The Legal Debate in Canada on The Protection of Stateless Individuals Under The 1951 Geneva Convention

Edward C. Corrigan, B.A., M.A., LL.B.*

The question of stateless individuals who have claimed refugee status in Canada has been subject to a vigorous legal debate in Canada over the past number of years both at the Immigration and Refugee Board (IRB) and also at the Federal Court. Generally speaking the International Community has had difficulty dealing with stateless individuals in a world governed by nation states and strict rules governing citizenship.

> Statelessness has long been recognized as a legal status "which entails a most severe and dramatic deprivation of the power of the individual. Despite long-standing recognition of the problem, the numbers of stateless aliens has risen sharply over the last century, particularly after the First and Second World Wars. As a result, an unprecedented number of stateless persons has presented the international community with complex economic, political and legal questions.[1]

The legal status of stateless persons has also been characterized as "*res nullis*" or void.[2]

It is interesting to note that Palestinians, the largest group of stateless individuals, were originally excluded from the 1951 Geneva Convention. To quote Article 1(D) Exclusion Clause of the 1951 Convention dealing with "Persons already receiving United Nations protection or assistance:"

> 1(D) This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commission for Refugees protection or assistance.
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> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.[3]

*Barrister and Solicitor.

[1]"Stateless Persons and Their Lack of Access to Judicial Forums," *Brooklyn Journal of International Law* (Vol. X1:2 1985) pp. 439-457 at 439.

[2]P. Weis, *Nationality and Statelessness in International Law 161*, (1979) p. 162, cited in Ibid p. 439.

[3]*UNHCR HANDBOOK*, para. 141, p. 33.

The agency referred to in the 1(D) Exclusion Clause is the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The only such other agency was the United Nations Korean Reconstruction Agency (UNKRA) which was disbanded before the ratification of the 1951 Geneva Convention.[4]

Hathaway discusses this Exclusion clause in his book *The Law of Refugee Status* and comments on the convergence of interest of both the Arab states and the Western powers to exclude Palestinian refugees from the 1951 Geneva Convention. Fortunately, Canada has chosen a restrictive interpretation of this Exclusion clause and limits its applicability only to areas where UNRWA operates. Stateless Palestinian refugees are therefore able to apply for protection under the Geneva Convention in Canada. This aspect of the question of protecting stateless persons, however, hints at reasons why Canada and other Western nations have had difficulty dealing with the legal status of stateless individuals.[5]

The international community and, in particular, the United Nations High Commissioner for Refugees (UNHCR), later modified this position. The *Handbook on Procedures and Criteria for Determining Refugee Status* (Office of the United Nations High Commissioner for Refugees, 1989) states that refugees from Palestine can make claims for protection under the 1951 Geneva Convention if they are in an area not covered by the United Nations Relief Works Agency which assists refugees from Palestine. The *UNHCR Handbook* at paragraph 143 reads as follows:

> With regard to refugees from Palestine, it will be noted that UNRWA operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. It should be normally sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.[6]

[4]*UNHCR HANDBOOK*, para. 142, pp. 33-34.

[5]James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pp. 205-209.

[6]*UNHCR Handbook*, para. 143, p. 34.

The definition of "Convention refugee" is contained in subsection 2(1) of the *Immigration Act*[7].

> "Convention refugee" means any person who
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> > (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,
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> > > (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
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> > > (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
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> > (b) has not ceased to be a Convention refugee by virtue of subsection (2),
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> but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

The key words in s. 2(1)(a)(ii) of the *Immigration Act* are "*and is unable.*" To qualify under s. 2(1)(a)(ii) of the *Immigration Act* as a Convention refugee, a stateless person who is unable to return to a country of former habitual residence, can qualify for protection as a Convention refugee. This position appears to be supported by *Ward* under the "unable branch" of the definition.[8]

It is recognized that not all stateless persons are refugees and that a stateless person must demonstrate a well-founded fear of persecution under one of the five grounds enumerated in the Convention before acquiring protection as a refugee against any one country of former habitual residence. As stated in paragraph 102 of the *UNHCR Handbook*:

> It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

The definition of former habitual residence is, however, a subjective one and open to a variety of interpretations. There may indeed be two or more countries of former habitual residence in any given case. According to Grahl-Madsen, when interpreting the term "country of former habitual residence", the term

[7]R.S.C. 1985, c. I-2.

[8]*Ward v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 85 (S.C.C.) pp. 105-108.

should usually only be equated with the state in which the stateless claimant first experienced persecution, namely, the "country of original persecution".[9]

Grahl-Madsen, in support of his position, states:

> It would seem to be best in keeping with the intention of the drafters if in the greatest possible number of cases application of the term "country of former habitual residence" would lead to the same practical result as application of the term "country of nationality"
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> The yardstick we seek may be found in the case of a person who, before becoming a refugee, has resided in the country of which he is a national. In his case the "country of former habitual residence" should be identical with the "country of his nationality". The unity of the two concepts in such a case should not be broken if the person in question moves first to one foreign country, then to a second, so to a third, a fourth, and a fifth. In any event, the term "country of his former habitual residence" should denote to the same country as does the term "country of his nationality", namely his "country of origin."....
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> This concept ["country of former habitual residence"] is related to the concept of the "country of nationality" in that both are of a stable nature. As mentioned above, both concepts may be brought under the joint heading of "country of origin" (or "country of original persecution") We saw that if a person has a nationality at the time when he becomes a refugee, he is to be considered a person having a nationality for the purpose of Article 1 (A) (2). It follows that the country of which he was a national at the relevant date is the "country of his nationality" in the sense of the said provision, and that it remains as such irrespective of whether he eventually loses his nationality. Similarly, the country from which a stateless person had to flee in the first instance remains the "country of his former habitual residence" throughout his life as a refugee, irrespective of any subsequent changes of factual residence.[10]

In *Ward* the Supreme Court found that where there are two countries of nationality, the claimant must show a well founded fear of persecution against both (or more if there are more). This, however, in a situation where individuals are stateless, there is no country of citizenship, no right of return and therefore *Ward*, which deals with citizens with nationality and who are vested with "a right of return", is not binding on individuals who are stateless and are from

[9]Grahl-Madsen, *The Status of Refugees in International Law* (Vol.1, the Netherlands: A. W. Sijthoff- Leyden, 1966), at 162.

[10]Grahl-Madsen, at 161.

countries of former habitual residence with no legal right of return and had no effective national protection.[11]

In *Maarouf* the Federal Court dealt with an appeal of a negative decision that held that a stateless person could not qualify as a refugee if they were not returnable to a Country of Former Habitual Residence (CFHR). Accordingly, if there was no right of return then there was no country from which protection needed to be granted and the stateless individual therefore did not require protection under the Geneva Convention. The result of this legal stand was that stateless individuals who did not have a right of return to a CFHR were left in a legal limbo.[12]

This legal viewpoint, adopted by some members of the IRB, was based on the academic position put forward by James Hathaway in his book *The Law of Refugee Status*. Professor Hathaway's argument with respect to "country of former habitual residence" where the existence of a legal right of return is determinative is as follows. If there is no right of return the person is "stateless" and since the person cannot be returned to any country there is no state to provide protection from and consequently the person cannot qualify under the Geneva Convention as a refugee. The thrust of the above analysis was to make it impossible for stateless people who could not be returned to any country to obtain protection under the Geneva Convention.[13]

Hathaway's legal view of country of former habitual residence was controversial and subject to considerable legal debate. In fact the position taken by Hathaway and those on the IRB who adopted his views on CFHR was contrary to the preferred IRB legal position paper on statelessness.[14]

Law should not discriminate against stateless individuals and create a result that denies them protection under the 1951 Geneva Convention. The right to return to a country of former habitual residence should not be determinative on the question. A country of former habitual residence should be based on a significant connection to that country and not solely on a right of return. To quote *Maarouf*:

> 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.[15]

Mr Justice Cullen, writing for the Federal Court, in *Maarouf* also observed:

> The rationale underlying international refugee protection, is as the Supreme Court of Canada stated in [*Ward v. A.G. Canada*] (Mr. Justice La Forest, at p. 752) to serve "as 'surrogate' shelter coming into play upon the failure of national support." For a stateless person, that is a person without a country of nationality, to come within this definition two facts 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 reasons cited in the definition.[16]

Madame Justice Reed in *Abdel-Khalik* also supported the legal view that stateless individuals who were not formally returnable to a CFHR could be refugees and that it was appropriate to assess the claim against a country of former habitual residence. The facts in *Abdel-Khalik* involve a stateless Palestinian from the U.A.E. who was out of that country during the Gulf War and prevented from returning due to the fact that she was a Palestinian. Madame Justice Reed stated:

> In the case of a stateless person, one cannot look to the country of the person's nationality but considers instead the country of the individual's former habitual residence. The applicant is a Palestinian. She was born and lived most of her life in the United Arab Emirates. A person born in the United Arab Emirates does not automatically become a citizen of that country. Citizenship depends on the nationality of the father. Both counsel for the applicant and counsel for the respondent agree that the applicant is a stateless person and that the board applied the correct test and properly identified the applicant's country of former habitual residence as the United Arab Emirates. The denial of a right to return to that country can be an act of persecu-

[11] *Ward v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 85 (S.C.C.) at 105.

[12] *Maarouf v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 163 (Fed. T.D.).

[13] James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 61-63.

[14] Guy Goodwin-Gill, "Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!" (Unpublished Paper) Director, Legal Services, "Treatment of Stateless Refugee Claimants at CRDD," March 11, 1992.

[15] *Maarouf v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 163 (Fed. T.D.) at pp. 174-175.

[16] *Maarouf v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 163 (Fed. T.D.) at pp. 172.

> tion: [See *Maarouf v. The Minister of Employment and Immigration* (1993), 23 Imm. L.R. 163 (T.D.)][17]

The Supreme Court in *Ward* found that it was necessary to find a fear of persecution against *all countries of nationality*. This principle does not, however, apply to stateless individuals in that a fear of persecution should not be required to be proved with respect to all countries of former habitual residence, only for countries where the claimant has a legal right to return and has a meaningful right of protection. The key consideration is that there is legal right of return and that protection is available.

To quote Mr Justice Cullen in *Maarouf* "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."[18] Accordingly the right of return was not determinative in granting refugee status.

After the Federal Court overruled Hathaway's interpretation on the requirement of returnability, some members of the IRB interpreted *Maarouf* in a manner, which I believe, was not intended by the Federal Court. As a result, yet another, a legal dispute arose with respect to CFHR that was not explicitly dealt with in *Maarouf*. In particular the question was where there are more than one country of former habitual residence, what CFHR was the reference country for the fear of persecution in order to determine eligibility for protection under the Geneva Convention?

In a number of decisions at the IRB stateless refugee claimants where there was more than one county of former habitual residence, the refugee claimants were being required to demonstrate a well-founded fear of persecution against all countries of former habitual residence in order to be accepted as a Convention refugee. This position was contrary to the legal position set out in the *UNHCR Handbook on Refugees*. Paragraph 104 reads as follows:

> A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.[19]

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[17]*Abdel-Khalik v. Canada (Minister of Employment & Immigration)* (1994), 23 Imm. L.R. (2d) 262 (Fed. T.D.) at para. 3. Also see *Shaat v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. No. 1149, 1994 CarswellNat 248, 28 Imm. L.R. (2d) 41 (Fed. T.D.); See also *Zdanov v. Canada (Minister of Employment & Immigration)*, 1994 CarswellNat 378 (Fed. T.D.); *Ibrahim v. Canada (Secretary of State)*, [1994] F.C.J. No. 1056, 1994 CarswellNat 187, 26 Imm. L.R. (2d) 157 (Fed. T.D.).

[18]*Maarouf v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 163 (Fed. T.D.) at p. 175.

[19]*UNHCR Handbook on Refugees*, para 104, p. 24.

Paragraph 105 of the *UNHCR Handbook* states:

> Once a stateless person has been determined a refugee in relation to "the country of his former habitual residence", any further change of country of habitual residence will not affect his refugee status.[20]

The Supreme Court of Canada has commented on the persuasiveness of the *UNHCR Handbook*:

> While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states.[21]

This type of legal analysis where stateless individuals must prove a fear of persecution against all CFHR's was fundamentally flawed and created a legal absurdity in that it could create the legal result of returning a stateless refugee who could not prove a claim against one country of CFHR to a country where they could be returned and where they faced a genuine risk of persecution.

The key issue is the availability of protection for a person who has genuine fear of persecution for a reason under the 1951 Geneva Convention and not a useless academic exercise to determine fear of persecution in countries that the individual cannot legally return.[22]

This question was considered in *Thabet v. Canada (Minister of Citizenship & Immigration)* where the Federal Court (Trial Division) ruled that the claimant had to make his refugee claim against the last country of former habitual residence. The applicant, a stateless Palestinian had been a student in the United States but had no legal status in the United States, no legal right of return or legal right of protection. The Federal Court, however, ruled that the claim must be made against the last CFHR, the United States, and not against Kuwait a second country of former habitual residence and where a fear of persecution was also alleged.[23]

The law as set out in *Thabet* was considered by the Immigration and Refugee Board and the Panel made the following observation in rendering a positive decision in a claim involving a stateless Palestinian who had a genuine fear of persecution in Syria and had the right to return to Syria but also had Tunisia as a

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[20]*UNHCR HANDBOOK*, paragraphs 104 and 105, p.24.

[21]*Ward v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 85 (S.C.C.) at 103.

[22]*Maarouf v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 163 (Fed. T.D.).

[23]*Thabet v. Canada (Minister of Citizenship & Immigration)* (1995), 105 F.T.R. 49 (Fed. T.D.).

CFHR but had no right to return to Tunisia. According to the law set out in *Thabet* at the Trial Division this claimant could not qualify as a Convention refugee. To quote the CRDD Reasons for Decision.

> In our opinion, however, such a result would be perverse. Were we to find the claimants not to be Convention refugees on that basis, the fact remains that they cannot be returned to Tunisia. They are returnable to Syria, but that is where they face a reasonable chance of persecution. How could Canada, a signatory to the 1951 Convention, commit *refoulement*? Can the *Maarouf* decision possibly mean that claimants are at risk of being sent to a country where they have a well-founded fear of persecution simply because they do not have such a fear with respect to another country to which in any event they cannot be returned? Such a perverse result would not, in our opinion, be in keeping with Canada's international obligations.[24]

In *Ramadan v. Canada* the Federal Court overturned a decision of the CRDD involving a stateless Palestinian from the UAE and remitted the matter back to the Immigration and Refugee Board on Consent. The issue in that case was there were two countries of former habitual residence found and the CRDD failed to assess the claim against the second country of former habitual residence. However, this decision was referred back to the IRB without direction from the Court. The case ultimately was resolved with a positive decision despite the fact that there were four countries of former habitual residence.[25]

The CRDD, in another Decision involving a stateless individual in their Reasons for Decision, noted that there was a legal controversy on the question of which country of former habitual residence must be assessed in reviewing a stateless individual's claim. In discussing the law, and in particular *Thabet*, they also explicitly pointed to the problem in the legal reasoning outlined in that case thereby supporting an application for judicial review. The panel felt bound by the precedent set out in *Thabet* and assessed the fear of persecution against only the last country of former habitual residence, the United Arab Emirates, despite the fact the claimant was returnable to Syria where a claim of fear of persecution was also asserted. The panel wrote detailed reasons on the question, and while bound to follow the higher court ruling in *Thabet*, they assessed the fear of persecution only against the last CFHR. This result could see the claimant returned to a country where there was a genuine risk of persecution and no hearing on the merits of that claim.[26]

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[24]*CRDD Decision T94-02330* at 8-9.

[25]*Ramadan v. Canada (Minister of Employment & Immigration)* (November 7, 1994), Doc. IMM-3089-93.

[26]*CRDD T95-05010 Reasons for Decision* pp. 2-5

The Federal Court eventually overturned the above noted CRDD decision. The issue before the Federal Court was whether or not a stateless individual had to make a refugee claim against his last country of former habitual residence. The Department of Justice consented to an Order from the Federal Court with a direction that the Immigration and Refugee Board assess the claim for refugee status against only one country of former habitual residence in order to prove a well founded fear of persecution.[27]

There is yet another consent decision of the Federal Court, *Sayed v. Canada (Minister of Citizenship & Immigration)* (May 15, 1995), Doc. IMM-3398-94 (Fed. T.D.) which also is referred back to the Immigration and Refugee Board with a Direction similar to one obtained in *Kablawi* and requiring that the claim to be assessed against only one country of former habitual residence in order to qualify for protection under the Geneva Convention.[28]

A Consent Order and Direction issued by the Federal Court of Canada (Trial Division) is not considered a binding precedent on Immigration and Refugee Board or on other Judges at the Federal Court of Canada who have co-equal jurisdiction. A Consent Order even with Direction, and therefore, has no value as a precedent.[29] The Department of Justice, however, seemed to recognize that the law in *Thabet* was flawed and in a least three Orders from the Federal Court recognized that there was a problem with the legal reasoning in *Thabet* and that a refugee claim for a stateless individual should be accessed against one country of former habitual residence and not just the last CFHR.

A determination that a "country of Former Habitual Residence" is the "last" country where the refugee had resided because of proximity in time could lead to an unfair and perverse result in that this approach ignores the definition of a Convention Refugee itself as set out in the *Immigration Act* as well as international instruments on Statelessness, including the *Convention Relating to the*

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[27]*Kablawi v. Canada (Minister of Citizenship & Immigration)* (June 10, 1997), Doc. IMM-2371-96.

[28]*Sayed v. Canada (Minister of Citizenship & Immigration)* (May 15, 1995), Doc. IMM-3398-94 (Fed. T.D.).

[29]*Uppal v. Canada (Minister of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 143 (Fed. C.A.), p. 8. The Court of Appeal wrote: "A consent judgment has no precedential value. Generally speaking, a court granting a consent judgment is concerned with only two things: the capacity of the parties to agree and its jurisdiction to make the order they have agreed to ask it to make. A consent judgment reflects neither findings of fact nor a considered application of the law to the facts by the court."

Status of Stateless Persons[30] and notably the *Convention on the Reduction of Statelessness*.[31]

According to Article 33(1) of the Geneva Convention:

> No Contracting State shall expel or return (re-fouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[32]

The effect of the *Thabet* decision at the Federal Court Trial Division is precisely what the Convention seeks to avoid. As we saw in *Kablawi* where the claim failed against the last country of former habitual residence there was no consideration given to a second country of possible persecution. The claimant in that case was returnable to the second CFHR where he alleged a genuine fear of persecution. The law as interpreted in the first Federal Court decision in *Thabet* placed Canada in violation of the prohibition on refoulement as set out in the Article 33 of the Geneva Convention where it is illegal to return a refugee to a country where they face persecution. This principle is adopted into law in Canada as part of our legal obligations under the 1951 Geneva Convention on Refugees.

It is the issue of protection that is the key consideration. Where there is nationality or defacto nationality and a legal right of return, protection is available and there is no requirement to provide international protection. Where there is a right of return, the claimant must exercise that right, since as Ward states, international protection is a surrogate where an individual "is unable" or "unwilling" to return to a country and the basis for this inability is a fear of persecution based on one of the five grounds set out in the Convention. Then and only then would a refugee be entitled to protection as a Convention refugee.

A parallel can be made to the applicability of the 1(E) Exclusion clause where a refugee claimant who has nationality or defacto nationality and cannot demonstrate a well-founded fear of persecution against the country of nationality or defacto nationality is then excluded under the Geneva Convention.

> This convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.[33]

[30] *Convention Relating to the Status of Stateless Persons (28 September 1954).*

[31] *Convention on the Reduction of Statelessness*, UNHCR, New York, August 30, 1961.

[32] *Convention Relating to the Status of Refugees*, United Nations, Article 33

[33] Article 1(E) of the 1951 Convention, Schedule 2(1) of *Immigration Act.*

The UNHCR gives some of the background that went in to the writing of the Exclusion Clauses in the 1951 Convention on Refugees. They explain how the 1(E) Exclusion Clauses was primarily aimed at refugees of German extraction who were then residing in West Germany and were accorded the same rights as West German Nationals. Such individuals were not considered eligible for protection as alternate protection was available to individuals of German descent in West Germany.[34]

If a refugee claimant proves that there is a genuine fear of persecution under the terms of the Convention with respect to one country of former habitual residence, then they should qualify for protection as a Convention refugee. Where there is no right of return there is no effective protection. The lack of protection is the "raison d'être" behind the Convention and where a stateless individual cannot return and where there is a genuine fear of persecution under one of the grounds enumerated in the Convention, then international law steps in and the refugee qualifies for protection as a Convention Refugee. Logic dictates that if grounds exist for a genuine fear of persecution for one CFHR, then the Convention applies and there is no basis in law to exclude an individual who is stateless and has a genuine fear of persecution from one (or more) CFHRs if they have no right of return and no effective protection if they fail to prove a claim against all countries of former habitual residence.

As Mr. Justice Cullen noted in *Maarouf* "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."[35]

The Judge in Federal Court Trial Division decision *Thabet* certified the following question on statelessness:

> Whether a stateless person who has habitually resided in more than one country prior to making a refugee claim must establish his or her claim by reference to all such countries or by reference to some only, and if by reference to some only, by reference to which.[36]

The Federal Court of Appeal finally addressed the question of statelessness at a hearing on March 2, 1998 and issued their reasons on May 11, 1998. Linden J. writing for the Federal Court of Appeal stated:

> There is no reason why stateless persons should be any more or less accommodated in their claims to refugee status. There is no question that stateless

[34] *"Application of Exclusion Clauses of the 1951 Convention Relating to the States of Refugees", by Eduardo Arboleda, UMNHCR November 7, 1989.* (unpublished paper)

[35] Supra, note 18.

[36] *Thabet v. Canada (Minister of Citizenship & Immigration)* (1995), 105 F.T.R. 49 (Fed. T.D.) at 58.

> persons may qualify as refugees; the definition acknowledges this explicitly. However, people are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention. And they must still comply with those other sections of the Act which restrict access to the refugee determination process. Statelessness does not give a person an advantage over those refugees who are not stateless.[37]

On the question of which country of former habitual residence was the critical reference for finding a fear of persecution, the Federal Court of Appeal set out the following as the test to be applied for determining the relevant CFHR:

> **The Test to be Applied: Any Country Plus the Ward Factor**
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> . . . It will suffice to show that one state is guilty of persecution, but that both states are unable to protect the claimant. Likewise, where a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided. While it may appear burdensome to impose this duty upon all stateless claimants, we must, in the light of Ward, properly take into account the situations where claimants have other possible safe havens.
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> Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these two groups, where possible. It is not enough to show persecution in any of the countries of habitual residence - one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and other safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere. This is in harmony with the language in the definition and is also consistent with the teachings of the Supreme Court in Ward. If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden, here as elsewhere, of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. This is not an unreasonable burden. This is merely to make explicit what is implicit in Ward and in the philosophy of refugee law in general. This is essentially the responsible position which counsel for the Crown argued before us, a position that is characteristically generous and consistent with Canada's international obligations, and the position which we adopt.[38]

[37] *Thabet v. Canada (Minister of Citizenship & Immigration)* (1998), 48 Imm. L.R. (2d) 195 (Fed. C.A.) at para. 16.

[38] *Thabet v. Canada (Minister of Citizenship & Immigration)* (1998), 48 Imm. L.R. (2d) 195 (Fed. C.A.), paras. 27-28.

The law on statelessness was summarized and the certified question in *Thabet* was answered as follows:

> In order to be found a Convention refugee, a stateless person must show that, on the balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence.[39]

For a claim to succeed a stateless individual should need only prove a claim against one country of former habitual residence and other countries of habitual residence are irrelevant to the refugee claim if there is no legal right to return to the country of habitual residence and if alternate protection is absent.

The Federal Court of Appeal finally resolved the legal debate over protecting stateless persons under the Convention on refugees and the CFHR issue. The *Thabet* decision is a sound one and provides a mechanism to protect stateless persons who have a genuine fear of persecution and who have no alternate place of safety. This approach is in keeping with the Supreme Court ruling in *Ward* and gives stateless individuals who can prove a genuine fear of persecution the protection they seek and maintains Canada's obligations under International law and our humanitarian tradition of offering refuge to those who need protection.

[39] *Thabet v. Canada (Minister of Citizenship & Immigration)* (1998), 48 Imm. L.R. (2d) 195 (Fed. C.A.), para. 30