Maarouf v. Canada

93-A-343

Ayman Maarouf (*Applicant*)

v.

The Minister of Employment and Immigration (*Respondent*)

Indexed as: Maarouf v. Canada ***(*Minister of Employment and Immigration*) (*T.D.*)***

Trial Division, Cullen J."Toronto, November 30; Ottawa, December 13, 1993.

Citizenship and Immigration " Status in Canada " Convention refugees " Application to set aside CRDD determination applicant not Convention refugee " Applicant Palestinian born in refugee camp in Lebanon, moving to Kuwait at age five " Leaving Kuwait prior to Gulf War to study in U.S.A. " Unable to return to Kuwait " Evidence of detention, interrogation, beating by Syrian intelligence during short visit to Lebanon because of suspected PLO connections " Warned to leave Lebanon, not return " Because released, families of other arrested students suspecting applicant informer and threatening life if harm befalling others " CRDD holding outside definition of Convention refugee as having neither country of nationality nor country of former habitual residence " Erred in defining "former habitual residence" as requiring legal ability to return " Denial of right of return may constitute persecution by state " Significant period of de facto residence required " Also erred in requiring demonstration of state complicity in persecution feared from families of others arrested, rather than inquiring into state's ability to protect from persecution " Effectively finding internal flight alternative without considering appropriate test " Question of appropriate test for country of former habitual residence certified for possible appeal to F.C.A.

This was an application for judicial review of the Convention Refugee Division's decision that the applicant was not a Convention refugee. The applicant, a Palestinian, was born in a refugee camp in Lebanon. At age five, he and his family moved to Kuwait. In 1987 he went to Lebanon for two to three months to apply at the American University of Beirut. On arrival he was detained by Syrian intelligence officers and interrogated about the whereabouts and activities of an uncle who had been active in the PLO, which opposed the Syrian presence in Lebanon. During his visit he stayed with a friend who had been a former PLO supporter. Syrian soldiers searched the apartment and found PLO materials. The applicant and his friend were arrested and held for three days during which the applicant was beaten and questioned about his uncle and PLO activities. On his release he was told that it would be best for his safety if he left Lebanon and never returned. As a result of his release, families of other imprisoned students suspected the applicant was an informer and threatened to kill him if anything happened to the students. Other family members have been arrested, questioned about the uncle and beaten, even killed. The applicant left Kuwait in 1988 to attend university in the U.S.A. He arrived in Canada in 1992. Palestinians who left Kuwait prior to the Gulf War are not allowed to return.

Immigration Act, subparagraph 2(1)(*a*)(ii) defines "Convention refugee" as any person who, not having a country of nationality, is outside the country of the former habitual residence and is unable or, by reason of a well-founded fear of persecution for the enumerated grounds, is unwilling to return to that country. The CRDD adopted a test for habitual residence requiring (1) a significant period of *de facto* residence in the putative state of reference; (2) *de facto* abode and not merely ongoing transient presence; (3) a legal right to return. It found that the applicant did not have a country of former habitual residence because Kuwait did not meet the third part of the test and Lebanon did not meet the first part of the test. Therefore the applicant did not come within either subparagraph 2(1)(*a*)(i) or (ii) of the definition of Convention refugee. It held that even if either country could be considered a country of former habitual residence, it would be patently absurd to argue that the applicant required protection from being in Kuwait since he could not be returned there. With respect to Lebanon, the CRDD held that fear of personal vendettas did not amount to a fear of "persecution" because of the absence of state complicity and the applicant did not face a reasonable chance of persecution at the hands of Syrian forces in Lebanon because the civil war had ended. It held that the Syrian presence was not so pervasive that the claimant could not return to certain areas of Lebanon. The issues were: whether the Board erred in determining that (1) the applicant had neither a country of nationality nor a country of former habitual residence; (2) there was no reasonable chance that the applicant would be persecuted if he were returned to either Lebanon or Kuwait.

Held, the application should be allowed.

The Board erred in defining "country of former habitual residence".

As Canada has not ratified the *Convention relating to the Status of Stateless Persons*, a stateless claimant who falls outside the Convention refugee definition is apparently without recourse in Canada. To fall within the definition a stateless person must demonstrate a country of former habitual residence and be outside thereof or unable to return thereto for the reasons cited in the definition. The definition of "country of former habitual residence" should not be unduly restrictive so as to pre-empt the provision of "surrogate" shelter to a stateless person who has demonstrated a well-founded fear of persecution on any of the enumerated grounds. A country of former habitual residence should not be limited to the country where the claimant initially feared persecution. The argument that habitual residence necessitates the claimant be legally able to return to that state is contrary to the shelter rationale underlying international refugee protection. Once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return. As a final act of persecution a state could strip a person of his right to return to that country. Thus, to require that a claimant have a legal right of return would allow the persecuting state control over the claimant's recourse to the Convention and effectively undermine its humanitarian purpose. The concept of "former habitual residence" seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his country of nationality. Thus the term implies a situation where a stateless person was admitted to a country with a view to a continuing residence of some duration, without necessitating a minimum period of residence. The claimant must have established a significant period of *de facto* residence in the country in question.

The Board erred in dismissing Kuwait as a "country of former habitual residence" on the basis that the applicant was not legally able to return there. With respect to Lebanon, the Board erred in finding that the applicant had not established a significant period of *de facto* residence in that country.

As to the issue of a well-founded fear of persecution, the Board erred in requiring that the claimant demonstrate an element of state complicity in the persecution he feared from the families of persons arrested subsequent to his detention, rather than inquiring as to the state's ability to protect him from persecution. It also erred in effectively finding that the applicant had an internal flight alternative without considering the appropriate test for IFA.

A serious question of general importance as to the correct test for assessing the country of former habitual residence was certified in accordance with *Immigration Act*, subsection 83(1) as amended.

statutes and regulations judicially considered

Convention relating to the Status of Stateless Persons, 28 September 1954, 360 U.N.T.S. 117.

Immigration Act, R.S.C., 1985, c. I-2, ss. 2(1) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1), 83(1) (as am. by S.C. 1992, c. 49, s. 73).

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

cases judicially considered

applied:

Rasaratnam v. Canada (Minister of Employment and Immigration), [1992] 1 F.C. 706; (1991), 140 N.R. 138 (C.A.); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

distinguished:

Arafa v. Canada (Minister of Employment and Immigration), A-663-92, Gibson J., order dated 3/11/93, F.C.T.D., not yet reported.

considered:

Zalzali v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 605 (C.A.); *Urbanek v. Canada (Minister of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 153; 144 N.R. 77 (F.C.A.).

referred to:

Canada (Attorney General) v. Ward, [1990] 2 F.C. 667; (1990), 67 D.L.R. (4th) 1; 10 Imm. L.R. (2d) 189; 108 N.R. 60 (C.A.).

authors cited

Grahl-Madsen, Atle. *The Status of Refugees in International Law*. Leyden: A. W. Sijthoof, 1966.

Hathaway, James C. *The Law of Refugee Status*. Toronto: Butterworths, 1991.

United Nations. Office of the 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*. Geneva, 1979.

Waldman, Lorne. *Immigration Law and Practice*. Toronto, Butterworths, 1992.

APPLICATION FOR JUDICIAL REVIEW of the Convention Refugee Division's decision that the applicant was not a Convention refugee after defining "country of former habitual residence" as one to which an applicant might legally return. Application allowed.

counsel:

Rod Catford for applicant.

Robin Sharma for respondent.

solicitors:

Mousseau DeLuca, Windsor, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Cullen J.: This is an application for judicial review of a decision of the Immigration and Refugee Board of Canada (the Board), dated January 14, 1993 that the applicant is not a Convention refugee within the meaning of subsection 2(1) of the *Immigration Act*, R.S.C., 1985, c. I-2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1) (the Act). Leave to apply for judicial review was granted by Mr. Justice Rothstein on September 17, 1993.

FACTS

The applicant, a Palestinian, was born in a refugee camp in Rachidie, Lebanon. In 1974, the applicant, who was five years old at the time, and his family moved to Kuwait. The applicant lived in Kuwait until 1987.

In 1984 the applicant's uncle was in hiding from the Syrians because he held a political and military position in the PLO and the PLO opposed the Syrian presence in Lebanon.

In late 1986, early 1987, the applicant's father returned to Lebanon for a visit. He was arrested by Syrian intelligence officers and held for a full day. He was continuously questioned about the whereabouts of his brother and his brother's involvement in the PLO. His father was released and has not returned to Lebanon since.

In June of 1987 the applicant went to Lebanon for two to three months to apply at the American University of Beirut. On his arrival in Lebanon the applicant was detained at the airport for a full day by Syrian intelligence officers. He was extensively questioned about his uncle's activities and whereabouts. He was slapped and kicked and on his release warned that if he ever became involved in anti-Syrian activities he would be arrested and imprisoned.

During this visit the applicant was staying with a friend in Lebanon who, unknown to the applicant, had been a former PLO supporter. Syrian soldiers searched his friend's apartment and found PLO materials. The applicant and his friend were arrested. For three days, the applicant was beaten and questioned about his uncle and the PLO activities. The applicant's release was secured by a friend of the family. On his release the applicant was threatened that he would be killed if he ever became involved in anti-Syrian activities and forced to sign a document that he would not participate in any such activities. He was told that it would be best for his safety if he left Lebanon and never returned. As a result of his release, families of other imprisoned students suspected the applicant was an informer and threatened to kill him if anything happened to the students. The applicant returned two or three weeks later to Kuwait.

In June of 1988 the applicant's cousin was arrested and held for two years because of his suspected connection with the applicant's uncle and the PLO. He was beaten and tortured and finally released suffering from a mental disorder.

In July 1988 the applicant's uncle fled Lebanon to Libya and is still wanted by the Syrians in Lebanon. Another cousin of the applicant was arrested by Syrian Intelligence and taken for questioning concerning the whereabouts of the applicant's uncle. Two months later his body was discovered shot and tortured.

Finally, in August 1988 the applicant left Kuwait to attend university in the United States. He attended the University of Toledo from August 1988 to September 1990 and again from November 1990 to April 1992. He arrived in Canada on July 13, 1992.

Palestinians who left Kuwait prior to the Gulf War are not allowed to return to Kuwait.

THE BOARD'S DECISION

The Board first determined that subparagraph 2(1)(*a*)(i) [as am. *idem*] of the Act did not apply to the applicant. Whether "nationality" was defined as citizenship or ethnicity it was clear that the applicant had no country of nationality as he was not a citizen of any country and at that time there was no state of Palestine.

Second, the Board determined that the applicant did not fall within subparagraph 2(1)(*a*)(ii) [as am. *idem*] of the Act. The Board adopted the threefold test proposed by Professor Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) as the definition of "habitual residence" [at page 63]:

First, the case law has required a significant period of *de facto* residence in the putative state of reference: one year appears to be accepted as a reasonable threshold standard, although most relevant decisions have in fact involved persons who resided in a foreign state for several years. Second, former habitual residence implies: *de facto* abode and not merely ongoing transient presence. Third, and most important, a state is a country of former habitual residence only if the claimant is legally able to return there. [Tribunal's emphasis.]

The Board applied Professor Hathaway's threefold test and concluded at page 8 of its reasons for decision:

In applying Professor Hathaway's threefold test, it is clear that Kuwait is not a "country of former habitual residence". While the claimant lived in that state for most of his life, the claimant's uncontradicted evidence is that he now cannot return there. Kuwait thus fails the third, and in Hathaway's words the "most important" test.

With respect to Lebanon, the claimant only lived there for five years during his infancy. While he did later visit Lebanon for a short time, there would appear to be no "significant period of de facto residence", and thus Hathaway's first test is not met. Lebanon is therefore also not a "country of former habitual residence".

Based on this analysis, the Board concluded the applicant fell outside the parameters of the definition and could not be determined a Convention refugee.

Despite its conclusion, the Board went on to consider his claim *vis-à-vis* Kuwait and Lebanon on the basis that either or both of these nations could be considered a "country of former habitual residence", a proposition with which they noted they could not agree. With respect to Kuwait, the Board determined "since by his own evidence he cannot be returned there it is patently absurd to argue that he requires protection from being there."

With respect to Lebanon the Board determined that to the extent the applicant feared reprisals from families of persons arrested subsequent to his detention his fears may be well founded, however, the fear of personal vendettas did not amount to a fear of "persecution" because of the absence of state complicity. Further, the Board was of the opinion that the applicant did not face a reasonable chance of persecution at the hands of Syrian forces in Lebanon. As the Board stated, at page 11:

The claimant's difficulties in Lebanon were during the civil war in that country, and because relatives were PLO activists. The fact that the civil war has ended leads the panel to conclude that the claimant faces no more than a mere possibility of persecution.

Their conclusion was buttressed by evidence that the Syrian presence was not so pervasive in Lebanon that the claimant could not return to the area of Tyre and Sidon

and avoid their attention. Further, the Board found it highly unlikely that the applicant would have been able to have his travel documents renewed by Lebanon if he was wanted by the Syrians.

ISSUES

The applicant raises a number of issues. They can be effectively combined into two primary issues:

1. Did the Board commit a reviewable error in determining that the applicant had neither a country of nationality nor a country of former habitual residence and therefore fell outside the Convention refugee definition?

2. Did the Board commit a reviewable error in determining that there was no reasonable chance that the applicant would be persecuted should he be returned to either Lebanon or Kuwait?

APPLICANT'S SUBMISSIONS

I. Habitual Residence

The applicant submits that the Board erred in finding that the applicant was not a Convention refugee within the meaning of the Act. Subparagraph 2(1)(*a*)(i) does not apply to the applicant and he must therefore satisfy the requirements of subparagraph 2(1)(*a*)(ii) of the Act. With respect to subparagraph 2(1)(*a*)(ii) of the Act, the applicant submits on the basis of the reasoning of Atle Grahl-Madsen (*The Status of Refugees in International Law* (Leyden: A. W. Sijthoof, 1966)) and Lorne Waldman (*Immigration Law and Practice*, 1992) that the Board erred in law in finding that a state must provide a person with a formal right of return before it may be characterized as a "country of former habitual residence."

Atle Grahl-Madsen defines "country of former habitual residence" as follows [at page 160, volume I]:

The term "country of former habitual residence" is a technical term, conceived by the drafters of the Refugee Convention as a substitute for the term "country of nationality" in cases where the latter term is not appropriate. The Ad Hoc Committee defined the "country of former habitual residence" as "the country in which [a person] had resided and where he had suffered or fears he would suffer persecution if he returned".

In order that a country may qualify as a person's "country of former habitual residence" the person concerned must have resided in that country, but in this respect it seems as if a liberal interpretation is in place. It does not matter whether a person is born in the country or migrated thereto. It cannot be required that he shall have stayed there for any specific period of time, but he should be able to show that he has made it his abode or the centre of his interests.

Lorne Waldman prefers the reasoning of Grahl-Madsen over that of Hathaway and argues that the reasoning of the Federal Court of Appeal in *Zalzali v. Canada*

(Minister of Employment and Immigration), [1991] 3 F.C. 605, supports the former position (at page 8.129, paragraph 8.135):

If the individual can base a claim to be a Convention refugee on situations where the state is unable to protect, then it is certainly arguable that there should not be a requirement that the state be willing to allow an individual to return before the state can be considered a "former habitual residence".

On the basis of the principles articulated by Atle Grahl-Madsen and Lorne Waldman, the applicant submits that the Board erred in failing to consider the applicant's substantial connection with Kuwait and to find it a "country of former habitual residence" within the meaning of the Act. Further, denial of the applicant's right to return constituted a persecutory act by the state of Kuwait and the Board erred in law in failing to assess the applicant's circumstances in the context of persecution.

In addition, the applicant submits that the Board erred in law in giving greater weight to the opinions of Professor Hathaway on the basis of irrelevant considerations, e.g., the fact that he is Canadian, his writings are more recent than those of Grahl-Madsen and the fact that his reasoning has been adopted by the Federal Court in other unrelated cases. The Board also erred in law in failing to consider that the provisions of the *Convention relating to the Status of Stateless Persons* [28 September 1954, 360 U.N.T.S. 117] would properly apply to the applicant. The fact that Canada was not a party to this Convention should affect the interpretation of the 1951 Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] with respect to refugees and consequently subsection 2(1) of the Act.

In the alternative, the applicant submits that the Board erred in law in failing to find that Lebanon is his country of former habitual residence. The applicant submits that pursuant to the reasoning of Atle Grahl-Madsen everyone has a country of origin or habitual residence, and if Kuwait is not the applicant's country of former habitual residence then Lebanon necessarily is. The applicant submits that the Board's importation of the requirement of a "significant period of *de facto* residence" into the definition of a "former habitual residence" was in error. The Board failed to consider the applicant's connections to Lebanon: birth place, UN recognition, family ties, issuance of travel documents and his immediate family's continuing contact with the country.

II. Well-Founded Fear of Persecution

The applicant submits that the conclusion of the civil war in Lebanon is an irrelevant consideration with respect to the determination of this refugee claim. The Board failed to connect the context of the civil war with the applicant's persecution. Further, the Board erred in finding that the claimant faced no more than a mere possibility of persecution in the face of the claimant's evidence.

In addition, the Board erred in law in effectively finding that the applicant had an internal flight alternative while it failed to consider the legal test required of it by the Federal Court decision of *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), in assessing the availability of such an alternative. On the basis of an Amnesty International document, the Board found that

the applicant could return to the area of Sidon and Tyre where the Syrian presence is less visible and check points are manned by Lebanese forces. The Board effectively made a finding that there is an internal flight alternative when on the facts it had only found that the applicant could enter Lebanon at Sidon or Tyre, not that he would face no reasonable chance of persecution in that area. Further, it would be unreasonable to compel the claimant in this case to seek refuge only in the Tyre and Sidon area which in practice requires the claimant to remain within the refugee camps available to him there. Finally, the Board made an erroneous finding of fact that because of the pervasiveness of Syrian control in Lebanon a person truly wanted by the Syrians could not have had a travel document renewed by the Lebanese government. The Board erred in concluding that the applicant did not have a well-founded fear of persecution in Lebanon, and did so in a capricious manner without regard for the material before it.

In addition, in light of the Supreme Court of Canada decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Board erred in holding that state complicity was a necessary element of persecution.

Finally, the Board created a reasonable apprehension of bias by noting in its reasons the words of the Federal Court in *Urbanek v. Canada (Minister of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 153 (F.C.A.), at page 154, that "the purpose of [the refugee determination system] . . . not to give a quick and convenient route to landed status". The Board in citing these particular words meant to impugn the motives of the claimant when no evidence was before the Board which brought the claimant's motives into question.

RESPONDENT'S SUBMISSIONS

I. Former Habitual Residence

The Board committed no reviewable legal error in applying Professor Hathaway's tri-partite test of "country of former habitual residence." Further, the Board committed no reviewable error in concluding on the facts before it that the applicant had no country of former habitual residence and therefore fell outside the definition of "Convention refugee".

II. Well-founded Fear of Persecution

The Board committed no reviewable factual error in determining that there was no reasonable chance of persecution within Lebanon and Kuwait given the evidence before it: documentary evidence, the travel document of the applicant and the *viva voce* evidence of the applicant himself confirming that he could not be returned to Kuwait. As the applicant could not be returned to Kuwait, it was reasonable for the Board to determine "not only is there not a reasonable chance that the claimant would be persecuted, there is simply no chance at all. How can a person claim to be afraid of being returned to Kuwait when he cannot be returned there?"

As to the claim of a well-founded fear of persecution in Lebanon, the applicant articulated a fear of persecution from families of persons who were arrested and who view him as an informant. The respondent, relying on the Federal Court of Appeal

decision in *Canada (Attorney General) v. Ward* [[1990] 2 F.C. 667] submits that involvement of the state, or state complicity is a *sine qua non* of persecution. Further, documentary evidence and the fact that the applicant was issued travel documents by Lebanon buttress the determination of the Board that there was no reasonable chance of persecution of the applicant at the hands of the Syrian forces.

ANALYSIS

I. Habitual Residence

The definition of "Convention refugee" is contained in subsection 2(1) of the Act and reads:

2. . . .

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).

The rationale underlying international refugee protection is as the Supreme Court of Canada stated in *Canada (Attorney General) v. Ward*, *supra* (Mr. Justice La Forest, at page 752) "to serve as `surrogate' shelter coming into play upon failure of national support." For a stateless person, that is a person without a country of nationality, to come within this definition two factors must be established. First, the country of the person's former habitual residence must be identified. Second, the claimant must be outside the country of his or her former habitual residence or unable to return to that country by reason of a well-founded fear of persecution for one or more of the reasons cited in the definition. As Canada has not ratified the *Convention relating to the Status of Stateless Persons*, 360 U.N.T.S. 117, a stateless claimant who falls outside the Convention refugee definition is apparently without recourse in Canada.

In the instant case, the key determination is the definition of "former habitual residence." In particular, whether the definition of "former habitual residence" requires that the claimant be legally able to return to that country. To date the Federal Court has not considered the definition of this term. Rather, cases where the issue of statelessness has been raised have been determined on other grounds. For example, in *Arafa v. Canada (Minister of Employment and Immigration)* (F.C.T.D. No. A-663-92, Nov. 3, 1993), the definition of "former habitual residence" was potentially in issue. The claimant was a Palestinian born in the United Arab Emirates (UAE). There was evidence before the Court that the claimant's authorization to stay or reside in the

UAE had expired before his claim to refugee status was heard by the CRDD. The Court, however, chose to accept the claimant's evidence that he would be able to return to the UAE for short and well-defined periods to visit his family and therefore determined the UAE was his "country of former habitual residence" without discussing the meaning of this term. The Court rejected the claimant's refugee claim on the basis that he had not demonstrated a well-founded fear of persecution.

In contrast, the definition of "country of former habitual residence" has been the subject of much discussion in the legal literature. However, the views of the two leading authors in this area (Grahl-Madsen and Hathaway) are in conflict. Before discussing their competing theories it is worth noting that both authors agree that not all stateless persons are Convention refugees. For stateless persons to be refugees they must be outside their country of habitual residence for the reasons listed in the Convention refugee definition. This point is supported both by the Convention refugee definition itself and by the discussion in the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* (1979: Geneva), at page 24, paragraph 102 (the Handbook).

Grahl-Madsen argues that the "country of former habitual residence" is the country of initial persecution: "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" (at page 162, volume 1). In contrast, Hathaway argues that while the state from which the first flight occurred is often the state to which the refugee claimant retains the greatest formal legal ties, the claimant may have stronger formal ties to some other country or countries. Hathaway argues that the essential issue is to establish which countries the stateless person is returnable to since refugee law seeks to prevent the return of an individual to a state in which he or she is at risk of persecution (at page 62).

Lorne Waldman is critical of Hathaway's view that the concept of habitual residence be tied to the claimant's right to return to the country. He argues that denial of the right to return can be used as a persecutory act by the state. Hathaway's position, in Waldman's view, gives the persecuting authority great power over the claimant's right to recourse under the Convention. Waldman asserts that since the concept of former habitual residence is not necessarily tied to a claimant's right to return to a country, individuals who have no nationality can seek protection as refugees if they have had anything more than a transitory connection to a state in which they resided prior to seeking connection in Canada. In support of this argument Waldman states, at page 8.129, paragraph 8.135:

This reasoning is in accord with the principles set down by the Federal Court in *Zalzali v. Canada (Minister of Employment & Immigration)* (30 April 1991), Action No. A-382-90 (Fed.C.A.) where the court recognized that state involvement is not an essential ingredient to persecution where an individual is unable to seek the protection of the state. If the individual can base a claim to be a Convention Refugee on situations where the state is unable to protect, then it is certainly arguable that there should not be a requirement that the state be willing to allow an individual to return before the state can be considered a "former habitual residence".

Notably, the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, *supra*, upheld the reasoning in *Zalzali*, *supra*.

In my opinion, the Handbook provides a useful framework for defining "country of former habitual residence" and for analyzing the competing positions of Grahl-Madsen and Hathaway. First, Grahl-Madsen's view that habitual residence refers only to the country of initial persecution appears unnecessarily restrictive. As the Handbook states, at page 24, paragraph 104:

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 satisfy the criteria in relation to all of them.

Second, Hathaway's argument that habitual residence necessitates the claimant be legally able to return to that state creates a substantial hurdle and is contrary to the shelter rationale underlying international refugee protection. As the Handbook states at paragraph 101 [at page 24]: "[O]nce a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return." As a final act of persecution a state could strip a person of his right to return to that country. Thus, to require that a claimant have a legal right of return would allow the persecuting state control over the claimant's recourse to the Convention and effectively undermine its humanitarian purpose.

A final consideration is what a claimant must establish in the nature of ties to a country for that country to be a former habitual residence. Both Grahl-Madsen and Hathaway agree that former habitual residence requires more than an on-going transient presence in a country. Hathaway asserts a claimant should establish *de facto* residence for a significant period of time; one year being a reasonable threshold. Similarly, Grahl-Madsen states, at page 160, volume 1:

It does not matter whether a person is born in the country or migrated thereto. It cannot be required that he shall have stayed there for a specific period of time, but he should be able to show that he has made it his abode or the centre of his interests.

The Handbook simply quotes the drafters of the 1951 Convention: "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned" (at page 24, paragraph 103). In my view, the concept of "former habitual residence" seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his or her country of nationality. Thus the term implies a situation where a stateless person was admitted to a given country with a view to a continuing residence of some duration, without necessitating a minimum period of residence.

In summary, the definition of "country of former habitual residence" should not be unduly restrictive so as to pre-empt the provision of "surrogate" shelter to a stateless person who has demonstrated a well-founded fear of persecution on any of the grounds enumerated in subsection 2(1) of the Act. Further, a "country of former habitual residence" should not be limited to the country where the claimant initially feared persecution. Finally, the claimant does not have to be legally able to return to a country of former habitual residence as denial of a right of return may in itself

constitute an act of persecution by the state. The claimant must, however, have established a significant period of *de facto* residence in the country in question.

Thus, the Board erred in defining "country of former habitual residence" and in applying its definition to the instant case. In particular, it erred in dismissing Kuwait as a "country of former habitual residence" on the basis that the applicant was not legally able to return there. With respect to Lebanon, the applicant's right to return to that country was not in issue; however, in light of the evidence before it the Board erred in finding that the applicant had not established a significant period of *de facto* residence in that country.

II. Well-founded Fear of Persecution

The Board clearly stated that the determination of whether or not the applicant had a well-founded fear of persecution did not form the basis of its decision. It is worth noting, however, that the Board made a number of errors in considering this issue. First, the Board erred in requiring that the claimant demonstrate an element of state complicity in the persecution he feared from the families of persons arrested subsequent to his detention, rather than inquiring as to the state's ability to protect him from persecution. As the Supreme Court stated in *Canada (Attorney General) v. Ward, supra* [at page 726]:

In summary, I find that state complicity is not a necessary component of persecution, either under the "unwilling" or under the "unable" branch of the definition. A subjective fear of persecution combined with the state inability to protect the claimant creates a presumption that the fear is well-founded.

Second, the Board erred in effectively finding the applicant had an internal flight alternative (IFA) to the area near Sidon and Tyre without considering the appropriate test for IFA. The recent Federal Court of Appeal decision of *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 upheld the test for IFA outlined in *Rasaratnam v. Canada (Minister of Employment and Immigration), supra*, however, they emphasized the onus was on the claimant to show on a balance of probabilities a serious possibility of persecution throughout the country, including the alleged IFA area. Further, the Court emphasized the availability component of the *Rasaratnam* test, such that the question was whether, given the persecution in the claimant's part of the country, it would be objectively reasonable to expect the claimant to seek safety within the country first.

Accordingly, in view of the error made by the Convention Refugee Determination Division of the Immigration and Refugee Board, its decision January 14, 1993 in which the applicant was found not to be a Convention refugee is quashed and the applicant is to be granted a new hearing.

Counsel for the respondent submitted that a question should be certified pursuant to subsection 83(1) of the Act (as am. by S.C. 1992, c. 49, section 73) for the purposes of a possible appeal to the Federal Court of Appeal. The question, as phrased by the respondent in his letter to the Federal Court, December 1, 1993, is:

Is the correct test for assessing the country of former habitual residence under section 2(1)(*a*)(ii) of the Convention refugee definition within the Immigration Act, R.S.C. 1985, c. I-2 as follows?

(i) The Applicant must first establish *de facto* residence within a country.

(ii) The Applicant must establish that he left that jurisdiction by reason of persecution.

(iii) Refugee status may be granted to such a stateless claimant against *any* of the countries where he has resided (*de facto* residence) and left for reasons of persecution where he then demonstrates a serious possibility of persecution on return to those places.

In my opinion, this is indeed a serious question of general importance which warrants certification pursuant to the Act.