A-20-96

Marwan Youssef Thabet (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Thabet v. Canada (Minister of Citizenship and Immigration) (C.A.)

Court of Appeal, Linden, McDonald JJ.A. and Henry D.J."Toronto, March 2; Ottawa, May 11, 1998.

Citizenship and Immigration — Status in Canada — Convention refugees — How stateless person habitually residing in more than one country may establish claim for Convention refugee status — Appellant, stateless Palestinian, lived in Kuwait and U.S.A. before applying for refugee status in Canada — Whether claim must be established in respect of all countries of habitual residence — Persecuted persons not having absolute right to demand protection by Canada: Canada (Attorney General) v. Ward — Claim to refugee status not to be resorted to unless all other possibilities exhausted — Person not refugee solely by virtue of statelessness — Test to be applied as to which country relevant to determination of claim: any country plus Ward factor — Immigration and Refugee Board asking appropriate question as to why applicant denied entry to Kuwait, country of former habitual residence.

This was an appeal from a Trial Division decision dismissing an application for judicial review of a decision by the Immigration and Refugee Board that the appellant was not a Convention refugee because he had not made out his fear of persecution in either of his two countries of former habitual residence. The appellant, a stateless Palestinian, was born in Kuwait and lived there on a residency permit sponsored by his father until he moved to the United States where he obtained an engineering degree. After his application for asylum in the United States was rejected, he came to Canada where he applied for refugee status. The Board found that both Kuwait and the U.S.A. were countries of former habitual residence and that the appellant had failed to demonstrate a well-founded fear of persecution against both. On appeal, the Trial Judge ruled that the Board erred in not asking itself whether the denial of a right to return to Kuwait was in itself an act of persecution, and in stating that the applicant must establish his claim by reference to each country of former habitual residence. Instead, he found that the latter had to establish his claim by reference to the last country of former habitual residence. The issue herein, as reflected by the question certified by the Trial Judge, was how a stateless person, who has habitually resided in more than one country, may establish his claim for Convention refugee status.

Held, the appeal should be dismissed.

Although Canada is a signatory to the *United Nations Convention Relating to the Status of Refugees*, its obligation to victims of persecution is not unqualified. Not every persecuted person has an absolute right to come to Canada and demand its protection, as that point was made clear by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*. The claim to refugee status should not be resorted to

unless all other possibilities have been exhausted. Where a person does fear persecution in some state, but subsequently acquires the right to protection from that persecution in a second state, that person ceases to be a refugee. The Convention is meant to apply to those people who are without protection. Because someone is persecuted somewhere does not mean that he is automatically granted refugee status. There is no question that stateless persons may qualify as refugees; however, people are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention and comply with those other sections of the *Immigration Act* which restrict access to the refugee determination process. Statelessness does not give a person an advantage over refugees who are not stateless.

There are four possible answers to the question as to which countries are relevant to the determination of a claim where a stateless person has habitually resided in more than one country. The first possibility is the last country of former habitual residence. This approach has a certain linguistic and logical coherence and is easy to administer, but is not the best solution. Its main flaw is that it leaves open the possibility that a person may be returned to a persecuting state, which is not in keeping with the intent of international refugee law and could put Canada in contravention of Article 33 of the Convention. The country relevant for the determination of a refugee claim could also be the first country of former habitual residence where the claimant faced persecution. This view suggests that a person becomes a refugee when he faces persecution and remains a refugee so long as the threat of that persecution persists in the original country. But the question is not whether someone faces persecution, but whether the claimant can be protected from that persecution. The latter must also show that he is without a safe alternative. This second option fails to address this point and, therefore, is deficient. The third option, which requires that a claimant establish a claim against all countries of former habitual residence, suggests that only states to which claimants are formally returnable should be relevant. This approach is not entirely satisfactory since it is unclear what is meant by "formally returnable". The fourth option is that a claimant need only establish a fear of persecution with respect to any country of former habitual residence. This option is also not entirely satisfactory as it pays insufficient attention to the requirement that a stateless person, like other refugee claimants, must establish unwillingness or inability to avail himself of the protection of places of former habitual residence. The test to be applied is a variation of the "any country" solution, that is any country plus the *Ward* factor. Where a claimant has been resident in more than one country, it is not necessary to prove that there was persecution at the hands of all those countries; but it is necessary to demonstrate that one country was guilty of persecution and that the claimant is unable or unwilling to return to any of the states where he formerly habitually resided. Stateless people should be treated as analogously as possible with those who have more than one nationality. Canada has no obligation to receive refugees if an alternate and viable haven is available elsewhere. The certified question was answered as follows: In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities, he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence.

The Trial Judge found that the Board erred by not asking itself whether the denial of the appellant's right to return to Kuwait was in itself an act of persecution. The Board

did address the question as to why the appellant was unable to return to Kuwait: he lacked a valid residency permit. This satisfied the requirement that the Board inquire into the reasons for denial of entry into one's country of former habitual residence.

statutes and regulations judicially considered

Convention Refugee Determination Rules, SOR/93-45, R. 14(3).

Immigration Act, R.S.C., 1985, c. I-2, ss. 2(1) "Convention refugee" (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1), (1.1) (as enacted by S.C. 1992, c. 49, s. 1), (2) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1), 14(1)(*c*) (as am. by S.C. 1992, c. 49, s. 8), 46.01(1)(*b*) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36), 46.03(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 37), 46.04(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 38), 114(1)(*s*) (as am. *idem*, s. 102).

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Arts. 1E, 33.

cases judicially considered

followed:

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321.

considered:

Maarouf v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 723; (1993), 72 F.T.R. 6; 23 Imm. L.R. (2d) 163 (T.D.); *Martchenko et al. v. Canada (Minister of Citizenship and Immigration)* (1995), 104 F.T.R. 59 (F.C.T.D.); *Abdel-Khalik v. Minister of Employment and Immigration* (1994), 73 F.T.R. 211; 23 Imm. L.R. (2d) 262 (F.C.T.D.); *Altawil v. Canada (Minister of Citizenship and Immigration)* (1996), 114 F.T.R. 241 (F.C.T.D.).

referred to:

Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589; (1993), 109 D.L.R. (4th) 682; 22 Imm. L.R. (2d) 241; 163 N.R. 232 (C.A.); *Khatib v. Canada (Minister of Citizenship and Immigration)* (1994), 83 F.T.R. 310 (F.C.T.D.); affd *sub nom. El Khatib v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 968 (C.A.) (QL).

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APPEAL from a Trial Division decision ([1996] 1 F.C. 685; (1995), 105 F.T.R. 49) dismissing an application for judicial review of a decision of the Immigration and Refugee Board that the appellant, a stateless Palestinian, was not a Convention refugee because he did not have a well-founded fear of persecution if he were to return to either of his two countries of former habitual residence. Appeal dismissed.

appearances:

Ghina Al-Sewaidi for appellant

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Ghina Al-Sewaidi, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Linden J.A.: The issue to be decided in this appeal is how a stateless person, who has habitually resided in more than one country, may establish his or her claim for Convention refugee status.

The facts are straightforward. The appellant was born in Kuwait and is a stateless Palestinian. His father is a Palestinian and currently works as a physician for the Kuwaiti government. The appellant lived in Kuwait on a residency permit sponsored by his father. In 1983 the appellant left Kuwait to study in the United States, where he obtained an engineering degree. In 1986 his residency status in Kuwait came to an end and he returned to Kuwait to make an independent application to renew his residency permit, which was denied. He therefore returned to the U.S. on a visitors visa, where he lived for 11 years. While in the United States he married twice, his first marriage being a marriage of convenience, worked both legally and illegally, filed income tax returns, obtained a social security card as well as employment authorization.

After the outbreak of the Gulf War, the appellant sought asylum in the United States. His application for asylum was rejected and he was ordered deported. He filed an appeal but abandoned it and came to Canada where he applied for refugee status. Before the Immigration and Refugee Board, the appellant based his claim for Convention refugee status on the ground that Kuwait was his country of former

habitual residence and that he feared persecution there if he returned. He also claimed to fear persecution in the U.S. because, while living in Louisiana, he experienced harassment, threats and incidents of violence at the hands of the Ku Klux Klan. He abandoned this claim at the trial level and it was not pursued on appeal.

The Board found that both Kuwait and the U.S. were countries of former habitual residence and that the appellant had to demonstrate a well-founded fear of persecution against both in order to be granted Convention refugee status. According to the Board, the appellant had not made out his fear of persecution in either country and it denied his claim for Convention refugee status. The appellant applied for judicial review to the Trial Division [[1996] 1 F.C. 685].

Reasons of the Trial Judge

The Trial Judge found that the Board erred in not asking itself whether the denial of a right to return to Kuwait was in itself an act of persecution. He found that, because the Board might have reached a different conclusion had it addressed this question, its decision was vulnerable. However, the Trial Judge went on to hold that while the Board was correct to find that both the U.S. and Kuwait constituted countries of former habitual residence, it erred in stating that the applicant must establish his claim by reference to each country. Instead, the Trial Judge found that a stateless person, who has habitually resided in more than one country before making a refugee claim, must establish his or her claim by reference to the last country of former habitual residence. The application was therefore dismissed as the appellant had conceded he did not fear persecution in the U.S. The following question was certified by the Trial Judge [at page 701]:

Whether a stateless person who has habitually resided in more than one country prior to making a refugee claim must establish his or her claim by reference to all such countries or by reference to some only, and if by reference to some only, by reference to which.

Analysis

A Convention refugee is defined by subsection 2(1) of the *Immigration Act*:[1]

2. (1) . . .

"Convention refugee" means any person who

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(*b*) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

The "Convention" referred to is the *United Nations Convention Relating to the Status of Refugees* , signed at Geneva on July 28, 1951 [[1969] Can. T.S. No. 6].

While Canada is a signatory to that Convention, our obligation to those persons who are victims of persecution is not unqualified. It is not every persecuted person's absolute right to come to Canada and demand protection. In *Canada (Attorney General) v. Ward*[2] La Forest J. makes this point very clear:

International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.[3]

In other words, if persecuted persons have other alternatives, these must be exhausted before their claim can be determined in this country. This is reflected in both domestic and international law.

It is stated in the Convention, and has been incorporated into the Act as a schedule, that a person who would otherwise qualify as a Convention refugee is excluded from obtaining that status if that person has the rights of a national in a non-persecuting state. Section E of Article 1 of the Convention reads:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

As La Forest J. points out, the claim to refugee status should not be resorted to unless all other possibilities have been exhausted. Where a person has fled a country where persecution took place but was subsequently able to settle in a second country and acquire the rights of a national in that country, then it cannot be said that that person is still a refugee.

This is not dissimilar to the cessation provisions in the Act. Subsection 2(2) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1] states:

2. (1) . . .

(2) A person ceases to be a Convention refugee when

(*a*) the person voluntarily reavails himself of the protection of the country of his nationality;

(*b*) the person voluntarily reacquires his nationality;

(*c*) the person acquires a new nationality and enjoys the protection of the country of that new nationality;

(*d*) the person voluntarily re-establishes himself in the country that the person left, or outside of which the person remained, by reason of fear of persecution; or

(*e*) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

Paragraph 2(2)(*c*) addresses the situation where a person does fear persecution in some state, but subsequently acquires the right to protection from that persecution in a second state. That person ceases to be a refugee.

This attention to the question of available protection was also the justification given in *Ward* for requiring those claimants with multiple nationalities to establish their claim with reference to all those countries of which they are a national. In that case the Board had found that the claimant would have been in danger if he had been returned to the United Kingdom but that there had been no finding as to whether protection could be provided to him there. The decision was flawed because as La Forest J. stated:

The fact that Ward's life will be in danger should he be returned either to Ireland or to Great Britain is not disputed by anyone; the question, rather, is whether Ward can be protected from that danger. The Board never made a finding of fact on the real issue"the ability of the British to protect Ward.[4] [Emphasis in original.]

The Act also contains some elaborate mechanisms to protect Canada's territorial integrity from those persons who have had the opportunity to have their refugee claim determined in other forums. Paragraph 46.01(1)(*b*) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36] of the Act reads:

46.01(1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person

. . .

(*b*) came to Canada, directly or indirectly, from a country, other than a country of the person's nationality or, where the person has no country of nationality, the country of the person's habitual residence, that is a prescribed country under paragraph 114(1)(*s*);

This prevents potential claimants from having their claims determined in Canada where they have come to this country *via* other nations that are prescribed countries under paragraph 114(1)(*s*) [as am. *idem*, s. 102]. That paragraph reads:

114. (1) The Governor in Council may make regulations

. . .

(*s*) prescribing, for the purpose of sharing responsibility for the examination of persons who claim to be Convention refugees, countries that comply with Article 33 of the Convention.

Article 33 of the Convention is the non-*refoulement* [return] provision, by which signatory nations undertake not to return refugees to persecuting states. It states:

Article 33

Prohibition of Expulsion or Return (—Refoulement—)

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

As a result of this scheme claimants who have come to Canada from those signatory states cannot have their claims determined in Canada.

Subsection 46.01(1) must be read in conjunction with subsection 46.03(1) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 37], which reads:

46.03 (1) Where a removal order is made against a person who has been determined not to be eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(*b*), but the person

(*a*) cannot be removed from Canada to a country prescribed pursuant to paragraph 114(1)(*s*),

(*b*) having been removed from Canada, is allowed to come into Canada pursuant to paragraph 14(1)(*c*), or

(*c*) having been allowed to leave Canada voluntarily, has not been permitted entry to the country from which the person had come to Canada and is allowed to come to Canada pursuant to paragraph 14(1)(*c*),

a senior immigration officer shall forthwith refer the claim to the Refugee Division in the manner and form prescribed by rules made under subsection 65(1).

The result is that the claimant, if unable to obtain the protection of another prescribed country, will then be permitted to have his or her claim determined by the Refugee Division. The reference to paragraph 14(1)(*c*) [as am. *idem*, s. 8] is again to a provision that allows an immigration officer to admit a person to the country where he or she have been unable to find refuge elsewhere. That paragraph provides:

14. (1) Where an immigration officer is satisfied that a person whom the officer has examined

. . .

(*c*) is a person against whom a removal order has been made who has been removed from or otherwise left Canada but has not been granted lawful permission to be in any other country . . .

the officer shall allow that person to come into Canada.

The Act also allows the removal of Convention refugees from Canada where that removal would not contravene Article 33 of the Convention. If a person, despite having come from a country willing to protect him or her, is found to be a Convention refugee, this does not grant that person the automatic right to remain in Canada. Section 46.04 [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 38] of the Act provides for this contingency:

46.04 (1) Any person who is determined by the Refugee Division to be a Convention refugee may, within the prescribed period, apply to an immigration officer for landing of that person and any dependant of that person, unless the Convention refugee is

. . .

(*d*) a person who has permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

As well, it is settled that a refugee claimant who has recourse to an internal flight alternative is not a refugee.[5] If a person is subjected to persecution in one part of a country, but has the option of moving to another part of the country where he or she will be safe from persecution, then that person must take advantage of the protection available. It is not the aim or the desire of refugee law that people who have protection available to them should have recourse to the rights accorded by the Convention. The Convention is meant to apply to those people who are without protection.

The tenor of these provisions is in keeping with La Forest J.'s pronouncement in *Ward*. Because someone is persecuted somewhere does not mean he or she is automatically granted refugee status. That person may be subject to the exclusion clauses. The cessation provisions may be applicable. There may be an internal flight alternative. The claimant may have come here via a third country where a claim could have been made. He or she may possess nationality of a second country which would be willing to afford him or her protection. In all these cases the person is not a Convention refugee.

There is no reason why stateless persons should be any more or less accommodated in their claims to refugee status. There is no question that stateless persons may qualify as refugees; the definition acknowledges this explicitly. However, people are not refugees solely by virtue of their statelessness. They must still bring themselves

within the terms of the definition set forth in the Convention. And they must still comply with those other sections of the Act which restrict access to the refugee determination process. Statelessness does not give a person an advantage over those refugees who are not stateless.

However, it is important to note the key distinction between the two groups of people so that neither advantages nor disadvantages are created. This distinction is contained in the wording of the refugee definition itself. In the case of nationals it talks of the claimant being "unwilling to avail himself of the protection of that country". In the case of stateless persons it talks only of an unwillingness to return to that country. In this latter case the question of the availment of protection does not arise.[6] The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible.

Given these considerations, in the case of a stateless person who has habitually resided in more than one country, which of those countries is relevant to the determination of the claim? There are four possible answers to this question. The relevant country might be the first country of former habitual residence. It might be the last country of former habitual residence. It may be all of those countries, or it might be any one of those countries. Each of these options has something to recommend it, but each also has drawbacks.

The Last Country of Former Habitual Residence

The Trial Judge supported the view that it was only the last (most recent) country of former habitual residence that is relevant to a refugee claim. He based this view on two grounds. First, the Act makes provision for claimants possessing more than one nationality, but no provision is made for stateless persons in a similar situation. This implies that the drafters did not wish for the same provision to apply to stateless persons. If they had, it would have been a simple proposition. Secondly, subrule 14(3) of the *Convention Refugee Determination Division Rules*[7] indicates that, in the case of a stateless person, all references to nationality should be read as references to the claimant's "*dernier pays de résidence habituelle*" [emphasis added]. This supports the view that "former" in the English text should be read in the sense of "last", to be consistent with the French word "*dernier*".

While this approach has a certain linguistic and logical coherence and is easy to administer, it is not the best solution. Its main flaw is that it leaves open the possibility that a person may be returned to a persecuting state, something that concerned counsel for the claimant. Where the claimant has fled from persecution in a first country and settled in a second country where he or she is not persecuted, if the person's claim is judged only with reference to that second country then the claim will surely fail, with the result that he or she may be returned to the first country. This is not in keeping with the spirit or intent of international refugee law, and could create a situation where Canada is in contravention of Article 33 of the Convention. In addition, the French version of the definition in the statute (rather than the Rule) does not employ the word "*dernier*", but uses words equally vague as the English version.

First Country of Former Habitual Residence

Atle Grahl-Madsen supports the view that the country relevant for the determination of a refugee claim is the first country of former habitual residence where the claimant faced persecution. He states:

It follows that the country of which he was a national at the relevant date is the `country of his nationality' in the sense of the said provision, and that it remains as such irrespective of whether he eventually loses his nationality. Similarly, the country from which a stateless person had to flee in the first instance, remains the `country of his former habitual residence' throughout his life as a refugee, irrespective of any subsequent changes of factual residence.[8]

This view suggests that a person becomes a refugee when he or she faces persecution and remains a refugee so long as the threat of that persecution persists in the original country. But the question is not whether someone faces persecution, but whether the claimant can be protected from that persecution. Just as La Forest J. in *Ward* stressed the importance of establishing that the claimant cannot be protected by the relevant states, a similar question must be asked of stateless persons. Are they being persecuted and are no states with which they have a connection willing to protect them? Grahl-Madsen's thesis fails to address this point and, therefore, is deficient. The finding of persecution is a necessary but not sufficient condition to a claim for refugee status; the claimant must also show that he or she is without a safe alternative. If we assess refugee status by reference only to the first country, the possibility of havens in other states is ignored, something that cannot be done if we are to be content with *Ward*.

All Countries of Former Habitual Residence

The requirement to show an inability or unwillingness to return to all countries of former habitual residence is consistent with the need, in cases of multiple nationality, to establish a claim against all countries of which one is a national. Insisting that stateless persons validate their claims against all countries of former habitual residence would encourage a degree of symmetry between the concepts of nationality and habitual residence. Professor Hathaway is a proponent of this approach. In responding to the argument of Atle Grahl-Madsen he states:

Under this rubric, Atle Grahl-Madsen's argument that country of former habitual residence should usually be equated with the state in which the stateless claimant first experienced persecution is not fully sustainable. The country from which flight first occurred is often the state to which the refugee claimant retains the greatest formal legal ties, simply because subsequent states of residence which admitted her on the basis of her fear of persecution may not have granted her an unconditional right to return. On the other hand, the refugee claimant may have as strong or stronger formal ties to some other country or countries, in which case the claim to need protection should be assessed in relation to any and all countries to which she is formally returnable. This position respects the need for symmetrical treatment of persons with and without nationality, since in the case of the former group the Convention requires proof of lack of protection in all states of nationality.[9]

This view, however, should be considered in light of Professor Hathaway's comments with respect to nationality. A right to a second nationality, or the possession of a valid passport of a second nation, does not in and of itself indicate that a claim to refugee status will fail if not made out against both nations. The important point is that the second nation must be shown to be able and willing to protect the claimant. He states:

The major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure *effective*, rather than merely formal, nationality.[10]

Professor Hathaway does propose that stateless persons be treated analogously with claimants who possess a nationality. But implicit in this proposition is the notion that in both cases we are concerned with people who possess real rights. If a second nationality is only formal, and does not accord the holder substantive rights, then it is not a bar. Similarly, in the case of stateless persons, his proposition is that only states to which claimants are formally returnable should be relevant. The basis for this is that people cannot be refugees from a place to which they cannot return, because they cannot fear persecution from that state in the future.

However, the Court, in *Maarouf*[11] and elsewhere, has determined that a country to which a stateless person is not returnable may still constitute a country of former habitual residence. The impossibility of return to a persecuting state does not detract from the fact that a person is fleeing persecution. And, as it is pointed out in *Maarouf*, stripping people of their right to return to a country may in itself be an act of persecution. It is also unclear what Hathaway means by "formally returnable". Professor Hathaway's position, therefore, is not entirely satisfactory.[12] While it is important to maintain some symmetry of treatment between nationals and stateless persons, we must also be careful not to insist on strict symmetrical treatment where that is not appropriate.

Any Country of Former Habitual Residence

This is the most generous of the alternatives available, and was adopted by the Associate Chief Justice in *Martchenko et al. v. Canada (Minister of Citizenship and Immigration).*[13] This position is also in agreement with the Court's decision in *Maarouf v. Canada (Minister of Employment and Immigration)*[14], as well as the opinion of the United Nations High Commissioner for Refugees. In *Maarouf,* Cullen J. found that "a `country of former habitual residence' should not be limited to the country where the claimant initially feared persecution."[15] The Associate Chief Justice interpreted this to mean that a claimant could succeed if he or she were able to establish a fear of persecution with respect to any country of former habitual residence.

This interpretation would be consistent with the prescription of the UNHCR's Handbook, which says:

104. A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.[16]

Again I am forced to return to the definition of refugee enshrined in the Convention. A person may have a well-founded fear of persecution on one of the grounds enumerated therein, but that person must still establish that he or she is outside the country of former habitual residence and is either unable or unwilling to return to that country. The position of the UNHCR and of Associate Chief Justice Jerome pays insufficient attention to the latter part of the test. Just as a person with more than one nationality cannot be found to be a Convention refugee unless he or she establishes that he or she is unwilling or unable to avail themselves of the protection of those countries, a stateless person must also pass a similar test. If the claimant has available a place of former habitual residence which will offer safety from persecution, then he or she must return to that country. For this reason I find that this option is also not entirely satisfactory.

The Test to be Applied: Any Country Plus the *Ward* Factor

While I am somewhat attracted to Professor Hathaway's views, the best answer to this riddle is really a variation of the "any country" solution. When Professor Hathaway talks about refugee determination by reference to "any and all" countries of former habitual residence, this is really relevant to the latter part of the Convention refugee definition. Where a claimant has two nationalities he or she does not have to show two separate instances of persecution. It will suffice to show that one state is guilty of persecution, but that both states are unable to protect the claimant. Likewise, where a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided. While it may appear burdensome to impose this duty upon all stateless claimants, we must, in the light of *Ward* , properly take into account the situations where claimants have other possible safe havens.

Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these two groups, where possible. It is not enough to show persecution in any of the countries of habitual residence"one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere. This is in harmony with the language in the definition and is also consistent with the teachings of the Supreme Court in *Ward* . If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden, here as elsewhere, of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. This is not an unreasonable burden. This is merely to make explicit what is implicit in *Ward* and in the philosophy of refugee law in general. This is essentially the responsible position which counsel for the Crown argued before us, a position that is characteristically generous and consistent with Canada's international obligations, and the position which we adopt.

It is unlikely that many countries of former habitual residence will grant their former residents the right to return, but there may be lands that do normally accept back former habitual residents. In such cases, this would affect a claim for refugee status. So long as the claimant does not face persecution in a country of former habitual residence that will take him or her back, he or she cannot be determined to be a refugee. The concern expressed by counsel for the appellant that a person might face persecution in a country of former habitual residence if returned or deported there is unrealistic, given our obligations under Article 33 of the Convention not to send people back to where they may be persecuted. If that were even to be considered, it could not be found that they are able or willing to return to a country of habitual residence, for to be able to return to persecution does not, in reality, amount to the ability to return.

I would, therefore, answer the certified question in the following way:

In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence.

Having disposed of the certified question, the only issue left to be addressed on this appeal is the respondent's assertion that the Trial Judge erred in holding that the Refugee Division erred in its assessment of the appellant's claim against Kuwait. The Trial Judge found that the Board erred by not asking itself nor discussing in any way the fundamental question as to whether the denial of the appellant's right to return to Kuwait was in itself an act of persecution. In *Maarouf* and *Abdel-Khalik v. Minister of Employment and Immigration*,[17] it was held that the denial of a right to return to a country can in itself be an act of persecution. In *Altawil v. Canada (Minister of Citizenship and Immigration)*[18] Simpson J. stated:

While it is clear that a denial or a right to return may, in itself, constitute an act of persecution by a state, it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct.[19]

To ensure that a claimant properly qualifies for Convention refugee status, the Board is compelled to ask itself why the applicant is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state. The issue, therefore, is whether the Board asked itself this question. The following passages of the Board's decision are pertinent to the resolution of this issue:

It appears to this panel that the claimant's fears are based on personal actions of Salah, a former student known to the claimant while he studied in the U.S.A. and his inability to return to Kuwait due to lack of a valid residency permit.

The panel does not consider threats by one person, Salah, as sufficient to constitute persecution, it is not reasonable that the claimant would have fear of a fellow student because he is now a lieutenant in the Kuwaiti army. He is only speculating that Salam [*sic*] would have any interest in him.

Frankly, since the Liberation of Kuwait and the normalization process, Palestinians from Gaza have received extensions of their residence permits and are not being deported as they were at the conclusion of the Gulf War.[20]

It appears from these passages that the Board did address the question as to why the appellant was unable to return to Kuwait: he lacked a valid residency permit. This satisfies the requirement that the Board inquire into the reasons for denial of entry into one's country of former habitual residence.

The appeal should be dismissed.

McDonald J.A.: I agree.

Henry D.J.: I agree.

[1] R.S.C., 1985, c. I-2 [s. 2(1) (as am. by R.S.C., (1985) (4th Supp.), c. 28, s. 1] (the Act).

[2] [1993] 2 S.C.R. 689.

[3] *Ibid.*, at p. 709.

[4] *Ward*, *supra*, note 2, at p. 753. Since that decision the Act has been amended to codify this requirement. S. 2(1.1) [as enacted by S.C. 1992, c. 49, s. 1] states:

2. . . .

(1.1) For the purposes of the definition "Convention refugee" in subsection (1), where a person has more than one nationality, all references to the person's nationality in that definition shall be construed as applying to each of the countries of which the person is a national.

[5] See *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

[6] See *Khatib v. Canada (Minister of Citizenship and Immigration)* (1994), 83 F.T.R. 310 (F.C.T.D.); affd [1996] F.C.J. No. 968 (C.A.) (QL).

[7] SOR/93-45.

[8] Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1966), Vol. I, at p. 162.

[9] James Hathaway, *The Law of Refugee Status* (Butterworths: Toronto, 1991), at p. 62.

[10] *Ibid.*, at p. 59.

[11] ;*Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 723 (T.D.), at pp. 739-740.

[12] See the overly harsh criticism of Hathaway by Goodwin-Gill, "Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!", in *Développements récents en droit de l'immigration (1993)* . Les Éditions Yvon Blais, at p. 91.

[13] (1995), 104 F.T.R. 59 (F.C.T.D.).

[14] *Supra*, note 11.

[15] *Ibid*., at p. 739.

[16] Office of United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.* (1979, Geneva), at p. 24.

[17] (1994), 73 F.T.R. 211 (F.C.T.D.).

[18] (1996), 114 F.T.R. 241 (F.C.T.D.).

[19] *Ibid*., at p. 243.

[20] Decision of the Board, Appeal Book, Vol. 1, at p. 15.