

Statelessness matters 10 Years on from Al-Kateb: Statelessness in the Australian Context

Susan Kennedy

Abstract

This year is the tenth anniversary of the final decision on *al al Kateb v Godwin* (2004) HCA 37), a landmark case in Australian migration law. The Australian government sought to indefinitely detain al Kateb, a stateless Kuwaiti, after refusing his application for asylum. The High Court ruled in favour of al Kateb on the basis that indefinite detention of a stateless person is unlawful. Since then, Australian law on statelessness has failed to develop to the extent that the Australian government has not legislated on a determination procedure for stateless people. Australia does not provide protections under United Nations Convention on the Status of Stateless Persons (1954) to which Australia is a signatory. This paper discusses sources Australian Country Advice KWT39495 to describe how concepts about stateless communities might develop within the Refugee and Migration Review Tribunals. It challenges the veracity of the Country Advice information based on its use of sources. It explains the reasoning behind American and UK positions on statelessness in Kuwait in the Country Advice, which influences determinations on asylum claims, in the absence of a procedure to determine and resolve statelessness. It concludes that not only are the Australian Country Advices in need of update, there is also a need for the quality of evidence sourced and the interpretation of that evidence, to be reviewed

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Introduction: Why Statelessness Matters

I will discuss why statelessness matters in the Australian context of the Australian Department of Immigration and Citizenship's sources of advice on Statelessness, the two main sources of the advice, and the two trends emerging that are positioning the stateless population claims. There are approximately 22 million stateless people worldwide (UNHCR 2013). Most of these people are not displaced refugees, but remain in their countries of origin for generations (Refugee Appeal No. 72635/01, 2002). One of the reasons for this is that if they cross a border from their home country, they will not be allowed back in. The systematic exclusion of stateless people from legal frameworks in their own nations leads to some stateless people taking the risk of travelling, and this manifests as asylum flows to adjacent nations and also further afield. Stateless, they cannot leave the second country, since they have no nation to be exited to. Under Australia's new offshore processing procedures for Irregular Maritime Arrivals, stateless persons who do not make successful claims as refugees are left on Manus Island or Nauru.

However, as at 15 May 2012, there were 555 people in detention centres in Australia who identified as being stateless, 114 of whom had been detained for over a year and a half (Australian Human Rights Commission 2012 at 6.4), ten years after the *al Kateb* case (*al Kateb v Godwin* (2004) HCA 37) had decided that stateless asylum applicants should not be left in indefinite detention.

When his case first came to the attention of the Australian media, Ahmed al Kateb was a stateless Kuwaiti of Palestinian descent languishing in indefinite detention in South Australia (Zagor 2006). The Kuwaiti Bidoun Jinsiya provide a particularly compelling example of statelessness as, until 1986, this group were treated as citizens in Kuwait, while their claims to human rights and citizenship-like benefits are today made in competition with more recent arrivals from other regions of the Arab world ('Kuwait issues 80,000 identification cards to stateless Arabs', *Arabian Business*, 20 January 2013). A discussion on how the problem developed is beyond the scope of this article, suffice to say that the Kuwaiti government has called on the international community to treat this problem as an international issue, rather than a purely Kuwaiti one (Kuwait Government Response to Human Rights Watch, 2011).

Stateless Kuwaitis seek asylum in nations such as Britain, Canada, New Zealand and Australia (*Statement of Changes in Immigration Rules*, UK Border Agency, 2013; Research Directorate, Immigration and Refugee Board of Canada, 1999 and 2001; *DZABG v MIAC* (2012) FMCA 36; *MRT Case 1218580* (2012); Refugee Appeal No. 72635/01, 2002). The international flow of stateless populations changes the complexion of statelessness in Kuwait from a domestic problem into an international issue. The current Australian approach to the Convention on the Status of Stateless Persons (1954) has seen Australia fail to implement the Convention, despite being a signatory to it. The failure of the Australian government to implement a procedure to determine statelessness is the most significant problem for stateless asylum applicants in Australia, as they cannot have their stateless status resolved under Australian law. This failure means that stateless people have only the Convention Relating to the Status of Refugees (1951) under which to apply for protection. The means of protection for stateless persons under international law for those who do not qualify for refugee status remains denied to stateless people who apply for asylum in Australia. This creates a situation where stateless people and their legal counsel are

left to 'fit' their circumstances into a case for refugee status, although according to their circumstances, they are eligible for protection from Australia under the Convention on the Status of Stateless Persons (1954).

This leads to the second reason for the failure of stateless people to have their cases resolved under Australian law. While stateless people's asylum claims can only be processed as applications for refugee status, these are often rejected. This leaves their cases unresolved if they cannot be returned to their home country (the al Kateb case *al Kateb v Godwin & Ors* [2004] HCA 37 established that the return of stateless Kuwaitis and others is usually refused by the home country from which they came). The decisions of the Australian Migration Review Tribunal and the Australian Refugee Tribunal, including the rejection of refugee claims by stateless people, can be related to evidence from documents issued by the Australian Department of Immigration and Citizenship (now known as the Australian Department of Immigration and Border Control). As discussed above, because Australia has not implemented a statelessness determination procedure, the Refugee Convention is the only convention under which asylum seekers can apply for asylum. In Britain, asylum seekers can now apply for refugee or statelessness status according to either the Convention on the Status of Refugees (1951), or the Convention on the Status of Stateless Persons (1954) respectively. Asylum claimants in Australia must demonstrate that they are being persecuted in a particular way, according to the 'well-founded fear' test, to 'fit' their case to the definition of the Convention on the Status of Refugees (1951) (refer to the Australian government's Guide to Refugee Law: Chapter 3: Well-Founded Fear, September, 2013; *Refugee Appeal 72635/01*, 6 September 2002 provides a judicial analysis of how the test was applied regarding a stateless Kuwaiti).

If a claim for refugee status is based on membership of a particular group, claimants must demonstrate that they are members of that group, and that this group has been subjected to persecution, having experienced prejudice or discrimination. This means that their cases put forward by solicitors rely on proof of difference of race, religion or affiliation upon which claims of persecution are constructed. Where the status of a person's membership of a group subject to persecution cannot be decided, or if the existence of that group is not accepted, the claimant's case is unlikely to be deemed to satisfy the definition of a 'well-founded fear' of persecution. Where Country Advice documents issued by the Australian Department of Immigration and Citizenship questions or denies the status of stateless groups, which are subject to persecution, according to the group members' 'sameness' or 'difference', this has the potential to negatively influence determinations on cases brought before the tribunals. Such claims about the group identity of stateless Kuwaitis were found in Australian Country Advice *KWT39495*.

This article analyses sources Australian Country Advice *KWT39495* to describe how concepts about belonging and the identity of stateless communities subject to persecution have developed. It explains the reasoning behind what appears to be two conflicting positions on statelessness expressed in Kuwait in the Country Advice. The positions relate to stateless Kuwaitis' claims to belong to a group that is discriminated against or persecuted. I challenge the veracity, quality and context of information from American sources used in the Country Advice, used to assert that the stateless people of Kuwait are the same as Kuwaiti citizens, and that stateless people have no

distinct identity or culture. On the other hand, information in the Country Advice based on British sources supported assertions that stateless people of Kuwait have a distinct identity, and a rightful claim to refugee status. The UK information was downplayed, despite its better quality and contextual fit. This raises questions about the sources and the interpretation of sources in the Advice. The Country Advices influence determinations on stateless person's asylum claims in Australia the absence of a procedure to determine and resolve statelessness, where stateless applicants are expected to prove refugee status in order to be granted protection.

The Department of Immigration's Sources of Advice on Statelessness

Australia has had so many stateless asylum applicants from Kuwait that it began issuing summaries to migration department staff via the Australian Country Advice, regarding the 'Bidoun Jinisya,' people without nationality. Numbers of stateless people arriving or staying in Australia from particular countries of origin are not published by the Department of Immigration and Migration Australia (now known as the Department of Immigration and Border Protection) or the Australian Bureau of Statistics. Therefore, I am unable to suggest just how many Kuwaiti stateless applicants for asylum in Australia there have been. However, as at mid-2013, there were four advices listed on the Australian Migration and Refugee Review Tribunal website, including Australian Country Advice: *Kuwait KWT37495* (2010), *KWT37848* (2010), *KWT38627* (2011) and *KWT38642* (2011). The Advices described various issues arising in appeal cases relating to identity, culture, society and politics. Country Advice KWT39495 was particularly significant, because it discussed at length claims to identity made by stateless asylum applicants. The two main pieces of evidence used in the Advice were:

- *About Being Without: Stories of Statelessness in Kuwait* by Refugees International 2007;
- *UK Home Office Operational Guidance Note – Kuwait, March, 2009* (hereafter referred to as OGN 2009).

About Being Without: Stories of Stateless in Kuwait, Refugees International, 2007

Regarding the abovementioned Refugees International (2007) source information, Refugees International is a Washington-based advocacy organisation that has produced a number of field reports on the Stateless in Kuwait (see Refugees International 25 July 2007, 2 September 2009, 12 September 2009, 17 October 2011, 5 March 2012 and 12 May 2012). Ironically, the publication referenced in the Country Advice is probably the least rigorous research publication on Kuwait that the organisation ever produced. The document did not even claim to be a fact based report. It was a monograph of six 'stories', over just fifteen pages, with large photographs filling the pages, constructed by a field worker who flew into the site for around two weeks.

While the research method used to produce *About Being Without: Stories of Statelessness in Kuwait* (Refugees International 2007) included interviews to construct a life history of participants, a method used frequently in the qualitative social sciences, the manner in which the author used this data to analyse and construct 'results' was creative (in a creative writing sense) rather than rigorous (in an academic or humanitarian advocacy sense). The interview data was pieced together to create

general biographical life stories, including life stories of individuals and life stories of families. The family research comprised interviews with only certain individuals in the group, which were presented as providing a portrait of sorts, of the entire group.

The first story, 'A Family Destroyed' concluded with: "Mohammad remembers that he lay awake all night, repeating the word 'bidun' and wondering what it meant." (*About Being Without: Stories of Statelessness in Kuwait*, Refugees International 2007 pp.5).

Principles of beneficence were adhered to by the researcher so loosely in interpreting and reporting the results, that I believe readers would likely come away from reading the work with a somewhat tainted or negative impression of stateless people. For example, in the first story quote above, the married couple's divorce for the purpose of obtaining free schooling for their five children was described by the researcher while the couple's daughter tried to put forward an argument about the discrimination she had experienced that prevented her education. I believe that application and disclosure of research methods is a significant concern in humanitarian research on statelessness in the Middle East. In *Stateless Aesthetics, Feminist Human Rights Discourse on the Stateless in Kuwait* (Kennedy 2013), I explored the use of feminist methodology to produce results and make recommendations that run counter to the principles of beneficence in the research carried out on stateless people in Kuwait. In *About Being Without: Stories of Statelessness in Kuwait* (Refugees International 2007), the author relied on sensational language and unverified data to craft his stories on statelessness.

UK Home Office Operational Guidance Note – Kuwait, March, 2009

Regarding the British source of information for the Country Advice on Kuwait, the OGN (2009) issued by the UK Home Office was compiled by the British Asylum Policy Directorate. It drew on information from the British Foreign and Commonwealth Office (citing humanitarian and diplomatic efforts in the Middle East), Freedom House (another Washington-based rights group, whose mandate is similar to Refugees International), the US State Department, The National News service (a Middle East daily news source), the World Health Organisation, and case law from three British law cases on stateless asylum claims. The sources of information were authoritative and well spread across a number of genres.

Two trends emerge positioning the stateless population claims

Emerging from the Country Advice are two apparent positions: a British position and an American position on Kuwaiti statelessness. The Washington-based Refugees International (2007) work was held out to be comparable with the OGN (2009), in terms of the evidence from each publication being used to weigh up claims about the stateless Kuwaitis' cultural identity. I explained in the textual analysis why the stories by Refugees International (2007) was not of a comparable quality to the Guidance Note, and nor did it seem intended for the purpose of helping a Tribunal to decide on an asylum claims. A field report by Refugees International (2008) was quoted out of context, and used to support the 'sameness' argument, while in fact it argued the stateless were treated with discrimination based on their status of statelessness.

On the other hand, the US Department of State (2010) information was used to support a claim of 'difference,' but it did so by claiming that the Kuwaiti stateless

community is Iraqi. If this line of argument was developed fully, it would substantiate that the stateless in Kuwait are culturally distinct, but are nevertheless unwelcome foreigners. Even the Kuwait government acknowledges that there are stateless populations in Kuwait of Kuwaiti descent (*Kuwait Government Response to Human Rights Watch* 2011). It is also well-established that many stateless Kuwaitis were left trapped in Iraq and unable to return to Kuwait as a result of the Iraqi invasion of 1990 (al Najjar 2001).

The authors of Country Advice *KWT39495*, having elaborated on the Refugees International evidence (2007), but not the UK OGN (2009) evidence, appeared to favour the American viewpoint that would lead to a negative decision on asylum claims. Had the authors of the Country Advice checked with the sources for the UK Home Office Operational Guidance Note (2009) (that is said did not elaborate further), it would have found there was ample evidence available to counter the American views expressed in the Country Advice. In *BA and others UKIAT [2004] 00256 CG*, expert witness Dr Abbas Shiblak addressed in detail the issue of stateless people in Kuwait being Iraqis. He soundly refuted the claim, making reference to the change in composition and numbers of stateless Kuwaitis in the population over time, which he argued justifies the diverse cultural heritage that is shared by Kuwaiti citizens with others across the Gulf and the Middle East.

It is not known how the Country Advices are constructed, or how evidence is evaluated and selected for inclusion. One wonders then, why the opinion of the UK Home Office (OGN 2009) was not explored more thoroughly when it supported the claims of stateless Kuwaitis to asylum. Ten years on from *al-Kateb v Godwin and Ors [2004] HCA 37*, it appears little has been learned in Australia about the protections that all stateless people are provided under International Law, whoever they are, and wherever they are from. After an update on Country Advices was recommended during the 2013 Australian federal election campaign, in order to reduce the number of positive Iranian refugee determinations (Hawley, S and Norman, J, 2013), the Australian Country Advices on Kuwait were removed from the Australian Migration Review and the Australian Refugee Review Tribunal website. There was a message on the website requesting inquiries about the Advices to be emailed to the Tribunal. The Tribunal did not respond to my email requesting a copy of the previous advices, and a copy of any new advices being used by the Tribunal.

Conclusion

Despite the success of the *al Kateb* case (*al-Kateb v Godwin and Ors* (2004) HCA 37), which remains a landmark case in Australian immigration law, Australia has failed to develop law on statelessness and asylum seekers who continue to languish in detention or in the community with unresolved cases. There are two main reasons why cases are not being resolved. The first is due to the lack of a statelessness implementation procedure with which Australia can apply protections under the Convention Relating to the Status of Stateless Persons (1954). The second reason is that stateless persons' claims for asylum are often unsuccessful under the 'well-founded fear' test, according to the definition in the Convention Relating to the Status of Refugees (1951). The Convention Relating to the Status of Stateless Persons (1954) is designed to address the special context of stateless persons under international law. Where stateless persons cannot access this Convention (as is currently the case under Australian law), the applicant and legal counsel are made to

‘fit’ their case into the alternate Convention. Australian Country Advices provide information for the Migration Review Tribunal and the Refugee Review Tribunal, which is used to determine refugee claims for all applicants, stateless, refugees or both.

A close reading of a Country Advice *KWT39495* on Kuwaiti statelessness found that two different arguments emerged from the sources that could influence decision making on asylum claims, where stateless applicants apply for protection as refugees on appeal. It was found that not only is there is an urgent need for Australian authorities to update and publish new Country Advices, but there is also a need for the quality of evidence used in the advices to be reviewed. Since writing this paper, the Australian Country Advices have been removed from the Australian Migration Review and Refugee Review Tribunal website. As yet, they have not been replaced. One wonders what new Advices are being used by the Tribunal, if any. This is an unsatisfactory situation ten years after the success of *Al-Kateb v Godwin and Ors* (2004) HCA 37.

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