their last meeting during which they allowed the residents of the Cooperation Council States to freely visit the Gulf States, therefore, the residents of the State of Kuwait can visit the Gulf Countries in accordance with the States that are applying this resolution.

In addition, the visit does not require the presence of a medical examination for the visitors, confirming if the visitors were suffering from a disease, they would not have obtained residences from the Gulf countries.

Brigadier Al Riuwayh mentioned that coordination occurred between all the related bodies in the Cooperation Council States from one part Bind with the Kuwait Directorate General for Civil Aviation from another part in order to execute this resolution according to specific rules and conditions that facilitate the entrance of the residents of the Cooperation Council State to the country in an easy and flexible manner with avoiding any negativism.

As for what is related to the fact of imposing fees on these visits, Brigadier General Al Rouwayh confirmed that the visit shall be for free and rib fees shall be collected in this respect, noting that the fact of imposing fees is related to the political leadership while the Directorate General for Immigration is an executive authority_

Brigadier General Al Rouwayh ended his speech regarding this resolution and if this shall lead to a touristic and economic boom in the country saying:

I think that this resolution shall lead to a touristic and economic boom in the country, where the visitor shall reside for three months in the country during which he shall lease a place of residence or shall stay in a hotel, in addition to his expenses during his period of residence in the country and the fact of purchasing goods and his personal needs.

Evidence at the hearing

- 31.The applicant appeared before the Tribunal [in] March 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
- 32.The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
- 33.The applicant told the Tribunal that he was still studying and hoped to finish his course in April 2009. He was working part time at a convenience store.
- 34.He first came to Australia in September 2005. He has returned to Kuwait twice; in January 2006 when his father died and in January 2007 because his mother was ill and his family asked him to come back. On both these occasions he had a valid residency permit for Kuwait.
- 35.His parents were both born in the Gaza strip and they came to Kuwait in 1967. He was born in Kuwait [in] 1976. He has his mother and 6 siblings in Kuwait and a sister in Abu Dhabi His mother is 61 years old and has to be employed in order to have a residency permit. She was sponsored by her husband but after his death in 2006 she had to find an employer and be put on his books in order to be able to have a residency permit. Without this she would be forced to leave Kuwait The applicant said that only Kuwaitis with a Kuwaiti father can have Kuwaiti citizenship and that Palestinian refugees are never granted citizenship. Their residency is dependent upon employment; without employment they are illegal residents. All his brothers in Kuwait have residency based on employment. His two oldest sisters in Kuwait are sponsored by their

husband while his youngest sister is 19 years old and therefore sponsored by her mother. Once a child turns 21 years old they must be sponsored by an employer.

36. The applicant told the Tribunal that he had completed 12 years of primary, middle and secondary schooling in Kuwait and then he undertook a diploma at a private business institute in 1994/1995. He stated that he wanted to study properly at a tertiary level at university in Kuwait but could not because he was a Palestinian. He had no problems attending 4 years of primary school and 4 years of middle school because his father was a teacher and employed by the Ministry of Education and so he could attend government schools at no charge. However in 1990 Iraq invaded Kuwait and the Palestinian leadership backed Saddam Hussein and this meant that in 1991 the Kuwait authorities sacked all Palestinian government employees including teachers and his father lost his job and he was no longer permitted to attend a government school. He therefore had to complete his 4 years secondary schooling at a private school where the family had to pay private fees. He was not permitted to attend any government institutions. He was never able to attend university in Kuwait.
37. The applicant told the Tribunal that he was employed [in sales] for [a] firm from 1996 to 2005. He said that it was difficult for Palestinians to obtain employment in Kuwait and that it was dependent upon having good connections but once employed you were kept on as long as you performed.
38. The Tribunal asked him how he had been discriminated in terms of education and employment given his evidence and he stated that he wanted to study at a university and was not allowed to and was not allowed to study in Gaza. He had wanted to study languages and marketing. In Australia he was studying marketing.
39. The Tribunal asked him how his freedom of movement was restricted and he said that Palestinians in Kuwait were issued with travel documents by Egypt but these were not recognised by other Arab countries and it made foreign travel very difficult. He was meant to travel overseas for his employment but had not been able to other than on one occasion when his employer had to approach the Ambassador to be able to travel to Turkey. He had also travelled to Bahrain to complete medicals for his Australian student visa but had to be escorted. He said that after 1967, Egypt agreed to issue Palestinians with travel documents but these documents gave the holder no right to enter in or reside in Egypt.
40. The applicant stated that after the 1990 Gulf War all Palestinians were sacked and his father never got his job back as a teacher. In 1991 the UNHCR came to Kuwait and gave Palestinians refugee rights and people they knew were able to come to Australia but his father refused because he believed that it would be a matter of time before the situation improved and he got his job back as a teacher. That never happened and apart from casual jobs like delivering newspapers which he could not really physically cope with, his father never worked again.
41. In relation to his study in Australia he stated that his employer had to arrange with Kuwait authorities for him to have permission to leave the country and that there was generally a 6 month limit on being outside Kuwait before residency was lost but if you were studying that could be 12 months. When he returned in January 2006 he had no problems as he had only been absent for less than 6 months and when he returned in January 2007 he had no problems as his employer had given him 12 months leave. This

expired in early 2008 and he tried to have his employer arrange another extension but he did not reply to him and finally in May 2008 he discovered that his employer had terminated his employment because he needed to have a real employee rather than the applicant, who was “on the books” but not working for him in Kuwait.

42. The Tribunal asked the applicant if he could apply now to have his residency renewed and he said that he could not apply even to visit Kuwait because he was on an Egyptian travel document and had no valid residency permit.
43. The Tribunal discussed with him the information that a person could self sponsor to Kuwait if they were a long term resident and had good financial means. He said that he had heard of that but in reality it did not happen. His mother had lived in Kuwait for 41 years and still was required to be sponsored by an employer once his father had died.
44. The Tribunal advised the applicant that it accepted that he was now stateless but advised that this did not in itself accord him refugee status. The Tribunal had to assess whether he had a well founded fear of persecution for a Convention ground in Kuwait, his country of former habitual residence.
45. He stated that he would be illegal in Kuwait and would be jailed if he tried to return. The Tribunal asked him if he had suffered persecution in the past in Kuwait and he stated that from 1990 to 2005 just being a Palestinian in Kuwait meant that your life was hard. He said that people without a residence permit were jailed for 2 years then sent home but he had no home to be sent to and therefore would be kept in jail. He said that he was completely dependent upon his employer.
46. The Tribunal put to him country information that suggested that people without a residence permit in Kuwait would be fined and deported rather than jailed. He stated that was true of foreign nationals but Palestinians like him had nowhere to be deported to and therefore risked being jailed. The Tribunal asked him if he knew of anyone that had happened to and he said that he heard of people who were jailed until they could find an employer to sponsor them but that depended upon them having qualifications and he had none from Kuwait. He said that an employer would not sponsor him because he was the holder of an Egyptian travel document and had no residence permit.
47. The applicant said that he could not go and live in Gaza and referred to the letter from the Palestinian Authority to that effect. He said if he returned to Kuwait now he would go to jail.
48. After a short adjournment the Tribunal discussed with the applicant the fact that any law jailing non residents in Kuwait could arguably be regarded as a law of general application and, if not applied in a discriminatory way for a Convention reason, such a law would not constitute persecution for a Convention reason. The applicant’s representative stated that further submissions would be made on this point after the hearing. The applicant stated that as he did not have a country of nationality he could not be deported to that country and therefore would be jailed.
49. The applicant told the Tribunal that he wanted to study at university and he wanted his children to be able to study and that was not possible for him in Kuwait. The Tribunal raised with him the fact that denial of education at a tertiary level may not amount to “serious harm” as required under the Act.

50. The applicant told the Tribunal that the Kuwait government did not want any Palestinian travel document holders to return to Kuwait once they had left the country and that was why the number of Palestinians resident in Kuwait had gone from 400,000 to 10,000.

51. The Tribunal granted the applicant's advisor [additional time] to put in further submissions.

Post-hearing Submissions

52. [In] March 2009 the Tribunal received a submission from the applicant's representative together with a certificate from [a Kuwaiti] Lawyer before the Court of Cassation and Supreme Constitutional Court.

53. The certificate from [the lawyer] stated that the applicant did not have a valid residency inside Kuwait and his residency had been cancelled by the sponsor. If he attempted to return to Kuwait he would be subject to deportation to the country of his departure or detention. He had no right to enter Egypt, Gaza or the West Bank.

54. In the accompanying submission it was stated that:

1. ISSUES RAISED AT HEARING

1.1 At the RRT hearing of [date] March 2009, with the Tribunal constituted by Member Jennifer Ellis, the applicant began with a general summary of his background; his parents' flight from Gaza in the 1960s, his siblings in Kuwait and the UAE respectively, and his own personal history including study in Australia. The Member then continued by asking the applicant to explain his own understanding of current citizenship and residency laws in Kuwait. The applicant stated:

- It is not possible to become a Kuwaiti citizen by conferral;
- In order to have Kuwaiti citizenship, your father must be Kuwaiti;
- Those who moved to Kuwait after the 1920s or 1930s (the applicant was not definite of the exact date, but said the cut off period was the date of creation of a Kuwaiti state) are not Kuwaiti citizens.

1.2 On the issue of residency of non-citizens in Kuwait, the applicant noted that the only way to be granted legal residency in Kuwait as a non Kuwaiti citizen is through the grant of a working visa. This is either obtained through sponsorship by a genuine Kuwaiti employer, or alternatively by the paying of a bribe to a Kuwaiti employer who registers you falsely as an employee for the purpose of obtaining such a visa. The applicant stated that he believes such requirements must be met by anyone over the age of 21.

1.3 The Member then questioned the applicant about his experiences growing up in Kuwait. The applicant noted particularly that he was unable to enrol in tertiary education, despite an ardent personal desire to do so. He said that university places are reserved either Kuwait citizens or for high-ranking/high profile non-citizens. He stated that a simple person like have a chance for higher education within Kuwait.

1.4 The Member then asked the applicant about his primary education. The applicant stated that his primary schooling (prior to the 1990 Iraqi invasion of Kuwait) was undertaken without difficulty and that he was able to attend a normal Kuwaiti school, particularly as his father was employed by the Ministry of Education Following the

first Gulf war, the applicant stated that he and his siblings were forced to go to a special private school rather than through the public system. The applicant noted that his [tertiary] diploma was obtained through a private institute, without any formal accreditations.

1.5 The Member then questioned the applicant on his employment history. The applicant stated that he was an external sales representative for [a] company from 1996 until his initial travel to Australia approximately eight years later.

1.6 When asked by the Member whether he felt that he had been discriminated against as a Palestinian in Kuwait, the applicant stated that:

- He felt that he had been discriminated against in both his education and subsequent employment due to his Palestinian nationality;
- Although his family (particularly his father) had instilled in him the great importance of education, he was unable to realise his dream of higher education despite attempting to do so;
- He had found this discrimination to be unbearable for him personally, particularly given his strong desire to study languages and marketing;

1.7 Turning to the issue of his father's redundancy, the applicant stated that:

- After 1990, following the Iraqi invasion of Kuwait, Palestinians in Kuwait were sacked and people had to pay a lot of money in order to continue their residence;
- People tried to take 'revenge' on Palestinians in Kuwait at this time;
- UNHCR at that time offered refugee status to Palestinians in Kuwait but that his father refused it, believing that the situation would improve;
- His father was sacked at this time and never regained his employment as a teacher for [his employer]; and
- His father was rarely able to find employment, and only occasionally managed to secure low-paying, unskilled casual work.

1.8 In discussing his family's residency status, the applicant explained that his brothers all hold a working visa, and that his two older sisters are sponsored by their Syrian husbands. He stated that his mother also has a working visa which includes his younger sister as she still under the age of 21 years.

1.9 The Member then questioned the applicant on his 'leave of absence' from Kuwait in order to study. The applicant explained that in order to extend his permission to be outside the country, his employer was required to take his certificate of enrolment to the Kuwaiti authorities and request his residency to be renewed. He stated that although the usual time limit on travel outside Kuwait is six months, it is able to be extended to one year only at the request of your employer. When returning to Australia in February 2007, the applicant was granted permission to remain outside Kuwait until early 2008, Following his sacking by his employer in May 2007, the

applicant lost his capacity to renew his Kuwaiti residency. On this point, the applicant elaborated;

- Travel document holders (in contrast to citizens or those with passports) have no right to even visit Kuwait;
- Although he has heard rumours of 'self-sponsorship' over many years, he has never known anyone to manage this in practice, including his own parents (despite their residence in Kuwait for over 40 years); and
- He believes that although a technical law may exist allowing self-sponsorship, it is not available in practice.

1.10 The member accepted that the applicant is stateless, and that it would be 'difficult if not impossible' for him to renew his residency given present circumstances. Turning to the issue of whether or not a lack of legal residency would leave him vulnerable to persecution, the applicant explained that were he to be returned to Kuwait, he would live there as an illegal non-citizen. He would not be accepted by the Kuwaiti authorities and is likely to be imprisoned. Asked by the member as to his experiences while living in Kuwait, the applicant reiterated that he had been personally persecuted on the basis of his Palestinian nationality, particularly between approximately 1990 and 2000. He described systematic discrimination under which Palestinians are imprisoned indefinitely (due to their inability to be returned to their country of origin) for any offence, including a lack of required sponsorship.

1.11 The Member then advised the applicant that she had country of origin information before her indicating that people without valid residence permits in Kuwait are ordinarily fined and then deported. Asked whether or not he had any evidence to suggest he would be jailed upon return to Kuwait, the applicant elaborated:

- People with a valid country of citizenship to which they can be returned would usually be deported rather than imprisoned, or after a relatively brief period of imprisonment;
- Since he has no right of return to the Gaza strip, the Kuwaiti authorities have no place to which they could deport him.
- His submission makes reference to the detention of approximately 259 workers for violation of residency laws in 2007;
- He believes he would remain in prison indefinitely, as the Kuwaiti authorities have no place to which they could deport him;
- He is aware of other people being imprisoned until they are able to find alternative sponsorship or another resolution, but that he has no chance of finding a new employer as the holder of a travel document without even visitor's rights;
- If his residency was still valid he may be able to find an alternative employer;
- In the absence of a particular request made by his employer, his ordinary right of residency in Kuwait has expired as a result of an absence of more than six months from Kuwait; and

- In the present circumstances, given his lapse of residency, this option of new sponsorship is not open to him and he would therefore be imprisoned indefinitely.

1.12 Asked what the likely consequences would be of his return to Kuwait, the applicant stated that he would without doubt go to jail. He further stated that he believed this imprisonment would be of significant duration, but that he could not know exactly how long without looking into the Kuwaiti law. The applicant commented that this would be the situation for any Palestinian resident Kuwait whose residence had expired outside the country. The applicant noted that although he has never been inside a Kuwaiti jail, he believes conditions are very poor.

1.13 Following a short adjournment, the Member noted that if laws sanctioning the imprisonment of non-citizens applied generally in Kuwait, that this treatment would not ordinarily constitute persecution for a Convention reason. The applicant noted at this point that while the law may apply generally, it is unequal in its application insofar as Palestinian non-citizens without a valid country of return are particularly discriminated against and affected by it. The applicant agreed that his representative would make further submissions on this point.

SECTION 2. THE APPLICANTS INABILITY TO RETURN TO KUWAIT LEGALLY

2.1 The applicant has previously submitted and provided evidence from the Kuwaiti authorities that he is unable to legally return to Kuwait. The original decision maker also accepted this contention, noting that:

A DFAT advice from 2002 states that Kuwaiti authorities are not likely to admit into the country a Palestinian holding an Egyptian travel document, who was born in Kuwait and lived there for a long period of time, because he was not a Kuwaiti citizen.

The original decision maker further accepted that the applicant does not at present hold the right to enter and reside in Kuwait. As a consequence of this finding, the key question in our submission is therefore whether or not the applicant is likely to be persecuted as a stateless Palestinian whose residency rights in Kuwait have expired, and who is presently outside Kuwait.

SECTION 3: THE APPLICANT'S LAPSE OF RESIDENCY AS CONSTITUTING A WELL FOUNDED FEAR OF FUTURE PERSECUTION

3.1 The applicant's dismissal from employment

The applicant clarifies in his most recent statutory declaration of [date] February dismissed from employment with [his former employer] in May 2007, despite a previous oral agreement between them that his employment would continue until January 2008. A copy of the termination of service letter, [date] May 2007 accompanies this submission. The applicant submits that his employer changed his mind about his ongoing employment due to the strict employee quotas imposed by the Kuwait Ministry of Worker Affairs, and the fact that the applicant would have had an adverse impact upon his business by his inclusion in this quota without being present in Kuwait to actually work. This change in the applicant's employment situation has now caused his legal residency in Kuwait to lapse.

3.2 The lapse in the applicant's Kuwaiti residency

To live permanently in Kuwait, expatriates other than GCC citizens must have 'iqama' - a residence permit. The three main types are work visas, domestic and dependent visas, all of which require a sponsor... To obtain residence on a work visa an offer of employment must first be accepted. The Kuwaiti sponsoring employer then applies for a work permit from the Ministry of Social Affairs & Labour, for which the sponsor needs a copy of the employee's passport.'

As noted by the applicant at the hearing, non-citizens in possession of a travel document, in contrast with passport holders, have no right to enter or reside in Kuwait (1.9). It is as a consequence of this law that he is unable to secure alternative sponsorship and subsequent legal residency.

The applicant has contacted [name deleted: s431(2)] a Kuwaiti lawyer, who confirms that the applicant has no valid residency in Kuwait and that if returned he would be detained (See Annexure A). [The lawyer] further confirms that the applicant has no right to enter Egypt or Palestine. As such, his residency status would be unable to be resolved. The implications of this issue are discussed below.

3.3 The applicant's likely treatment upon return to Kuwait

The applicant has emphasised in both his pre-hearing submission and at hearing that he is likely to be jailed upon return to Kuwait (1.11-1.12). This assertion is corroborated by available country of origin information. The Immigration and Refugee Board of Canada notes that:

By the end of 1998, Kuwait had reduced the number of foreign residents from such groups to, about ten percent of its pre-war total, largely through routing their residence permit renewals through the State Security Service, which often denied their applications. (Kuwait deports foreigners who are unable to renew residence and work permits. Those unable to return to their places of origin may opt to stay in Kuwait, in detention.) Residence renewal denials for Palestinians and Iraqis increased sharply after 1996, when Kuwait implemented the policy.

The US State Department Report on Human Rights for 2008 also confirms that non-nationals in Kuwait are sometimes subject to arbitrary arrest. Furthermore, a number of laws and regulations discriminate against non-nationals, and 'police and security forces were more likely to inflict such abuse on non-nationals, and the 'police and security forces were more likely to inflict such abuse on non-citizens, particularly non-Gulf Arabs.' It commented that no developments had been made on the 2006 case of two non-nationals who died in police custody.

The World Refugee Survey 2008 notes the detention of 259 workers for violating residency laws in January of that year.⁴ The UK Home Office Operational Guidance Note on Kuwait (released 3rd May 2007) comments upon prison conditions in Kuwait as follows:

In their 18 April 2005 report, the National Assembly's Human Rights Defense Committee overcrowding, poor sanitation, inadequate containment of infectious diseases, and lack of sufficient problems in the old prison complex ... There were reports in 2006 that the authorities mistreated and prevented inmate-on-inmate violence, including rape.⁵

We submit that available country of information corroborates the applicant's claim mistreatment upon his return to Kuwait.

3.4 The 'law of general application' test

While it is a settled proposition of Australian law that the enforcement of a generally not ordinarily constitute persecution,⁶ it is equally apparent that a correct application requires the decision maker to look beyond the law itself to see whether the law is intent, or whether it has a discriminatory impact on members of a group recognised under the Convention. As Germov and Motta comment:

To merely characterise a law as being of general application requires a lack of inquiry on the part of the decision-maker, and, in a sense, an acceptance of a value judgement that the law is neutral in its intention. But this represents a gloss on what may be the true purpose of the law.

The applicant falls under the terms of the 1951 Refugee Convention due to his nationality and by reason of his membership of a particular social group. Unlike the case of Applicant A in which the act which gave rise to the well-founded fear of persecution was the only means of identifying the social group, the applicant before the Tribunal at present belongs to a class of people distinguishable by their nationality, by their lack of passport, and their lack of a home country to which they may be deported. It is as a result of the applicant's status as a stateless Palestinian, and the holder of a travel document rather than passport, that he is discriminated against by a law which would at first glance appear to be general in its terms.

The limitation imposed by Justice Dawson in Applicant A upon consideration of the phrase 'particular social group' is that the characteristic or element which unites the group cannot be a common fear of persecution. That is not so in the applicant's circumstances, as outlined above. We would further submit that the Kuwaiti residency law discriminates against people in the applicant's position in that the sanctions imposed for violations of the law are only 'appropriate' to those in breach of the law with a country to which they may be returned.

The 'legitimate objective and appropriate and adapted' test has been discussed by the High Court of Australia in Applicant S v Minister for Immigration and Multicultural Affairs." While we would accept that current Kuwaiti citizenship law may indeed satisfy the 'legitimate objective' test, in that its aim would appear to be protection and integrity of the nation's borders and an exercise of its right to control entry across them, in cases such as the applicant's the law is neither appropriate nor adapted. As held by Gleeson C, Gummow and Kirby JJ, there must be a degree of proportionality in the means used to achieve that [legitimate] objective. As the application of the Alien Residence Law is grossly disproportionate in its treatment of stateless Palestinians, it follows that it is therefore neither appropriate nor adaptive to people falling within that group. The law cannot fairly be described in these circumstances as a law of general application.

3.5 Indefinite imprisonment of the applicant amounting to a well-founded fear of future persecution

Turning to the issue of whether indefinite imprisonment under the Alien Residence Law amounts to persecution, we submit that loss of liberty has traditionally been accepted by the Australian courts as constituting the requisite serious harm. As held by Chief Justice Mason of the High Court of Australia:

Discrimination which involves ... detention ... under penalty of imprisonment for escape or return to amounts prima facie to persecution.

As discussed above (3.3), the applicant would be particularly vulnerable to mistreatment and uncommonly harsh conditions upon his almost certain imprisonment in Kuwait if returned. We would submit that the applicant has clearly established a well-founded fear of persecution for reason of his nationality and membership of a particular social group (stateless non-citizens in Kuwait who are not entitled to hold a passport) in light of the abovementioned factors.

SECTION 4: THE APPLICANTS PREVIOUS TREATMENT IN KUWAIT AS CONSTITUTING DISCRIMINATION

AMOUNTING TO PERSECUTION

The longstanding mistreatment of Palestinians in Kuwait is well-documented, and recognised by the Refugee Review Tribunal in cases such as V95/03377.¹⁴ The UK on Kuwait 2008 states:

Before the 1990 Iraqi invasion there were some 400,000 Palestinians living in Kuwait. Palestinians had originally gone to Kuwait to find work after the war in 1948. At that stage Palestinians were a clear asset to an under-developed Kuwait, which was in need of teachers, labourers and civil servants. Whilst it was hard to acquire citizenship, this was not necessary for long term work and residency. The numbers of Palestinian children were restricted within the Kuwaiti education system...

The Palestinian leadership was seen to support Iraq following the invasion in 1990 and, after Kuwait's liberation, non Kuwaitis, including Palestinians, were subject to many legal restrictions. By 1992 it was estimated that only 30,000 to 40,000 Palestinians remained in Kuwait. Around half of this number had Egyptian travel documents, but because they did not have Israeli identity cards, were not allowed to return to the Gaza Strip, and did not have access to citizenship in Kuwait.¹⁵

Restrictions in both education and employment opportunities have been recognised as serious harm amounting to persecution, in circumstances that do not threaten subsistence. Addressing exclusion from public sector employment in the applicant's country of origin, Justice Mansfield held:

In my view, the tribunal erred in concluding that the ability to obtain work in private enterprise reflects the state upholding the "right to work", where the state either imposes or tolerates a system which precludes certain of its citizens from working in government employment for reasons of religion or political beliefs. Far from treating its citizens equally, the state then is sanctioning discrimination against some of them for Convention reasons. It is difficult to envisage circumstances where such discrimination may, in a practical sense, be insignificant. That is the more so when there is a significant economic disadvantage consequent upon that restriction, although actual economic disadvantage in an immediate personal sense is not *per se* the critical matter. It is unnecessary to resort specifically to relatively recent historical examples to make the point. To characterise the circumstances as not sufficiently serious to constitute persecution in my view fails to acknowledge the fundamental significance of the state positively excluding certain of its citizens for Convention reasons from employment by the state and its organs.

The applicant has further emphasised, both in his submissions and at hearing, his inability to access the Kuwaiti education system and the impact this has had upon his

life (see 1.3 and 1.6). A lack of entitlement to education has been accepted by the Federal Court as a possible component of systematic discrimination amounting to persecution. It is clear that the accepted definition of persecution encompasses a range of deprivation of interests that do not come close to threatening subsistence. We would submit that the applicant's exclusion from the education system in Kuwait is but one indicator of discrimination amounting to persecution for reason of his (Palestinian) nationality.

SECTION 5: CONCLUSION

The applicant claims, and has been able to corroborate, a well-founded fear of persecution on the basis of his nationality (Palestinian) and membership of a particular social group (illegal non-citizens of Kuwait without entitlement to passport of any nationality). Both his past treatment in Kuwait and his likely future treatment upon return are serious enough to constitute persecution. [The applicant] therefore meets the Convention definition of a refugee and both needs and deserves the protection of the Australian Government. We hope you will allow him to settle in Australia to continue his life in freedom and dignity.

INDEPENDENT COUNTRY INFORMATION

55. The Tribunal considered information from external sources relevant to the applicant's claims.

The status of Palestinians in Kuwait

56. Along with most other Arab states, Kuwait is not a signatory to the 1951 Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. Since 1948, Palestinian refugees have been assisted by the UN Conciliation Commission for Palestine (UNCCP) and the UNRWA (United National Relief and Works Agency for Palestine Refugees in the Near East). As a consequence,

because the Palestinian refugees had a UN agency exclusively devoted to their relief, at the international level they were not covered by the 1951 Convention Relating to the Status of Refugees. Article 1D stipulated that the convention should not apply to those persons who at the time were receiving protection or assistance from organs or agencies of the United Nations other than the UN High Commissioner for Refugees (UNHCR). As a result, Palestinian refugees registered with UNRWA and residing in its area of operation lack both the special protection provided for in the convention and the international protection provided by UNHCR (Shiblak, Abbas, 1996, "Residency Status and Civil Rights of Palestinian Refugees in Arab Countries", Journal of Palestine Studies, Vol. 25, No. 3, Spring, p. 37).

57. Other UN legal instruments are also relevant to the rights of Palestinians but whilst receiving some formal acceptance by Arab states, often these formal entitlements were not observed in practice. The Protocol for the Treatment of Palestinians in Arab States, the so-called Casablanca Protocol, was signed by a number of Arab states in 1965 and was designed to ensure residency (though not political) rights were accorded to Palestinians. Other individual decrees and resolutions were adopted by individual states subsequently. The Protocol came under increasing pressure and after the Gulf War the Protocol was effectively revoked in 1991 through Arab League Resolution 5093,

which has been superseded by the internal laws of each host state. Restrictions in varying degrees involving residency rights, freedom of movement, employment, property ownership rights and access to government services are now imposed on RD

holders in all Arab countries. Indeed, education, health and social benefits are increasingly being curtailed, if not denied outright to Palestinians (Shiblak, Abbas, 1996, "Residency Status and Civil Rights of Palestinian Refugees in Arab Countries", *Journal of Palestine Studies*, Vol. 25, No. 3, Spring, p. 42).

58. Until the Gulf War of 1990-91, Palestinians in Kuwait formed the largest group of Palestinians in the region, between 350-400,000, most of whom were 1948 UNRWA refugees holding Jordanian passports or Egyptian travel documents (BADIL Resource Centre 2007, *Survey of Palestinian Refugees and Internally Displaced Persons (2006-2007)* p. 24 – Attachment 2). This number reduced by about half in the first year of the war, and to roughly 25,000 by 1992. There are approximately 6,000 Palestinians in Kuwait, according to USCRI (United States Committee for Refugees and Immigrants 2008, *World Refugee Survey Kuwait 2008* , 19 June) but figures relating to Palestinian population numbers and labour migration in the Gulf countries are imprecise.

Re-entry to Kuwait.

59. Kuwait has exercised restrictions on Palestinian rights to residency for some decades:

Kuwait instituted regulations to control the influx of foreigners from the late 1960's. The pillar of these regulations was the sponsor system, which meant that a kafil – a Kuwaiti employer and sponsor – was responsible for all the legal and financial matters of their non-Kuwait employees. Residency could only be obtained through a Kuwaiti employer, and the employee would have to leave the country once the job was finished or when he reached the age of retirement. Moreover, adult children of immigrants had to leave the country, even those who had been born and grown up in Kuwait, unless they obtained their own individual sponsorship. The sponsor system, with minor variations, is practised by all the Gulf states in their dealings with foreign labour (Hovdenak, A. Pederson, J. Tuastad, D. H. and Zureik, E. 1997, *Constructing Order: Palestinian Adaptations to Refugee Life* , Fafo Institute for Applied Social Science, Oslo).

60. The applicant appears to have no right to re-enter Kuwait without appropriate employer sponsorship, as under this system,

The Kuwait system did not guarantee any permanent residency rights or citizenship for that matter. A series of permits were instituted to regulate the Palestinians' work and their residency rights. The law required that all foreigners leave Kuwait when their employment contract expired and could only reenter when a new contract was written. ...The employer became a guardian regulating the legal and financial dealings of a foreign national in the country...The termination of an employment contract also meant the termination of residency rights, whereas before this law, Palestinians and others were able to arrive in the country without a prior work contract. Not only were foreigners required to leave the country when their contract expired, they could only resume work with a new contract. This was a clear hardship to Palestinians who mostly had no country to return to (Talhami Ghada H. 2003, *Palestinian Refugees: Pawns to Political Actors* , Nova Science Publishers, New York, p. 115).

61. A person found to be without a valid iqam, or residence permit, is fined and deported, according to the Australian website of the Embassy of the State of Kuwait. A work, domestic or dependent visa is required:

Work visas are iqamas granted under articles 17 (for public sector employees) and 18 (private sector employees) of the immigration regulations. To obtain residence on a work visa an offer of employment must first be accepted.

The Kuwaiti sponsoring employer then applies for a work permit from the Ministry of Social Affairs & Labour, for which the sponsor needs a copy of the employee's passport showing full personal details, and any other Kuwait entry visas. A private sector sponsoring employer must then obtain a no-objection certificate (NOC) from the General Administration of Criminal Investigation at the Ministry of the Interior which he does by submitting the employee's personal details.

If the employee is living in a country that has a Kuwaiti Embassy the employer will send him a copy of the work permit, which the employee will take, with a medical certificate, to the Kuwaiti Embassy for endorsement. The Kuwaiti Embassy will have received a copy of the work permit through the Ministry of Foreign Affairs. Those sponsored by private sector companies will require their NOCs and a copy of the employer's authorized signatory as registered for business purposes. Applicants are also required to provide a medical certificate stating that their general state of health is good and that they are free of specific epidemic diseases. The Embassy will then provide an entry visa for Kuwait on submission of the application form.

If the employee is living in a country that has no Kuwaiti Embassy then the sponsor will submit the work permit and NOC to the Ministry of the Interior to obtain the entry visa. If an employee is on a visit visa to Kuwait when he accepts employment, then, once the work permit and NOC are ready, he must leave Kuwait and return on the entry visa the sponsor obtains for him. Once he has entered Kuwait on the entry visa, the employee is required to undergo medical tests and obtain a fingerprint certificate before he can process his residence visa (Embassy of the State of Kuwait (Australia) 2008, "Residency Procedure: Obtaining Residence").

62. The Kuwaitiah.net website states that:

Self-sponsorship is available under article 24 of the immigration regulations to those who have "spent long years in Kuwait" and can obtain a residence permit "for two to five years, provided they can support themselves financially and can produce a certificate of good conduct.

Exit visas are required of government ministers "and some other government institutions". However, "other expatriate[s] do not require exit visas".

Transfer to another sponsor is possible between some categories of employment, e.g. within the public sector or as a domestic servant with a new sponsor. However expatriates 'in the private sector may transfer [to] another sponsor in the private sector only once every two years', except in specified circumstances. The support of the current sponsor is required for all transfers via a letter of release.

Absence abroad

A residence visa is cancelled if the holder is absent abroad for a continuous period of six months. The only exceptions are for those who:

- Are studying abroad
- Are receiving necessary treatment abroad [sic], or
- Are required by virtue of their work to be abroad [sic],

Provided permission in all three cases is obtained before leaving Kuwait (Kuwait Ministry (undated), "Residence Visa", Kuwaitiah.net <http://e-kuwait.ws/kuwaitiah/ministry.html> - Accessed 2 February 2009).

63. In 2007, the Ministry of Interior (not for the first time) offered an amnesty for two months from 1 May to 30 June for those with expired residency visas to regularise their status or to leave the country without penalty:

In a ministerial decree No. 483/2007 issued by First Deputy Prime Minister, Minister of Interior and Defence Sheikh Jaber Al-Moubarak Al-Sabah, expatriates whose residencies have expired or those who do not hold residency permits can avail of the grace period subject to the following conditions:

Article 1: All those who are not subject to travel bans by any concerned legal authority, and who do not hold a residence permit or their residency has expired, must leave the state during the period 1-5-2007 to 30-6-2007 through any border exit point directly without obtaining any permission from any authority.

Article 2: Those who wish to retain or renew their residencies in the state and are ready to pay the applicable fines without being referred for interrogation will also be granted residencies on the condition that they meet all the other relevant criteria.

Article 3: All those apprehended during the amnesty period granted in Article 1 of this decision, and found to be in violation of the residency laws will be deported immediately, unless they are entitled to official deportations as per the law.

Article 4: Expatriates found in violation of other laws and have security restrictions against them (eg. financial liabilities) cannot leave the state. They must abide by the law in setting their legal statuses right by obtaining the required residency permits as per legal requirements and within the granted grace period mentioned in Article 1.

Article 5: Foreigners who leave the state within the period mentioned in Article 1 and were in violation of residency laws will be exempted from any penalties or fines as stated in the Amiri decree 17/59. The law in this Article is not applicable to those who enter the state after the date of issuing this order or those found in violation after the said date.

Article 6: Foreigners who leave in accordance with this law can return back again through legal official procedures unless they are banned for reasons other than residency law violations.

Article 7: Those violators who do not leave the state within the period mentioned in Article 1 will be subject to legal punishments as applicable by the law, will not be granted residencies, will be deported from the state and will never again be allowed to return to the state at any given point of time ("Amnesty for residency violators from May 1" 2007, Kuwait Times, 25 April, http://www.kuwaittimes.net/read_news.php?newsid=MTM0NDM1ODgyMw == - Accessed 3 February 2009).

64. The Kuwaiti parliament recently passed a new labor law bill which will improve employment conditions for foreign workers, however the often-criticised sponsorship system remains unchanged;

Minister of Social Affairs and Labour Bader al-Duwaila said in September the emirate was considering alternatives for the system to meet international labour standards.

The statement came after violent protests by foreign workers demanding better conditions.

Parliament's human rights committee had also called for a review of the sponsorship system to try to stop employers from abusing hundreds of thousands of foreign labourers.

Following the unrest in July, the government introduced a minimum monthly wage of 40 dinars (150 dollars) for cleaners and 70 dinars (261 dollars) for security guards.

However, the ruling applies only to those working for companies on government contracts ("Kuwait parliament approves new labor law" 2009, ABS-CBN News , 29 January, <http://www.abs-cbnnews.com/world/01/29/09/kuwait-parliament-approves-new-labor-law> - Accessed 3 February 2009).

Discrimination against Palestinians in Kuwait, particularly in terms of access to education and employment

65. Treatment of the Palestinian population which remains in Kuwait today is marked by policies which existed before the 1990 Gulf War as well as post-war hostility to the PLO and perceived Palestinian co-operation with Iraq. Reprisals against Palestinians eventually ceased but new policies followed, and these were

designed to strip the remaining Palestinians of any privileges enjoyed by workers prior to the invasion and to encourage their departure. The Palestinians were not reinstated in the government positions, especially the teachers, and civil servants waited until they were officially removed from their positions before leaving the country. Collective punishment was even directed at Palestinian children who were refused permission to government schools and who were no longer eligible to half tuition payments by the government... Free medical care previously enjoyed by Palestinians was now withdrawn. Renewal of identity cards and care license plates became a nightmare for Palestinians who were punished for any evidence of having taken Iraqi identity cards. Kuwaitis were, thus, unwilling to recognize the dilemma of the Palestinians who risked deportation by the Iraqis because of their precarious residency status (Talhami Ghada H. 2003, *Palestinian Refugees: Pawns to Political Actors* , Nova Science Publishers, New York, p. 120).

66. Restrictions on access to education has been in existence in Kuwait for some time, beginning in 1965, when government schools restricted enrolments of non-Kuwaiti students to no more than 25%.

The PLO was later given permission to operate its own schools with teachers, buildings and furnishings supplied by the Ministry of Education. The programme included 22 schools and lasted until 1976, when they were closed for financial and political reasons, and the students incorporated into government schools. In the 1980s, due to overcrowding, the government decided that only children of expatriates who had been in Kuwait since 1 January 1963 would be permitted to register in government schools. Other children would have to enrol in private schools. The government subsequently moved to subsidize tuition for children affected by this ruling by 50%. Ten per cent of places at the University of Kuwait are available for foreign students (Badil Resource Centre 2007, *Survey of Palestinian Refugees and Internally Displaced Persons (2006-2007)* , 12 September, p. 130).

67. According to USCRI,

Recognized “expatriates” (refugees) holding legal residence permits and UNHCR protection certificates could move freely throughout the country.

Although the Constitution provided for residents’ rights of freedom of movement and residence, in practice some workers complained they could not leave their residential camps.

...

The Government granted workers the right to unionize but excluded over half a million domestic servants and an unknown number of marine employees. It ruled further that each occupational trade could have only one union. Foreign private sector workers could join but not lead unions.

Foreign workers had to live under the sponsorship of a registered Kuwaiti company, and could not change employers without the latter’s approval during their first two years in Kuwait.

Labor laws did not protect domestic workers from abuse. Police reportedly arrested and indefinitely detained dozens of domestic servants for alleged immigration violations after they ran away from abusive employers. They fell under the jurisdiction of the MOI rather than the Ministry of Social Affairs and Labor, which regarded such cases as criminal matters rather than labor disputes. Employers also routinely withheld passports and threatened deportation to pressure foreign employees to drop court cases against them.

In early 2008, a prominent opposition MP proposed doing away with sponsorship requirements for expatriates who had lived in Kuwait for 40 years or more.

Public Relief and Education

Kuwait did not have a system of public relief for foreigners. The neediest refugees received assistance from UNHCR, which assisted the Kuwaiti Red Crescent and the government-run Zakat House in providing basic humanitarian aid. Unlike nationals, foreigners had to pay yearly fees to the Ministry of Health for medical coverage to obtain or renew residency or work permits. They also had to pay additional fees each time they received medical care (United States Committee for Refugees and Immigrants 2008, World Refugee Survey Kuwait 2008 , 19 June – Attachment 3).

68. UNHCR notes the parallel lack of reliable statistical information on the Palestinians in the Gulf states with the inability to find a durable solution to their situation. These countries

are gradually reaching the limit of the applicability of their current regulations which consider Palestinians as expatriates. These regulations (immigration, penal) or conditions for accessing basic social services (medical, education, higher education) were not designed for and can not be applicable to the situation of families, such as the Palestinians, that may have been living in the country for 3 or 4 generations. The standard of treatment of some Palestinian refugees has therefore been slowly and silently moving from the status of expatriate to something else, to a new category with a more favourable treatment that still does not exist in the local legislation. The authorities do not want this change in the standard of treatment to be perceived as a gradual local integration. They emphasize on [sic] their international commitment towards the rights of Palestinian refugees and the relevant resolutions of the United Nations and in particular resolution 194 on the right to return (UNHCR 2007,

“Regional Operations Plan 2008. Saudi Arabia, Kuwait, UAE, Qatar, Bahrain, Oman”, September, p. 12).

69. Working conditions for citizens and non-citizens differ significantly;

An institutionalized, two-tiered labor market ensured high wages for citizen employees, most of whom were in government white collar or executive positions, while noncitizen workers, even those in skilled positions, received substantially lower wages. A national minimum wage was in effect for public sector employees. Citizens were guaranteed at least \$700 (200 dinars) per month, while the noncitizen wage was \$320 (90 dinars). The public sector minimum wage provided a decent standard of living for a worker and family. There was no legal minimum wage in the private sector. The minimum wage for domestic workers who signed contracts after October 2006 was \$140 (40 dinars). The MOSAL is responsible for implementing the minimum wage, which was effectively enforced.

The law establishes general conditions of work for the private sector, with the oil industry regulated separately. The law limits the standard workweek to 48 hours with one full day of rest per week; one hour of rest after every five consecutive hours of work; provides for a minimum of 14 workdays of leave each year; and establishes a compensation schedule for industrial accidents. The government had amended the law to extend the weekly one-day rest period to temporary workers employed less than six months and to workers in enterprises employing fewer than five persons. Domestic servants and other unskilled foreign workers in the private sector frequently worked in excess of 48 hours, often with no day of rest and no annual leave. As of October 2006, they were entitled to a weekly day of rest, two daily one-hour rest periods, and a month of annual leave (US Department of State 2008, Country Reports on Human Rights Practices for 2007 - Kuwait , 11 March (section 6)).

FINDINGS AND REASONS

Article 1D

70. Article 1D of the Refugees Convention operates to exclude from the Convention persons presently receiving protection or assistance from a United Nations organ or agency other than the United Nations High Commissioner for Refugees (UNHCR). Article 1D states:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations, other than the United Nations High Commission for Refugees, protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

71. The Full Federal Court in *MIMA v WABQ (WABQ)* held that the first paragraph of Article 1D applies to exclude a person from the Convention if the person belongs to a class of persons who were receiving protection or assistance from organs or agencies of the United Nations other than UNHCR as at 28 July 1951, the date when the Refugees Convention was signed, this being the time referred to by the words ‘at present’ The relevant factual issue in relation to the first paragraph is whether the applicant belongs to the relevant class of persons. In the case of a stateless Palestinian applicant, if Palestinians as a group were as at 28 July 1951 receiving protection or assistance then the first paragraph applies. The Full Court in *WABQ* observed that the United Nations

Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency (UNRWA) appeared to have been providing protection and/or assistance to Palestinians at the relevant time.

72.If a person falls within the terms of the first paragraph, it is then necessary to consider if the second paragraph applies. The Full Court in *WABQ* held that the second paragraph is also concerned with a class of persons rather than individuals and that it is sufficient if either protection or assistance has ceased for any reason in respect of the class (without their position being definitively settled) for the second paragraph to apply. It will not be sufficient that protection or assistance has ceased in relation to an individual member of the class. Whether protection or assistance has ceased in relation to the class of persons is a question of fact for the Tribunal to determine according to the material before it.

73.Whether protection or assistance has ceased in relation to the class of persons is a question of fact for the Tribunal to determine according to the material before it. In relation to a stateless Palestinian applicant, if it is found that either protection or assistance has ceased in relation to the class, the applicant is entitled to have his or her application for a protection visa determined according to the Convention definition in Article 1A(2): *WACG v MIMA* [2002] FCAFC 332 (Hill, Moore and Tamberlin JJ, 8 November 2002).

74.Independent country information available supports the Full Court’s view that there were two UN agencies primarily concerned with the provision of protection or assistance to Palestinians at the time of signing the Convention in 1951: the United Nations Conciliation Commission for Palestine (UNCCP) and UNRWA.

75.The country information indicates that whether or not UNRWA ever did provide protection to Palestinians, it does not do so now. UNRWA provides assistance to Palestinians primarily in the areas of health, education, social and emergency aid (Report from the Fact-Finding Mission to Lebanon, 1-8 May, 1998 , s.5 A - C, Danish Refugee Council and Danish Immigration Service, October 1998). When UNRWA was specifically asked by the Danish researchers for its view of the Article 1(D) clause and its scope, its head office in Gaza stated that:

... [I]t is the UNRWA's clear understanding that its mandate does not extend to protection from persecution, but merely embodies a number of practical aid measures.

76.Independent country information also shows that the UNCCP has not been formally abolished but seems to be largely inactive and has been for many years. BADIL Resource Center for Palestinian Residency and Refugee Rights is, according to its website www.badil.org , “a Palestinian community-based organization that aims to provide a resource pool of alternative, critical and progressive information and analysis on the question of Palestinian refugees” Badil, in an information paper on the UNCCP says:

The United Nations Conciliation Commission for Palestine (UNCCP) was established under paragraph 2 of UN General Assembly Resolution 194(III). The durable solutions for Palestinian refugees displaced in 1948, including internally displaced Palestinians inside Israel. The Commission is composed of representatives of the United States, France and Turkey and is empowered to create sub-organs, as necessary, in order to fulfill its mandate...

By the early 1950s, the UNCCP had reached the conclusion that it was unable to fulfill its mandate. The decision by the UN General Assembly to merge the role of

international protection for the refugees with the larger task of Arab-Israeli conciliation ultimately compromised the Commission's ability to protect and promote the legal rights of the refugees. Moreover, the Committee noted that the conditions for return assumed under Resolution 194 had changed in the intervening years since the adoption of the resolution... <

Since this period, the UNCCP has not provided Palestinian refugees with the basic international protection accorded to all other refugees.

77. Since the independent evidence shows that the class of persons to which the applicant belongs does not enjoy protection from a relevant UN body, the Tribunal finds that the applicant is not excluded from the Convention.

Statelessness

78. The applicant is the holder of an Egyptian Travel Document for Palestinian Refugees. With regard to Egypt, according to the independent evidence a person born in the Gaza Strip [or in this case whose parents were born in Gaza] and who has been granted an Egyptian travel document does not have the right to reside in Egypt, and according to the independent evidence [Country Information Report 493/00, Palestinian refugees: Residency and citizenship rights in Egypt, CISNET Document No.:CX44686, 29 June 2000], citizenship is not offered to the vast majority of Palestinians. The Egyptian government has granted citizenship to only a "handful" of Palestinians, most of whom are multi-millionaires. According to an article on the legal status of Palestinians in the Middle East, since 1991 it has been very difficult for Palestinians to even obtain entry visas to Egypt. The Tribunal is satisfied from the applicant's claims and evidence and the independent evidence that he is not a citizen of Egypt and has no right of residence in that country.

79. The applicant provided a document issued by the Palestinian authorities, which states that the applicant is not allowed to enter or reside in Gaza or the Palestinian Territories.

80. The applicant was born in Kuwait and the Tribunal is satisfied, on the evidence before it, that the applicant cannot access citizenship of that country and is unable to return to that country because his residency there has expired.

81. Accordingly the Tribunal accepts that the applicant is stateless. However refugee status will not be accorded to a person merely because they are stateless and unable to return to their country of former habitual residence. Whilst the Tribunal accepts that the applicant may be unable to return to Kuwait, his country of former habitual residence, as suggested by the applicant and supported by the independent evidence [which suggests that there is no automatic right of return], in accordance with *Savvin's Case* [2000] FCA 478 (12 April 2000) the Tribunal must consider whether or not the applicant has a well founded fear of persecution for a Convention ground in the reasonably foreseeable future in his country of former habitual residence.

Country of Former Habitual residence

82. Under Article 1A(2) of the Refugees Convention, a person without a nationality (i.e. stateless) must be assessed against his or her "country of former habitual residence". The Tribunal has considered which country could be said to be the applicant's "country of former habitual residence".

Egypt

83. Although the applicant is the holder of a Travel Document issued by the Egyptian authorities, the applicant has never resided in Egypt - in fact he has never even travelled to Egypt. The independent evidence [above] suggests that the applicant would be unable to enter or reside in Egypt. On the evidence before it, Egypt is not the applicant's "former habitual residence".

Palestine

84. The applicant provided a document issued by the Palestinian authorities, which states that the applicant is not allowed to enter or reside in Gaza or the Palestinian Territories. On the evidence before it, the Tribunal finds that neither Gaza nor the Palestinian Territories are the applicant's "former habitual residence".

Kuwait

85. The applicant was born in Kuwait [date of birth deleted: s431(2)] He resided in Kuwait for most of his life. His mother and siblings reside in Kuwait and the applicant underwent his primary, secondary and part of his tertiary education in Kuwait. The applicant worked in Kuwait for several years. The Tribunal finds that Kuwait is the "country of former habitual residence" of the applicant.

Well founded fear

86. The applicant's claims are based on the convention grounds of race, nationality and membership of a particular social group namely as a Palestinian who was formerly resident in Kuwait. He was born in Kuwait to Palestinian parents who left Gaza in 1967. The family then moved to Kuwait where the applicant was born.

87. At the hearing, the applicant provided his evidence in an unblemished manner entirely consistent with his written claims. The Tribunal found him to be a credible and truthful witness.

88. The applicant's claims and evidence in regard to Kuwait are to the effect that Palestinians are discriminated against in Kuwait in relation to education, employment and in travel restrictions. The Tribunal notes that a denial of employment on the basis of a Convention reason might constitute persecution in circumstances where that denial gives rise to a denial of the applicant's basic human rights (such as where the denial of employment would in turn prevent or limit the applicant's access to adequate housing, food and other rights set out in international treaties and conventions). The Tribunal does not, however, accept that the applicant has been denied employment by reason of his race or any Convention ground. He has worked in a sales and marketing position in Kuwait for many years before he came to Australia.

89. Similarly in relation to education, the Tribunal accepts that Palestinians are discriminated against in relation to public education. However the applicant was able to not only complete his primary and secondary education in Kuwait but to study at tertiary level and obtain a diploma. The fact that he was forced to study in a private institution and was not able to enter a public institution because he was a Palestinian indicates that there

is discrimination against Palestinians in Kuwait but the Tribunal finds that this does not amount to the level of 'serious harm' required under section 91R of the Act.

90. The applicant has had access to a high level of education and had access to employment opportunities and therefore the Tribunal finds that the applicant had not suffered persecution under the Convention in the past in Kuwait on this basis
91. In relation to his claim that his freedom of movement has been restricted due to his race, the Tribunal accepts that restrictions are imposed on Palestinians in Kuwait and that this may have caused him difficulties in being able to travel for his employment in the past. However restricted freedom of movement would not in these circumstances amount to persecution which entails "serious harm", a defining characteristic of persecution.
92. The Tribunal therefore finds that the applicant has not suffered persecution for a Convention reason resulting in serious harm in the past in Kuwait.
93. However the Tribunal must consider whether the applicant is likely to suffer persecution for a Convention reason should he return to Kuwait in the future.
94. The applicant has stated that he fears that he would be imprisoned if he returned to Kuwait because his residency has expired. He has submitted a document from a Kuwaiti lawyer which stated that he no longer holds a valid residency permit and that if he attempted to return to Kuwait he would be subject to deportation to the country of his departure or be detained considering his status.
95. The Tribunal accepts that the applicant's circumstances changed when his employer in Kuwait terminated his employment after he arrived in Australia. The Tribunal accepts that the termination of the applicant's employment directly impacted on his residence status in Kuwait and his ability to return to that country.
96. According to the country information referred to above, residence permits in Kuwait are issued through employment sponsorship on a temporary basis. The Tribunal accepts that the applicant's residence permit was cancelled as soon as his employment came to an end. On the basis of the evidence before it, the Tribunal finds that the applicant does not have the right to re-enter Kuwait.
97. Despite undertaking research into this issue, the Tribunal was unable to find any evidence that Palestinians have been subject to indefinite detention as claimed. Whilst the Tribunal accepts that this does not mean that such an event has not occurred in Kuwait and the Tribunal therefore accepts that should the applicant seek to return to Kuwait, there may be a possibility that he would be subject to indefinite detention as a result of his lack of residence rights, the Tribunal does not find that this would be for a Convention ground. The Tribunal considers that such a Kuwaiti law in relation to non residents could be considered to be a law of general application.
98. Enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention, for the reason that enforcement of such a law does not ordinarily constitute discrimination. As Brennan CJ stated in *Applicant A*:

... the feared persecution must be discriminatory. ... [It] must be "for reasons of" one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non discriminatory kind for contravention of a criminal

law of general application. Such laws are not discriminatory and punishment that is non discriminatory cannot stamp the contravener with the mark of “refugee”.

99. To come within the Convention it must still be shown that the law, no matter how harsh, discriminates for a Convention reason.

100. The principle that, ordinarily, non-discriminatory application of generally applicable laws does not constitute persecution, applies whether or not a particular law is oppressive or repugnant to the values of our society. In *Applicant A (above)*, Dawson J agreed with the observations of the Full Federal Court in that case that:

Since a person must establish well founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.

101. Whether a law is properly characterised as a law of general application turns on identifying those members of the population to whom it applies. In some circumstances, it may be necessary to look behind a law that is generally expressed, to establish whether the law itself is in truth discriminatory in its intent or whether it has a discriminatory impact on members of a group recognised by the Convention.

102. The High Court in *Chen Shi Hai v MIMA* (above) confirmed that laws or policies which target, or only apply to, or impact adversely upon, a particular section of the population are not properly described as laws or policies of general application.

103. In *Lama v MIMA* [1999] FCA 918 (8 July 1999) Tamberlin J held that:

... it is apparent that the laws of a nation, both legislative and judicial, to a large extent reflect the values of that nation. Some of these religious or ethical values will be of an abiding nature and others will vary from time to time due to changes arising from social, scientific, educational or technological developments. However, the fact that the law of a country may enshrine particular religious values does not mean that such laws can be described as targeting members in that society who do not adhere to the religion in question. In the present case, the law does not impact on the applicant in any way different to that in which it impacts upon other members of Nepalese society. It is a law of general application and the evidence does not support a conclusion that the law is applied in a discriminatory way. Although it is unlikely that a Hindu may kill a cow, in the event that he or she does so, the prescribed penalties apply. What is governed by the law is the act of killing the cow and not the social or political or religious beliefs of the person who commits the killing.

104. In this case the law complained of by the applicant applies to all people who are non citizens in Kuwait and who do not hold residency permits. The Tribunal must consider whether it operates in a discriminatory fashion.

105. The law in this case, while being one of general application at one level of generality (in that it applies to all non citizens of Kuwait who do not hold residency permits) at a more narrow level arguably imposes a burden on Palestinians who have no country to be

deported to and it is submitted this means they are treated differently. This will constitute discrimination if a relevant difference does not exist for this. In the context of refugee law, the concept of relevant difference is tied to the notion of the legitimacy of the objective of the law and whether the law is appropriate and adapted to achieve the objective.

106. Even if a law or its application results in discriminatory treatment, such treatment will not necessarily constitute persecution. It is settled law in Australia that where a law or policy results in discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group, the question of whether the discriminatory treatment constitutes persecution for that reason ultimately depends on whether that treatment is “appropriate and adapted to achieving some legitimate object of the country [concerned]” (see *Applicant A*).
107. Whether a law or its enforcement is “appropriate and adapted” to achieving a legitimate object involves consideration of proportionality of the means used to achieve that object. A legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens. Thus, enforcement of a generally applicable criminal law, or the enforcement of laws designed to protect the general welfare of the state, would not ordinarily constitute persecution. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.
108. However, a law or its purported enforcement will be persecutory if its real object is not the protection of the state but the oppression of the members of a race, religion, nationality etc. Generally, sanctions aimed at persons for reasons of race, religion or nationality will not be an appropriate means for achieving a legitimate government object and are likely to amount to persecution. In *Applicant A*, McHugh J stated:
- Conduct will not constitute persecution ... if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.
109. Thus, the courts have inferred that a law will not have the necessary persecutory quality even if it imposes an additional burden on some members of a community if the law has a legitimate objective and is appropriate and adapted to achieving that objective. The principle is that there can be no persecution where there is a relevant reason for the different treatment and a relevant reason will always exist where the law in question has a legitimate objective and is appropriate and adopted to achieving this.
110. A legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the state and its citizens. The law is question

would appear to be designed to ensure that only non citizens with residency permits can reside in Kuwait. In the context of interpreting the Convention this would appear to be a legitimate object.

111. In determining whether prosecution and penalty under a national law can properly be regarded as appropriate and adapted to achieving a legitimate object of the country, international human rights standards as well as the laws and culture of the country are relevant matters. In *Chen Shi Hai v MIMA*, it was stated that:

[w]hether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.

112. The law in relation to non Palestinians appears to be such a law as it applies equally to all non Kuwaiti citizens. The Tribunal accepts that non Palestinians would be detained but then deported to their country of origin. Whilst Palestinians may be subject to potentially indefinite detention in Kuwait due to the fact that there is no country to deport them to, the Tribunal considers this is not for a reason of a Convention ground but as the result of the application of a law of general application.

113. Accordingly, the Tribunal based on the evidence before it, finds that the applicant does not face a real chance of persecution for reasons of his race, imputed political opinion or particular social group, his religion or any other Convention related reason.

Humanitarian considerations

114. The Tribunal has considerable sympathy for the applicant's circumstances. The applicant travelled to Australia to study and due to his studies he has lost his residency in Kuwait. The applicant was born in Kuwait and lived his whole life there until he came to Australia to study. Almost all of his immediate family members reside in Kuwait and he is unable to return there. The fact that he is unable to ever receive citizenship in Kuwait despite these circumstances does appear repugnant to the values of our society. The Tribunal accepts that Palestinians are discriminated against in Kuwait but not to the degree required to constitute serious harm under section 91R of the Act. The Tribunal accepts that the applicant cannot return and enter Kuwait and has no right to enter and reside in any other country. However, these are not matters that the Tribunal can take into account in making a decision. Only the Minister has the discretion to intervene and take humanitarian circumstances into account.

115. Having regard to the applicant's circumstances as outlined above and having considered the ministerial guidelines relating to the Minister's discretionary power under section 417 set out in PAM3 "Minister's guidelines on ministerial powers (sections 345, 351, 417, 454 and 501J) the Tribunal considers this case should be referred to the Department to be brought to the Minister's attention.

CONCLUSION

116. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

117. The Tribunal affirms the decision not to grant the applicant a protection visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44