REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 73861

REFUGEE APPEAL NO 73862

AT AUCKLAND

Before:	P Millar (Chairperson) V J Shaw (Member)
Counsel for the Appellant:	P Moses
Appearing for the NZIS:	No Appearance
Date of Hearing:	10 December 2003
Date of Decision:	30 June 2005

DECISION DELIVERED BY V J SHAW

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[1] These are appeals from decisions of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants, who are stateless Palestinians.

INTRODUCTION

[2] The appellants, a husband and wife, both aged in their mid-30s, arrived in New Zealand on 8 January 2001 and requested the grant of refugee status at the airport. They were interviewed by the refugee status officer on 19 April 2001 and advised that their claims had been declined in decisions dated 29 May 2002. As the wife's refugee claim is premised on that of the husband, for convenience he will be referred to as the appellant throughout.

[3] The case turns on the issue of whether the husband's and the wife's inability to return to Saudi Arabia, their country of former habitual residence,

means that they do not have a well-founded fear of being persecuted. Each member has delivered a separate decision.

THE APPELLANT'S CASE

[4] The appellant was born in 1968 in Jeddah, Saudi Arabia, to Palestinian parents who had fled their home in Gaza during the late 1940s as a result of the Israel-Palestine conflict. The parents continue to reside in Saudi Arabia, along with one of the appellant's brothers and two of his sisters. Another brother is a New Zealand citizen and a third brother currently resides in Turkey. A sister lives with her husband in Gaza.

[5] Despite their lengthy period of uninterrupted residence in Saudi Arabia, neither the appellant's parents nor any of their children have been able to acquire Saudi citizenship or permanent resident status. However, as Palestinian refugees, their presence is tolerated by the Saudi authorities. They are eligible for temporary residents' permits renewable every two years and have been issued with Saudi identification books.

[6] Like many other stateless Palestinians, the appellant and his family were issued with Egyptian travel documents which can be used for foreign travel but do not entitle the holder to any rights of entry or residence in Egypt.

[7] The appellant's father has now retired from his employment with a supplier of bathroom and ceramic products. As a non-resident, his ability to work was dependent on having sponsorship from a Saudi citizen or company. Although his father enjoyed a relatively good relationship with his employer of many years, his father's non-resident status created an undue dependency on the employer who could effectively treat the father as a servant. According to the appellant, Palestinians living in Saudi Arabia, the appellant claimed, are generally exploited and discriminated against. As non-residents, they are unable to access free education or medical care and subjected to various restrictions including prohibitions on owning property and motor vehicles.

[8] After completing his secondary education, the appellant commenced working with his father. In 1986 he married. His wife, who is also his first cousin,

came from Gaza. It had originally been intended that the marriage take place at her family home in Gaza but although the appellant's parents had been able, on various occasions, to visit family in Gaza, the appellant was refused permission to similarly do so by the occupying authorities.

[9] The appellant's family had no particular problems with the Saudi authorities up until 1995 or 1996 when the appellant was stopped at a checkpoint and found to be without his identification document. He was detained for three days in a prison where persons awaiting deportation are held. His father arranged his release on production of the relevant document and payment of a fine.

[10] Around 1996, one of the appellant's brothers was deported following an incident with a group of Saudi youths. When walking in the street, the brother had been sexually assaulted by the youths. He had hit one of his assailants before managing to escape. He was arrested and detained and although not tried or convicted of any offence, the brother's deportation followed nonetheless. In all, he was detained for almost a year while his father sought to obtain a visa for a third country so as to enable him to leave Saudi Arabia. A visa was eventually secured for Sudan from where the brother subsequently travelled to Turkey.

[11] In early 1999, various events occurred which were to culminate in the appellant also being deported from Saudi Arabia. The appellant had a Palestinian friend who lived in the same neighbourhood and whom he had known since childhood. The friend would often borrow the appellant's car (registered in his family's sponsor's name) for the purpose of shopping, taking his family to hospital and other such errands. On this occasion, the friend borrowed the car but failed to return it, telling the appellant that he had had a minor accident which had necessitated leaving the car in a garage for several days for repairs. A day or two later, the appellant was arrested without explanation from his workplace. From there he was taken first to his house, which the police searched, then to a prison.

[12] At the prison, the appellant, still without explanation, was placed in a cell in solitary confinement where he remained for the next two months or so.

[13] After this time, he was taken from his cell for interrogation. He learned that his friend, together with a Saudi and a Yemeni, neither of whom he knew, were seemingly being accused of involvement in an attack on a United States army bus

and that his car, when seized by the police, had contained weapons. The appellant was accused of involvement in the same attack, which he vehemently denied.

[14] The appellant told the Authority that during the one to two weeks prior to the final occasion on which he had lent his car to his friend, he had heard people talking about a United States bus being shot at. He did not think anyone had been injured but he was uncertain of the details as news of such incidents was often suppressed by the Saudi authorities.

[15] Over the next month, the appellant was interrogated once or twice each week mainly about his relationship with his friend. He does not know if the weapons allegedly found in his car – the nature of which he was not told - were used in the shooting of the United States bus or not. His interrogators would merely state that weapons had been found in his car and that he must have been involved in the incident. He was beaten throughout his interrogations so that to seek explanation or clarification was merely to invite further assault.

[16] Ill-treatment experienced by the appellant included being kicked, punched and slapped, hit in the knee with a piece of wood and being spat on. He was also threatened that his wife would be apprehended and raped in front of him. In the face of such a threat, the appellant agreed to provide a false confession that he had been buying and selling weapons.

[17] Thereafter he was taken before a court. He estimates that the hearing took no longer than 20 minutes. He was not legally represented nor had he been allowed to see any member of his family. One of his interrogators was present in the court. The judge referred to his confession and requested that he sign a further statement, the contents of which were not read to him. He was sentenced to one and a half years in prison.

[18] During his sentence, he was held in a cell by himself. He was allowed out of this cell for only one hour a day in order to clean the toilets. Visits from his family were prohibited. He was subjected to regular sexual assault by the prison guards.

[19] At the completion of his sentence, the appellant was transferred to a second prison to await deportation. Up until this time, the appellant's family had received no notice from the Saudi authorities of the appellant's circumstances or whereabouts. However, once transferred, his father was notified – and also able to visit the appellant – with a view to his arranging his son's departure from Saudi Arabia. Failure to organise a destination would have meant the appellant's indefinite incarceration.

[20] In the prison, the appellant was held in a large room with about 100 other detainees. The conditions were very dirty and the guards abusive. Sexual assault by both guards and other inmates was common.

[21] After some three months, the appellant was taken to the airport. His father had managed to obtain a Thai visa for him and his wife, whom the Saudi authorities had also requested leave Saudi Arabia. The appellant was reunited with his wife on the plane though was not allowed to see other members of his family present at the airport. His Egyptian travel document was stamped with the Arabic word for "removed". His Saudi identity document had been seized at the time of his arrest.

[22] The appellant and his wife remained in Thailand for around two months. Using money provided by the appellant's father, they arranged onward travel to New Zealand through an agent who provided them with photo-substituted Dutch passports. They arrived in New Zealand in January 2001.

[23] In talking with his wife after their reunion, the appellant learned that his Palestinian friend was still in prison. The Saudi had been released and the Yemeni deported.

[24] The appellant does not know if his friend is still in prison. He explained that he was not mindful to make any enquiries due to the trouble this person had brought upon himself.

[25] The appellant maintains occasional telephone contact with his family. They have not reported any further contact with the Saudi authorities.

[26] The appellant says he cannot return to Saudi Arabia and he has nowhere else to go. If returned to Saudi Arabia, he would be refused entry and indefinitely detained once again pending his removal. If detained he would be at risk of the same ill-treatment as he experienced in the past.

Wife's evidence

[27] The appellant's wife also gave evidence. She was born in Gaza where her family remain living, apart from a sister (married to the appellant's brother) who is a New Zealand citizen. When living in Palestine up until her marriage in 1986, she, like other family members, held Egyptian travel documents only. She understands that when she left Palestine for Saudi Arabia to marry, she was given a permit valid for three years, authorising her return. However, due to the onset of the *Intifada*, she never returned to Palestine. She is uncertain whether her marriage to the appellant, who does not possess entitlement to live in Palestine, has negated her right of residence in Gaza or the occupied West Bank.

[28] The wife described how the police, in early 1999, had come to the family home seeking the appellant. She, her mother-in-law and the appellant's younger brother had been present. The police had immediately left on being advised that the appellant was at work. Later they had returned and searched the house. She and her mother-in-law had hid in a locked room during the search. The younger brother had informed them that nothing had been taken from the house.

[29] From that time on until the appellant was transferred to the second prison, she had no knowledge of his whereabouts. Up until that time, her father-in-law's numerous enquiries, as to the appellant's circumstances, had been unsuccessful.

[30] She emphasised that as a woman living in Saudi Arabia, she could not herself have any contact with the authorities; women in that country, she said, "were nothing". Her father-in-law had handled all matters concerning the appellant and the couple's departure from Saudi Arabia. It was her understanding that as a wife, she was obliged to leave Saudi Arabia when her husband was deported although no "removed" stamp was placed on her Egyptian travel document at the time of departure.

[31] According to the wife, the appellant has been much affected by his prison experience. He remains in a nervous and distressed state, is frequently tired and unable to sleep, as well as given to talking in his sleep.

[32] Counsel filed written submissions prior to the hearing. At the completion of the hearing, the Authority granted leave to counsel to file further submissions addressing the application of the principles set out in *Refugee Appeal No 72635/01* concerning stateless refugee claimants. These were duly received and have been considered. Additionally, counsel provided copies of extracts from the travel documents issued by the Egyptian authorities to the appellant and his wife in 1995 and to the appellant's father in 1983 which includes his wife and five children.

THE ISSUES

[33] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

> "...owing to a 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."

[34] In terms of Refugee *Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[35] The Authority must first determine whether or not the appellant and his wife have given credible evidence.

[36] Their testimonies were forthcoming and consistent, both in relation to prior statements and as between each other. The appellant's account of his family's situation in Saudi Arabia is in keeping with country information, while his description of events following his arrest in early 1999 appears plausible when considered against country information identifying the numerous shortfalls in the Saudi criminal justice system. These include:

- failure to give prompt notification of arrests/detentions;

- abusive interrogations, including torture, of suspects under prolonged incommunicado detention aimed at extracting confessions;

- lack of independent judicial oversight of detention and judicial acceptance of coerced confessions;

- extremely limited access to legal representation; and

- secret trials.

See Human Rights Watch *Criminal Justice System in the Kingdom of Saudi Arabia*, May 28, 2003; Amnesty International *Saudi Arabia remains fertile ground for torture and impunity*, April 2002; United States Department of State *Country Reports on Human Rights Practices 2002: Saudi Arabia*, March 31, 2003.

[37] The Authority therefore finds that the appellant and his wife have given credible evidence and their accounts are accepted.

Nationality

[38] The appellant says that he is stateless. The Authority must therefore consider the issue of his nationality.

Egypt

[39] The appellant and his wife both hold Egyptian travel documents issued by the Egyptian authorities to Palestinian refugees. The appellant's contention that such documents serve only to facilitate foreign travel and give no rights of entry or

residence in Egypt, is confirmed by independent sources; see, for instance, Canadian Immigration and Refugee Board *EGY39111.E Egypt: Treatment of Palestinians*, 14 June 2002 and *EGY39042.E Egypt: Rights of a Palestinian who is holding a "document de voyage pour refugies Palestiniens" issued in 1999*, 23 May 2002; and Australian Country Information Service *Country Information Report No 485/00 - Return of Palestinians to Egypt*, 4 September 2000.

[40] The appellant and his wife are no longer in possession of their current Egyptian travel documents as they were left with their agent in Thailand. Quite possibly though, they would be able to obtain replacement documents from the Egyptian authorities on proof of identity (they have provided copies of their travel documents issued in 1995 apparently current for five years). Irrespective, the Authority finds that the possession of an Egyptian travel document creates no rights in the appellant and his wife vis-à-vis Egypt such that Egypt could be considered a country of nationality for the purposes of Article 1A(2) of the Refugee Convention.

Saudi Arabia

[41] The appellant was born and lived all of his life, until recently, in Saudi Arabia. He and his family are amongst the estimated 240,000 Palestinian refugees living in Saudi Arabia, most of whom have legal residence status and are not assisted or recognised as refugees by UNHCR; US Committee for Refugees *World Refugee Survey 2003 Country Report: Saudi Arabia*, http://www.refugees.org/world/country/rpt/mideast/2003/saudiarabia.csn (accessed 8 December 2003).

[42] Under the Saudi nationality laws, birth in the territory of Saudi Arabia does not confer citizenship. Rather, citizenship is acquired by being born, in or outside Saudi Arabia, to Saudi parents or to the mother of a foreign or unknown nationality and a Saudi father. Although it is possible for an individual born in Saudi Arabia of foreign parents to apply for naturalisation, this is reportedly very difficult to obtain; US Office of Personnel Management *Citizenship Rules of the World: Saudi Arabia*, March 2001; and US Bureau of Citizenship and Immigration Services SAU01001.ZAR – *Saudi Arabia: Information on "Laissez Passer" and the Al-Enezi Bedouins,* 14 February 2001, http://uscis.gov/graphic/exec/prnfriendly.asp.

[43] It therefore seems beyond doubt that although the appellant was born and lived all his life in Saudi Arabia, his status, like that of his parents and siblings, was only ever that of a temporary resident. He held a resident's permit or *aqamas* which had to be renewed every two years and to which few rights attach. His foreign status meant that employment was dependent on a Saudi sponsor and education, medical and other social benefits could not be freely accessed as is the case of Saudi citizens.

[44] That Palestinians, such as the appellant, have the same status as other foreigners residing in Saudi, is confirmed by a report from the Research Directorate, Canadian Immigration and Refugee Board, *SAU14602 Saudi Arabia: Information on the relations between the Palestinian community and the Saudi authorities (particularly the police),* June 1993. This report suggests that although Saudi Arabia is not a signatory to the Refugee Convention, historically, the Saudi authorities have extended certain privileges to Palestinians who fled from the former mandated territories of Palestine as a result of the conflict with Israel. However, the Gulf War brought a less tolerant attitude towards Palestinians residing in Saudi Arabia so that they are now "in the same category as other foreign nationals in the kingdom".

[45] The appellant says that he was deported from Saudi Arabia. At the time of his arrest, his residence document (which also included his wife's details) was seized. He was advised that he was to be deported and his father instructed to organise a destination for him. Had his father not complied, it is the appellant's understanding that he would have been indefinitely detained awaiting deportation. On departure, his Egyptian travel document was stamped with the Arabic word for "removed". Such actions on the part of the Saudi authorities are all consistent with the appellant having the official status of a foreign national, rather than a citizen of Saudi Arabia.

[46] The appellant's wife is similarly situated. Whether she was technically deported from Saudi Arabia is uncertain (her Egyptian travel document was not stamped as such). Even so, it would appear that her ability to reside in Saudi Arabia depended on her status as the appellant's wife. Once his temporary residence was lost, her entitlement to the same presumably lapsed also.

Palestine

[47] The appellant's parents were born in the formerly mandated territory of Palestine. Their home town is situated in Gaza within the area that is today under the administration of the Palestinian Authority. The appellant though was born in Saudi Arabia after his parents had fled Palestine.

[48] The question of Palestinian citizenship is complicated by the history of conflict with Israel. According to the Palestinian National Authority website, *The Palestinian Authority and Citizenship in the Palestinian Territories*, http://www.pna.net/reportsnetmcitizen.htm (accessed 6 June 2000), Palestinian citizenship, and the corresponding right of residence in the Palestinian territories, is governed by the principle of *jus sanguine* so that citizenship is conferred on all persons born in the Palestinian territories to Palestinian Arab parents who carry Israeli identification cards (a condition imposed by the Oslo Agreement). A child born abroad is also a citizen, provided his father holds Palestinian citizenship. As of yet, there has been no agreement concerning the fate of Palestinian refugees and the return of displaced persons, which awaits final status negotiations.

[49] It would appear from the above that the appellant is not entitled to Palestinian citizenship; he was not born in the Palestinian territories and his father is not a Palestinian citizen. Nor does the available information suggest that the appellant would have any entitlement to Palestinian citizenship by virtue of his marriage to a woman born in the Palestinian territories to Palestinian citizen parents. Married Palestinian women are assigned the citizenship of their husband, thereby losing their Palestinian citizenship. Whether, as in the present case, where the wife has married a stateless Palestinian, she would thereby lose her Palestinian citizenship, is not certain. However, even if this was not the case (and the Authority can make no actual finding on the point), the patrimonial bias of the Palestinian citizenship law almost certainly means that the appellant's marriage creates no entitlement to Palestinian citizenship. Nor, according to the Palestinian Authority website, can citizenship be acquired by naturalisation except in very special cases. In light of the above, and extending the benefit of the doubt, the Authority concludes that the appellant has no entitlement to Palestinian citizenship.

[50] As he is not considered a national by any state, the appellant is therefore stateless.

Country of former habitual residence

[51] In terms of Article 1A(2) of the Refugee Convention, a refugee claimant without a nationality must establish a well-founded fear of being persecuted in his or her country of former habitual residence. The appellant was born and resided continuously in Saudi Arabia up until coming to New Zealand in January 2001. Indeed, up until his expulsion from Saudi Arabia, he had neither visited nor resided in any other country. The Authority concludes that Saudi Arabia is the appellant's country of former habitual residence; *Refugee Appeal No 72635* (6 September 2002) at [113]-[116].

Well-founded fear of being persecuted

[52] The refugee status officer correctly held that the appellant's statelessness does not, of itself, create an entitlement to refugee status. Following Professor Hathaway's view in *The Law of Refugee Status* at p62 adopted in *Refugee Appeal No 1/92* (30 April 1992) that where a stateless refugee claimant does not have a right to return to any state, his or her needs should be addressed within the context of the conventional regime for stateless persons rather than under refugee law the officer concluded:

> "It is therefore highly unlikely that [the appellant] would be able to re-enter Saudi Arabia, nor does he have the right to live in either the Palestinian territories or Egypt. As such, the benefit of the doubt principle as to statelessness does not appear to apply to his situation. …
> As it has been found that the appellant is stateless and that he cannot return to Saudi Arabia or live in the Palestinian territories or Egypt, it is concluded that he cannot return to persecution. As such, it is concluded that [the appellant] does not have a well-founded fear of persecution, and it is therefore unnecessary to consider this issue further."

The decision in *Refugee Appeal No 72635*

[53] The refugee status officer's decision was issued some months prior to publication of *Refugee Appeal No 72635* which concerned a Kuwaiti *bedoon* who had been expelled to Iraq where he had lived for a number of years. The decision re-examines the Authority's jurisprudence in respect of stateless persons and contains an informative discussion on nationality, statelessness and the relationship between stateless persons and the Refugee Convention.

[54] Refugee Appeal No 72635 emphatically rejects the view that has found some academic and jurisprudential support that stateless claimants need only

establish that they are presently unable to return to their country of former habitual residence in order to qualify as a refugee. Rather there is but a single test for refugee status as explained at [64].

[55] Article 1A(2) recognises three potential categories of claimant: those who have a single nationality; those who have more than one nationality; and those who have no nationality at all (ie are stateless). Claimants in all three categories must satisfy the common requirement of a well-founded fear of being persecuted for reasons of race, nationality, religion, membership of a particular social group or political opinion. Thereafter the requirements vary:

(a) A person who possesses nationality must be outside the country of nationality and be unable, or owing to a well-founded fear of being persecuted for a Convention reason, be unwilling to avail him or herself of the protection of that country;

(b) In the case of a person possessing more than one nationality, such person is required to avail him or herself of the ***protection*** of each of the countries of which he or she is a national. To be recognised as a refugee he or she must therefore establish a well-founded fear of being persecuted in each country of nationality;

(c) A stateless claimant must be outside the country of his or her "country of former habitual residence" and unable or, owing to a well-founded fear, be unwilling to ***return*** to it.

[56] As noted in *Refugee Appeal No 72635* at [64], the word 'return' underlines the fact that the stateless claimant does not enjoy the protection of a country of nationality.

[57] After reviewing the drafting history of the Refugee Convention 1951 and the Convention Relating to the Status of Stateless Persons 1954, *Refugee Appeal No 72635* at [100]-[110] affirms the absence of any correlation between refugee-hood and statelessness. Statelessness *per se* does not give rise to refugee status.

[58] However, although statelessness is not the essential quality of a refugee, many refugees are, in fact, stateless. While acknowledging this overlap the concern of *Refugee Appeal No 72635* was to highlight the distinction between stateless persons and refugees. In particular it explains at [78]-[90] why statelessness is often the result of the operation and conflict of nationality laws and does not necessarily signify persecution in terms of the Refugee Convention. Article 1A(2) of the Refugee Convention should not therefore be used as a "catch-all" safety net for the problems relating to sojourn, entry and exit that are inherent in the condition of statelessness. To do so, as noted at [137], would collapse the clear distinction between stateless persons and refugees.

Return to country of former habitual residence

[59] Article 1A(2) requires that a stateless claimant establish a well-founded fear of being persecuted in his or her country of former habitual residence. The issue of return to a country of former habitual residence has, as noted in *Refugee Appeal No 72635*, given rise to some controversy and it is this point that is in issue in the present appeal.

[60] *Refugee Appeal No 72635*, for the reasons explained at [125]-[133], does not accept Professor Hathaway's view set out in The Law of Refugee Status at 62 (reproduced at [125]) that a state is a country of former habitual residence only if the claimant is legally able to return there, at least if construed literally. Rather, drawing on the non-refoulement principle contained in Article 33(1) of the Convention, it was proposed, at [132]:

> "We are of the view that the better answer to the "legal returnability" point is the non-refoulement principle contained in Article 33(1) of the Refugee Convention. The obligation of a State party is not to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened for a Convention reason. The protection thereby afforded to the refugee is protection from the act of expulsion or return, irrespective whether that act is "legal" under the domestic law of either the sending or the receiving State. The issue of return to a country of former habitual residence is therefore an issue of whether return is possible as a matter of fact, not as a matter of law. Article 33 prohibits return "in any manner whatsoever", not in any legal manner whatsoever."

[61] In formulating a more expansive test of the ability to return *as a matter of fact* rather than bare *legal* right, Professor Hathaway's underlying rationale set out at [125] is affirmed namely:

> "… where the stateless refugee claimant has no right to return to her country of first persecution or any other state she cannot qualify as a refugee because she is not at risk of return to persecution. Assessment of the claimant's fear of returning

> to the country of first persecution is a non-sensical exercise as she could not be sent back there in any event".

[62] This view, it is suggested at [126], has not been challenged in the case law unlike Professor Hathaway's second point that a state is a country of former habitual residence only if the claimant is legally able to return there.

[63] Most importantly the expanded factual ability to return test was held to be consistent with the well established principle discussed at [59] and [60] that a well-founded fear mandates an inquiry into the *prospective* risk of persecution. Once it is shown to be *factually* impossible for a stateless claimant to return to the country of former habitual residence it follows, according to *Refugee Appeal No 72635* at [134], that there is no well-founded fear. This is the case even when the claimant's statelessness may have resulted from persecution in the form of being stripped of nationality and the right of return:

> "… while it is clear that stripping a person of nationality and of the right to return may constitute persecution, once the person is outside the relevant country and it is factually impossibility for that person to return there, there is no well-founded fear of being persecuted in that country in the future. Any refugee claim would have to be based on the persecution which has already taken place. But as explained in paras [59] and [60], it is a first principle of refugee law that past persecution alone cannot satisfy the requirements of the refugee definition."

See also [157]

> "... if a stateless person cannot, as a matter of fact, return or be returned to a country of former habitual residence in relation to which a fear of being persecuted is claimed to exist, the claim to refugee status must fail as the fear is not a well-founded fear and past persecution alone is insufficient to establish a claim to refugee status."

[64] In *Refugee Appeal No 72635* it was held at [149] that:

> "the appellant cannot in fact be returned to Kuwait and he is not at risk of being refouled to a country of former habitual residence. It follows therefore that he cannot satisfy the Convention requirement of a well-founded fear of being persecuted."

As to Iraq there was held to be insufficient evidence to make a finding as to whether the appellant would, as a matter of fact, be re-admitted to Iraq. The matter was considered academic in any event because his claims to be at risk of persecution in that country were held to be not credible.

[65] In his submissions counsel acknowledged that the present appellant has no legal right of return to Saudi Arabia, his country of former habitual residence. It was also acknowledged – and we agree – that given the Saudi authorities' actions

in stripping the appellant of his right of residence and expelling him it is very unlikely that he could *in fact* be returned by the New Zealand authorities. On the reasoning in *Refugee Appeal No 72635* this is a sufficient basis on which to decline his claim. Mr Moses argues, however, that we should decline to follow *Refugee Appeal No 72635* on the issue of return. His objections are twofold: such an approach is contrary to both the underlying humanitarian purpose of the Refugee Convention and the actual wording of the Article 1A(2) inclusion clause.

[66] Summarising, Mr Moses notes the words of Lord Keith in *R v Secretary of State for the Home Department, Ex Parte Sivakumaran* [1998] AC 958,992G (HL) that the purpose of the Refugee Convention "is to afford protection and fair treatment to those for whom neither is available in their home country". The factual return test is criticised as narrow and legalistic and counter to this Authority's well established jurisprudence that in keeping with its humanitarian purpose the Convention should be applied generously.

[67] As for the wording of Article 1A(2), Mr Moses submits that the mere matter of an inability to return cannot be determinative of the entitlement to refugee status it being clearly anticipated that a stateless refugee will be outside the country of former habitual residence and *unable to return*. A requirement that a stateless claimant *be able to return* as a matter of fact is therefore an addition that runs counter to the strict wording of Article 1A(2). Further he notes that the proposition that factual inability to return equates with the denial of refugee status is not supported by citation from any superior court either in New Zealand or elsewhere.

[68] I have carefully considered the objections raised by counsel. In my view he has raised serious and not easily dispelled concerns about the approach adopted in *Refugee Appeal No 72635*. With respect to the panel, I consider that the proposed expanded factual ability to return test:

(a) is difficult to reconcile with the actual wording of Article1A(2);

(b) misconstrues the requirements of a well-founded fear;

(c) is not supported by the case law;

(d) has the result of undermining an internationally uniform outcome from the exact same Article 1A(2) test for refugee status and;

(e) is still problematic in respect of Article 33(1).

[69] Before addressing these concerns it is helpful to bear in mind the situation of a stateless person who has habitually resided in more than one country. Analogous with a person with more than one nationality, he or she must establish not only a well-founded fear of being persecuted in respect of at least one country of former habitual residence but also that he or she is unable or unwilling to return to any of his or her other countries of former habitual residence. If a stateless person can find safety or "an alternate and viable haven" in some other country of former habitual residence the surrogate protection of the Refugee Convention is not engaged. See the discussion concerning habitual residence in more than one country in *Refugee Appeal No 72635* at [117]-[123] and in particular the comments of the Canadian Court of Appeal in *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 666 reproduced at [118 (e)]

[70] It is clear that, along with the absence of a real risk of persecution, a right to return is implicit in the notion of an "alternative and viable haven". At this stage of the refugee enquiry a requirement that there be a right or ability to return to an alternate country of former habitual residence is uncontroversial.

Article 1A(2) - "unable to return"

[71] As noted *Refugee Appeal No 72635* finds support for the returnability test in Professor Hathaway's proposition that a stateless refugee claimant who cannot return to her country of former habitual residence "cannot qualify as a refugee because she is not at risk of return to persecution". However to the extent that the question whether a stateless claimant "*is at risk of return to persecution*" is treated as a substitute for the wording of Article1A(2) such a proposition is problematic. Article 1A(2) relevantly provides that a refugee is a person who;

> ***"owing to a well founded fear of being persecuted*** for reasons of race, religion, nationality, membership of a particular social group, 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**."

[72] There is general consensus that the proper construction of Article 1A(2), requires a clear *link* between a person's well-founded fear of being persecuted for a Convention reason and his or her being *unable* or *unwilling* to avail him or herself of the protection of the country of nationality or, if stateless, to return. In other words the person must be "unable" or "unwilling" owing to his or her well-founded fear of being persecuted for a Convention reason in the relevant country. "The hallmark of a refugee is the inability or unwillingness to return home because of a well-founded fear of being persecuted" Hathaway, *ibid*, p65.

[73] The requirement of this linkage between a person having a well-founded fear of being persecuted for a Convention reason and that person being unable or unwilling to return, in the context of stateless refugees, has been discussed and affirmed in a number of decisions. Specifically see the decisions of the English, Australian and Canadian courts cited in *Refugee Appeal No 72635* at [67].

[74] The phrase "is unable ... to return" has received sparse judicial or academic analysis – possibly indicating that the words have not been considered problematic or ambiguous.

[75] It is interesting to note in *Rishmani v Minister for Immigration and Multicultural Affairs* [1997] 829 FCA one of the few references made to the comments of the Ad Hoc Committee on the issue:

> "The Committee agreed that for the purposes of this sub-paragraph and sub-paragraph A-29(c) and therefore for the draft convention as a whole, 'unable' refers primarily to stateless refugees, but includes also refugees possessing a nationality who are refused passports or other protection by their own government. 'Unwilling' refers to refugees who refuse to accept the protection of the government of their nationality."

[76] Clearly the drafters of the Refugee Convention had in mind a notion of "unable" informed by the historic European experience of the first half of the 20th century that statelessness was intimately connected with persecution especially of ethnic minorities subject to denationalisation and/or expulsion. These obvious victims of persecution were unable to return to their former homes because of the risk of persecution of which their statelessness or expulsion was one manifestation.

[77] That "unable", which the drafters associated primarily with stateless refugees, was ultimately also employed for those with a nationality, came from a

recognition that even those with a nationality might be unable to return to their country of nationality through the persecutory actions of their own government falling short of denationalisation such as refusing a passport. Conversely it was presumably thought that some – albeit a small number – of stateless refugees, despite their lack of nationality, might be permitted to return to a country of former habitual residence but would be unwilling to do so because of a fear of persecution.

[78] In the context of the present discussion what is important is that the actual wording of Article 1A(2), reflecting the apparent intention of the drafters of the Convention, clearly contemplates that a stateless refugee may be *unable to return* to his or her country of former habitual residence. It cannot be, therefore, that *every* stateless person who is unable to return home is not a refugee since the inclusion clause contemplates some at least will be. Any attempt therefore to construct a definition of "country of former habitual residence" or "well-founded fear" that automatically excludes from the protection of the Convention every stateless person who is unable to return would appear to be at odds with the wording of Article 1A(2) and the underlying objectives and purpose of the Convention.

Well-founded fear

[79] With respect, I consider that the attempt to present the return as a matter of fact test as a *logical* requirement of a well-founded fear of being persecuted is an error that stems from undue reformulation of this Authority's established test for a well-founded fear of being persecuted, itself a substitute for the Convention term. The danger of such a practice was noted by the Australian High Court in *Minister of Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (HCA) at 572 and adopted by this Authority in *Refugee Appeal No 71404/99* (29 October 1999) at [37].

[80] The Authority's template issue (a) set out at [34] above omits, in the interests of simplicity, the link between a person's well-founded fear and his or her inability or unwillingness to avail him or herself of protection or to return. Issue (a) (which assumes nationality) asks the question: "… is there a real chance of the appellant being persecuted *if returned* to the country of nationality". Here the *"if returned"* signifies that the enquiry involves an assessment about anticipated

events if the person was *hypothetically returned* to or, in other words, was present in the country of nationality. Once there is a positive finding of a real chance of persecution in such hypothetical circumstances it is normally assumed that the Article1A(2) requirement that the person is unable or unwilling to avail him or herself of the protection of the country of nationality owing to a well-founded fear of being persecuted is met.

[81] It is notable that in respect of a claimant possessing a nationality the *hypothetical* nature of the *"if returned* to the country of nationality" is not questioned. Yet, if being able to return or be returned (not necessarily the same) as a matter of fact is integral to the existence of a well-founded fear this must be so in the case of those with, as well as those without, nationality.

[82] It might be argued that a person with nationality possesses a legal right of return in keeping with the principle that a state is under a duty to receive its own nationals as noted in *Refugee Appeal No 72635* at [133]. This, along with the issuing of passports or other documentation to nationals abroad is a critical aspect of "protection" offered by a state to its nationals. However, in practice, states sometimes refuse such protection as when dissidents are refused a passport or not allowed to return. Modern examples of countries which have refused to allow the return of nationals who had fled abroad and sought asylum, though they retained their citizenship, include Vietnam and Chile; Goodwin-Gill *The Refugee in International Law* 1996 at p16. As noted above Article 1A(2) employs "unable" in relation to those with nationality with these situations in mind.

[83] It follows that when a person is refused a passport or otherwise not permitted to return by the country of nationality, *to return on the part of the individual,* as a matter of fact, is not usually possible. Nor would a sending state find it easy to return such a person in the face of a receiving state refusing to permit return. In the case of a person with nationality such actions on the part of the country of nationality, far from disqualifying him or her from refugee status, are often considered indicators of a real chance of persecution qualifying the claimant for the protection of the Convention. The inability of the person to return is taken to be a manifestation of persecution, the risk of which remains ongoing.

[84] It has of course never been suggested in our jurisprudence or anywhere else that if, as a matter of fact, a person with nationality is unable to return or be

returned to the country of origin "she cannot qualify as a refugee because she is not at risk of return to persecution" or that to grant refugee status in such circumstances would be to rely on past persecution.

[85] In my view there is no logical basis for making the ability to return or be returned as a matter of fact a pre-requisite for a well-founded fear of being persecuted irrespective of the status of the claimant, provided the inability to return has a Convention nexus. As stated it seems to me that the error lies in the reformulation of the Article 1A(2) test and in particular the words "a well-founded fear". Changes in words can lead to ambiguity or subtle changes of meaning.

[86] The test for a well-founded fear of being persecuted adopted by this Authority "is there a real chance of the appellant being persecuted *if returned* to the country of nationality" is not the same as asking is a person "*at risk of return* to persecution" let alone "is it factually possible for that person to return" *Refugee Appeal No 72635* at [134] or can the person "as a matter of fact return or be returned" *ibid* at [157] or whether "re-entry is, as a matter of fact, not possible" or is the person "at risk of being refouled" *ibid* at [149] or "sent back" *ibid* at [126].

[87] In the first "if returned" test the risk to be assessed is the present or prospective risk of *being persecuted* in the relevant country. In the second it is the possibility of *being returned* to a particular country. It readily follows from the second formulation (and its abovementioned variants), but clearly not the first, that if a person cannot be returned he or she "is not at risk *of return* to persecution". To ask though about the *risk of return* is fallacious: it is not a requirement of this Authority's test for a well-founded fear and is far removed from the wording of Article 1A(2).

[88] It follows that Professor Hathaway's suggestion that if a stateless claimant is not "*at risk of return"* to persecution, assessment of the fear of returning *"is a non-sensical exercise*" is misleading. Likewise it is misleading to state that a person who is not *"at risk of return"* cannot have a well-founded fear as this offends the basic principle that past persecution is insufficient to establish a claim to refugee status.

Case law

[89] The suggestion in *Refugee Appeal No 72635* that Professor Hathaway's underlying rationale for the returnability test has not been challenged in the case law is, with respect, questionable. Certainly it has not been affirmed.

[90] As the decision acknowledges at [129] there is a line of Canadian cases which held Professor Hathaway's reasoning to be erroneous. The principal case is *Maarouf v Canada (Minister of Employment and Immigration)* [1994] 1FC 723. Although the reasoning is not detailed, the court firmly rejected Professor Hathaway's requirement that to qualify as a country of former habitual residence, the stateless claimant must be legally able to return. It held that this requirement was unduly restrictive and pre-empted the provision of "surrogate" shelter to a stateless person "who demonstrated a well-founded fear of persecution". The court expressly rejected as contrary to the humanitarian purpose of the Convention the requirement that a person have a legal right of return. Such a requirement, it was held, would result in a persecuting state being able to strip a person of their right to return as a final persecutory act and thereby control that person's recourse to the Refugee Convention.

[91] Professor Hathaway's rationale that if a person is *not at risk of return* to persecution, assessment of the fear is a nonsensical exercise had been adopted by the decision-maker at first instance: "since by his own evidence he cannot be returned there it is patently absurd to argue that he requires protection from being there". It was therefore before the court. It is hard to see how such a proposition, which *Refugee Appeal No 72635* holds, equates with a finding that a person does *not* have a well-founded fear and therefore is not a refugee in terms of the Convention, can stand alongside the court's acceptance that a stateless claimant with no legal right of return to a country of former habitual residence (and on the evidence could not therefore be returned) could still have a well-founded fear of being persecuted for a Convention reason.

[92] The rejection of this same Hathaway proposition is also implicit in the reasoning in *Shaat v Canada (Minister of Employment and Immigration)* 28 Imm LR (2d) 4, 82 FTR 102.

[93] The United Kingdom Immigration Appeal Tribunal in UKIAT00254 (15/09/2004), a decision that post-dates *Refugee Appeal 72635*, considered the position of two stateless Kuwaiti *bedoons* who, it was held, were not at all likely to be accepted for return by the Kuwaiti authorities in the foreseeable future and were not therefore returnable. In allowing the appeal and finding that both appellants faced a real risk of return to persecution for a Convention reason the Tribunal expressly rejected the requirement that the appellants be able to return to Kuwait either as a matter of law (Hathaway) or as a matter of fact.

[94] The Tribunal considered *Refugee Appeal 72635* and declined to follow it. It held that a requirement that a claimant be able to return offended the principle of assessment at the date of hearing, which assumes a return taking place, and instead enters into contradictory speculation. Secondly it infringes the principle of hypothetical assessment since it requires taking into account a factor relating to the modalities of return. Further a returnability test requires taking into account a future characteristic or factor not reasonably foreseeable and would entail reading into Article 1A(2) a further qualifying condition, namely that the fear was not a fear which could be obviated by the modality of return.

Uniform outcome of Article 1A(2) test – meaning of return as a matter of fact

[95] The appellant in *Refugee Appeal No 72635* was found not to be credible, excluded in terms of Article 1F(a) and his claimed persecution held to be unrelated to a Convention reason. (For comment on this later finding see *Refugee Appeal No 74467* (1 September 2004)). The appeal was therefore determined on the substantive issues rather than peremptorily dismissed merely on the basis of an inability to return or be returned to either Iraq or Kuwait, the two countries of former habitual residence. In consequence the decision includes little discussion as to the nature of the enquiry into whether, as *a matter of fact*, a claimant is able to return or be returned by a sending state to a country of former habitual residence or the standard of proof; indeed in respect of Iraq, whether the appellant was able to return, was considered academic in light of other substantive findings.

[96] What is actually entailed by a test of whether a person "can return or be returned" *as a matter of fact* is uncertain. *Refugee Appeal No 72635* does not distinguish between a person being "able to return" and being "returned" although they are not necessarily synonymous. The former arguably refers to the ability to

return *on the part of the person*. Asylum-seekers commonly leave (and potentially could re-enter) countries clandestinely. It would seem pointless though to ask if a stateless person, who has no legal entitlement to return to a country of former habitual residence where they are at risk of persecution, was able none-the-less to return *as a matter of fact*.

[97] Presumably *Refugee Appeal No 72635* meant the test of return as a matter of fact to apply to the factual ability of the sending state to return a stateless person to a country of former habitual residence ("be returned"). The reliance at [132] on the wording of Article 33(1) (which is wholly concerned with the duty of states towards refugees) suggests that the proposed inquiry is concerned with the ability of states to expel or return a person "in any manner whatsoever" irrespective of the legality of the action. The ability to return a person to or forcing them across a border irrespective of the agreement of the receiving state would therefore qualify.

[98] Whatever its scope, it is clear that the return or be returned *as a matter of fact* test renders otiose the critical issue of the events in the country of former habitual residence that give rise to a real chance of the stateless person being persecuted in favour of *the sending state's capacity to effect return in any manner whatsoever.* As the ability of states to return a stateless person to a country of former habitual residence (or even return a person with nationality) is not necessarily uniform, entitlement to refugee status will therefore potentially vary from one country to another while stateless claimants may find that their refugee status is successively lost or gained as they move between countries in flight from the exact same persecution for one of the five Convention reasons. Entitlement to refugee status in terms of the Refugee Convention is potentially no longer a uniform outcome of the application of Article 1A(2) irrespective of the country of asylum.

[99] This result is not the same as the inevitable divergence in outcome of the refugee determination process that flows from varying (and undesirable) national interpretations of Article 1A(2) or the vagaries of decision-making. It is instead the logical outcome of importing into the refugee definition itself the requirement that the asylum state be able to return or refoule a stateless claimant as a matter of fact.

[100] So for instance in the case of the present appellant, applying the exact same, able to return or be returned as a matter of fact test, he would arguably have been a Convention refugee had he sought asylum in a country that shared a common border with Saudi Arabia; a neighbouring county, could after all return the appellant to or even across the border irrespective of Saudi Arabia's agreement. Quite possibly if he sought asylum in a country with a common border with one of Saudi Arabia's neighbours he might, on the return as a matter of fact test, still have a well-founded fear qualifying him for refugee status, as return to an immediate neighbour of Saudi Arabia allows for the practical possibility of return to that country.

[101] The further the appellant travelled from Saudi Arabia, so according to the returnability test, did he potentially diminish his entitlement to recognition as a Convention refugee. He might have regained it along the way had he stopped in a country with a very close diplomatic relationship with Saudi Arabia (or even a very close diplomatic relationship with one of Saudi Arabia's neighbours). He might have improved his chances of invoking the protection of the Convention if he had had the foresight to leave Saudi Arabia travelling on false documentation as this opens up greater opportunities for states to exercise rights under international civil aviation agreements to remove persons without appropriate documentation back to the port of embarkation.

[102] There are a variety of factors which potentially condition the *factual ability* of a state to return “in any manner whatsoever” a stateless claimant with no legal right of return to a country of former habitual residence. Proximity, regard for legal process and the nature of the relevant states' relationship will be important. Other relevant factors might include whether the person travelled by plane on false documentation, or without requisite authorisation to enter, the sending state thereby triggering potential rights of removal under international civil aviation agreements. Even being granted a temporary permit to enter or refused a permit and held in custody or released on conditions may be relevant, the latter being an option employed by immigration authorities in this and other countries aimed, amongst other reasons, at facilitating the eventual removal of those who arrive without appropriate documentation.

[103] Other practical barriers to returning persons (including those stateless persons with a legal right of return or even those with nationality) could result from

a state of war, the absence of transport links, limited financial resources, the breakdown of state authority in the receiving state, and the receiving state's refusal to co-operate in such matters as the issuing of travel documents.

[104] All these matters are surely extraneous to the focus of Article 1A(2), namely whether a stateless person's inability to return has a Convention nexus. All however potentially come into play once the question to be asked is whether "it is factually possible for that person to return there" or can the person as "a matter of fact return or be returned", or whether "re-entry is, as a matter of fact, not possible" or can the person be "refouled" or "sent back".

[105] Not only is it hard to reconcile refugee status as being dependent on such capricious factors, the potential inconsistency of outcome of the determination process as between different asylum states surely points to the erroneous nature of the return as a matter of fact test. It is inconceivable that the framers of the Refugee Convention who set out to create an international rights regime could have intended such an outcome.

Risk of return – Article 33

[106] As *Refugee Appeal No 72635* convincingly shows, excluding from the protection of the Convention those stateless claimants who do not have a *legal* right of return to a country of former habitual residence would expose many stateless individuals to the very real possibility of being returned to a country of former habitual residence where they risked being persecuted. Such an outcome is contrary to the objectives and purpose of the Convention and fatally undermines the legal return test. Even so, it was suggested that this fatal objection could be overcome by expanding the test to one of return *as a matter of fact*. In our view, this wider formulation of the test still exposes stateless persons to the risk of return to persecution.

[107] In the case of the present appellant he was born and lived all of his life in Saudi Arabia. He suffered past persecution at the hands of the Saudi authorities and, should he return, there is a real chance that he will again suffer persecution. He left Saudi Arabia and sought asylum in New Zealand as a direct consequence of the persecution he experienced, indeed he was effectively expelled from the country as part of a series of persecutory acts by the Saudi authorities.

[108] Given the nature of the appellant's relationship to Saudi Arabia, should his refugee claim be declined *solely* on the basis of the practical difficulties entailed in his returning to that country, as was the approach of the refugee status officer, paradoxically this would potentially trigger *an attempt* by the New Zealand authorities to achieve just that.

[109] The returnability test (whether as a requirement of a country of former habitual residence or of a well-founded fear) invites the peremptory rejection of claims without any investigation of the substantive issues. A finding is able to be reached that a stateless claimant is *not* a refugee on the sole basis that he or she cannot or it is "highly unlikely" that he or she could return or be returned to the country of former habitual residence.

[110] Once declared *not* to be a refugee the stateless person's status is quite likely to become that of an unlawful alien with none of the rights and protections of the Refugee Convention (including importantly protection from prosecution for unlawful entry). In consequence, immigration authorities will feel free to attempt to remove a rejected stateless claimant including contacting the authorities in the country of former habitual residence. In the case of those held in custody or released on conditions the attempt to remove will be immediate. The person's statelessness presents no legal bar to removal as New Zealand is not a party to the Conventions on Statelessness nor do those conventions necessarily prohibit removal of stateless persons unlawfully present in a territory.

[111] The assumption that stateless individuals, such as the present appellant who is fleeing persecution, can somehow have their needs addressed within the context of the conventional regime for stateless persons (which has been adopted by only a relatively small number of countries, New Zealand not included) rather than under refugee law is surely misplaced.

[112] The logic of *Refugee Appeal No 72635* is to encourage immigration officials to employ all available strategies to return a stateless individual such as the present appellant to his country of former habitual residence where he is at risk of being persecuted (or to a third country from where he may be at risk of being returned to persecution). The danger to a stateless claimant is obvious. So too the potential danger to family members still in the home country from the breach of confidentiality normally accorded to an asylum seeker.

[113] Arguably, the Article 33 protection also extends to *attempts* by the authorities in a receiving country to return or *refoule* a refugee.

[114] It might be argued that this objection could be overcome by the application of a very liberal benefit of the doubt about the factual possibility of return (as was the approach in *Refugee Appeal No 1/92* (30 April 1992)) or the expediency of the stateless claimant filing a second or further refugee claim should it became apparent that the sending state might well be able to arrange return to the country of former habitual residence. The dubious utility of a principle, the application of which should be minimised or even avoided in practice, and the significant statutory limitation on the filing of second or subsequent refugee claims – not to mention practical problems entailed - make either solution unattractive.

[115] With respect to the panel in *Refugee Appeal No 72635,* for the reasons discussed above, I consider their attempt to rehabilitate Professor Hathaway's legal right of return test by substituting a test of return as a matter of fact, to be flawed. I respectfully decline to follow it.

[116] In summary I conclude that those stateless persons who are unable to return home, owing to a well-founded fear of being persecuted for a Convention reason, are entitled to the protection of the Refugee Convention.

Application to the appellant

[117] The appellant's predicament is not simply that inherent in the condition of being stateless. He has suffered past persecution. Following his arrest, he was denied a fair trial, arbitrarily detained, subjected to ill-treatment in the form of solitary confinement, beatings and sexual assaults and arbitrarily stripped of his right of residency and deported. His exclusion from Saudi Arabia, itself a form of persecution, is ongoing. If he was to be returned there is a real chance he would again be arbitrarily detained on an indefinite basis and ill-treated pending further deportation. His inability to return to Saudi Arabia arises directly from his persecution.

[118] In respect of the Convention reason, it would seem that there is a political complexion to the appellant’s alleged criminal offence of providing aid or weapons to persons involved in an attack on a United States military vehicle. As well as

imputed political opinion the Authority also finds that the appellant's Palestinian race/nationality was also a contributing factor to his ill-treatment. Racial discrimination and social prejudice based on ethnic or national origin is reportedly substantial inside Saudi Arabia. Foreigners, who make up the majority of the labour force, are subject to extensive discrimination and, as foreign nationals, are at a disadvantage when they come into contact with the security forces and the criminal justice system; Amnesty International para 2.3.1. It is relevant to note that, in keeping with the principles explained in *Refugee Appeal No 72635* at [173]-[177] it is not necessary that the Convention ground be the sole, or even a dominant, cause of the risk of being persecuted. It need only be a contributing factor.

[119] As far as the appellant's wife is concerned, I extend her the benefit of the doubt that, by reason of her familial relationship with her husband (particular social group), in the event of her being returned to Saudi Arabia with her husband, there is a real chance that she too will be denied entry and arbitrarily detained where she would be at risk of ill-treatment.

CONCLUSION

[120] For the above reasons, I find that the appellants are refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeals are allowed.

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V J Shaw
Member

DECISION DELIVERED BY P MILLAR

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[121] I have had the opportunity to read and consider the decision of my colleague V J Shaw and agree with her conclusion that the appellants are refugees.

[122] I also concur with her finding that a stateless person will meet the Inclusion clause of the Refugee Convention if that person is unable to return to his or her country of former habitual residence, owing to a well-founded fear of persecution based on one of the five Convention grounds.

[123] However, in my view, while the Authority needs to examine the reasons why a stateless person cannot return to their country of former habitual residence, that inquiry must include an examination as to whether that person can return to the country as a matter of fact and if they cannot, whether the reason for that is, or is linked to, one of the five Convention grounds.

[124] If the inability to return as a matter of fact is not based on one of those five Convention grounds, then the person does not fall within the Inclusion clause.

[125] Conversely where the inability to return arises due to Convention related persecution the refugee definition is met. This approach is consistent with the long held jurisprudence of the Authority that the assessment of risk is prospective as the ongoing inability to return in those circumstances is continuing persecution as contemplated by the Convention.

[126] This approach is consistent with the Convention requirement that the inability to return is owing to a well-founded fear of persecution for a Convention reason.

[127] In this case the appellant has been deported from Saudi Arabia and I agree with my colleague that he will not be allowed to return there. The appellant's wife also was in effect forcibly made to leave Saudi Arabia and she cannot re-enter that country.

[128] In addition to the past persecution suffered, I find their exclusion from Saudi Arabia to be part of ongoing persecution and therefore their fear of persecution is well-founded. Their exclusion from that country is based on the political complexion to the appellant's alleged criminal offence of providing weapons to persons involved in an attack on a United States military vehicle. In addition to adverse political opinions being imputed to the couple, I also am satisfied that their Palestinian race/nationality was a contributing factor. There is therefore a Convention reason for their persecution.

CONCLUSION

[129] Accordingly, they are both refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeals are allowed.

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P Millar
Chairperson