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Legal Framework for Protection Processing (Refugee Law and CP) - May 2020

Training Workbook

Name:	
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Document Change History

#	Version Date	Authorised Officer	Amendments made
1	24/07/18	s. 22(1)(a)(ii)	Initial Creation
2	24/05/19		Minor typo updates, glossary update, reference material update, updated the 'Introduction' section on pages 8-9, update the PV processing table on page 24, non-political crime and inclusion of crime of aggression wording.
3	18/07/19		Inclusion of updated slides, updated LEGEND references of PPCF documents and general updates relating to outdated departmental references. Update to structure based on slide updates and for consistency with structure of slides / Refugee Law Guidelines structure.
4	16/10/2019		Updates to contents to better reflect document structure. Minor stylistic changes for consistency throughout the document. Update to *BYE15 v Minister for Immigration and Border Protection* [2016] as the text noted it was on appeal in 2016 but this has not been updated.
5	26/05/2020		Minor updates to content. Updated flowchart on page 23. Updated slides.

Table of Contents

Reference Materials

- *Migration Act 1958* (the Act) and Migration Regulations 1994 (the Regulations)
- Refugee Law Guidelines (LS-1814) - LEGEND
- Complementary Protection Guidelines (LS-1815) - LEGEND
- The Protection Visa Processing Guidelines (VM-4825) - LEGEND
- Gender Guidelines (VM-5345) - LEGEND
- Use of Country of Origin Information (VM-3245) - LEGEND
- Child Soldiers Guidelines (VM-2324) - (LEGEND)
- Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (re-edited January 1992, UNHCR 1979)
- Rome Statute of the International Criminal Court
  - http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf
- Four Geneva Conventions
  - https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf
- Interpreting the Rome Statute - Elements of Crimes
  - http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf
- Interpreting the Rome Statute - Elements of Crimes
  - http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

Glossary of Key Terms and Abbreviations

Acronym	Description / Meaning
AAT	Administrative Appeals Tribunal
ASIO	Australian Security Intelligence Organisation
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
HC	High Court (of Australia)
IAA	Immigration Assessment Authority. An authority within the AAT (Migration and Refugee Division) for Fast Track applicants.
ICCPR	International Covenant on Civil and Political Rights
IMA	Illegal Maritime Arrival (Essentially means the same as UMA. Preferred term of the Minister.)
FC	Federal Court (of Australia)
FCC	Federal Circuit Court (of Australia)
FFC	Full Court of the Federal Court
FMC	Federal Magistrates Court (of Australia) * Note that this is included as an historical reference. The FMC's name has been changed to the Federal Circuit Court.
PV	Protection Visa
PPV	Permanent Protection Visa
Refugees Convention	United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees
RRT	Refugee Review Tribunal (merged with the Administrative Appeals Tribunal under changes introduced as part of the *Tribunals Amalgamation Act 2014*. Decisions formerly reviewed in the RRT are now reviewed in the Migration and Refugee Division of the AAT)
SHEV	Safe Haven Enterprise Visa
TPV	Temporary Protection Visa
UAA	Unauthorised Air Arrival
UMA	Unauthorised Maritime Arrival (Essentially means the same as IMA. UMA definition in s5 Migration Act.)
UNHCR	United Nations High Commissioner for Refugees

Acronym	Description / Meaning
UNHCR Handbook	Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (re-edited January 1992, United Nations High Commissioner for Refugees 1979).

Introduction

Welcome

This workbook intends to:

- Provide participants with skills to be able to apply the legal framework that governs the processing of protection visas in Australia.
- Provide interactive tasks so you can engage with and learn about topics.

Target audience

Departmental officers whose current work requires them to make protection obligation decisions in relation to onshore protection visa applicants or those who work in roles that require a knowledge of the Refugee Law and Complementary Protection (CP) Legal Framework.

Module duration

4 days face to face. Plus an open book quiz and attendance at a review session (for participants on the PODM Essentials Training Course only).

Module delivery and link with training

This module is delivered by Refugee and International Law Section and forms part of the PODM Essentials Training course. A PODM Subject Matter Expert from the network may also assist to provide more context on processes.

Department's visa training pathway phased learning approach

The Department has a phased learning approach. Phase 1 is the Department's Induction Program which all new starters complete. Phase 2 is the Visa and Citizenship Vocational Training Pathway (VCVTP): Foundation Program for all Visa and Citizenship decision makers. Please contact s. 47E(d) for more information. Phase 3 focuses on Caseload Specific Training, and Phase 4 is specialist programs and courses for specific decision making roles.

This module is part of the Phase 3 training as it covers information specific to the protection visa caseload.

Prerequiste Learning

The following table shows the prerequisite learning required to be completed in ourPeople before commencement of this course.

Title	Tick when complete	Date completed
Good Decision Making (GDM) Learning Pathway – Migration (CURR-3860)		
Department's Legal Framework (CURR-3871) • Administrative Law Principles (LIOL-10634)		

Title	Tick when complete	Date completed
• Legal Framework under the Migration Act (LIOL-10636) *Handbook ADD2013/680031*		
Decision Making Principles (CURR-3873) • Decision Making Principles (LIOL-10632) • Decision Making Principles: Assessment (LIOL-10633) *Handbook ADD2013/679980*		

How to use this workbook

This workbook is designed to be practical. The workbook contains icons to make it easy to see activities that are to be completed as per the following:

	Objectives / goals		**Handout**
	Key information		**Activity / Quiz**
	Additional reading / reference point		**Assessment**

Step-by-step procedure for this course

Step 1 Complete the prerequisite learning
Step 2 Print this workbook
Step 3 Read the introduction to this workbook on page 8
Step 4 Read the historical recap on protection visa processing pages 12 and 13.
Step 5 Complete knowledge quiz in this workbook on pages 10 and 11.
Step 6 Complete the pre session questionnaire (emailed separately by LCSS)
Step 7 Bring prerequisite learning handbooks (PODMs only) and this module to class
Step 8 Attend all classroom session and complete activities in class
Step 9 Complete the Refugee Law / CP quiz emailed to you (PODMs only)
Step 10 Attend review session for the quiz (PODMs only)

Learning outcomes for this workbook

At the end of this workbook you will be able to:

- Explain and apply the law relevant to determining:
  - Whether someone is a refugee and engages Australia's protection obligations under Australia's domestic law.
  - Whether someone engages Australia's protection obligations for complementary protection reasons under Australia's domestic law.

Knowledge Quiz

Q1. Australia is bound to comply with international obligations arising out of treaties and customary international law. Some have been incorporated into the Act. Others may be expressed through departmental policy. List 2 examples.

Q2. What are the 3 different types of legislation relevant to decision-making in the department?

Q3. If law takes precedence over policy, why must a decision maker have regard to policy?

Q4. The two underlying principles of natural justice are:

Q5. Describe the 3 characteristics of adverse information which must be put to an applicant for comment under section 57 of the Act.

Q6. What is non-disclosable information as defined under section 5 of the Act?

Q7. Why is it important to ensure that the decision record reflects that a decision has been made in respect of each applicant in a combined application?

Historical Recap on Protection Processing in Australia.

The historical recap below is not covered during the formal training. This is provided to supplement the formal training and to provide an overview of the historical context relevant to protection processing. This recap will provide you with an understanding of the changing nature of protection visa (PV) processing.

Historical recap:

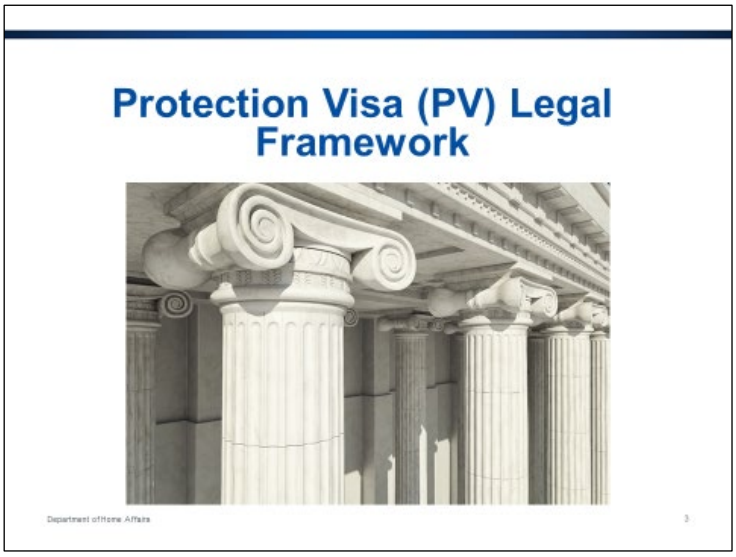
- 1989: first time Australia enacted specific provisions to deal with refugees under the 1951 United Nations Convention relating to the Status of Refugees as amended by its 1967 Protocol (Refugees Convention) – prior to this such persons were granted entry permits and resolution of status visas.
- 1999: introduction of temporary protection visas (TPVs).
- 2001: *MV Tampa* incident saw seven new bills introduced into Federal Parliament with bipartisan support providing further clarification on how and when a person is to be processed upon entering Australia.
- 2001: introduction of the *Pacific Solution* – asylum seekers arriving by boat processed in Nauru and Papua New Guinea under the UNHCR guidelines.
- 2008: cessation of TPVs.
- 2008: cessation of the *Pacific Solution* – asylum seekers arriving by boat processed on Christmas Island under *Refugee Status Assessment* (RSA) process – considered a non-statutory process as processing not conducted under the Act. Review of RSA process was conducted by and Indepdent Merits Reviewer (IMR).
- 11 November 2010: *M61* and *M69* High Court cases – RSA process conducted for the purpose of the Migration Act, therefore decision makers bound by Australian legislation and case law.
- 1 March 2011: RSA process replaced by *Protection Obligations Determination* (POD) process – providing automatic referral of negative decisions to a reviewer (the Independent Protection Assessment Office (IPAO) replaced the IMR).
- 31 August 2011: *M70 and M106* High Court cases – Australia's proposed *Malaysian Agreement* (for asylum seekers to be processed in Malaysia under s 198A – offshore transfer power) was determined to be invalid.
- 24 March 2012: commencement of complementary protection as an additional criterion for the grant of a PV.
- 24 March 2012: introduction of single PV process – previously two parallel processes, one process for onshore arrivals (onshore PV process) and one process for offshore entry persons (POD process).
- 13 August 2012: report of the Expert Panel on Asylum Seekers (Houston Report) released.
- 18 August 2012: commencement of Regional Processing legislation.

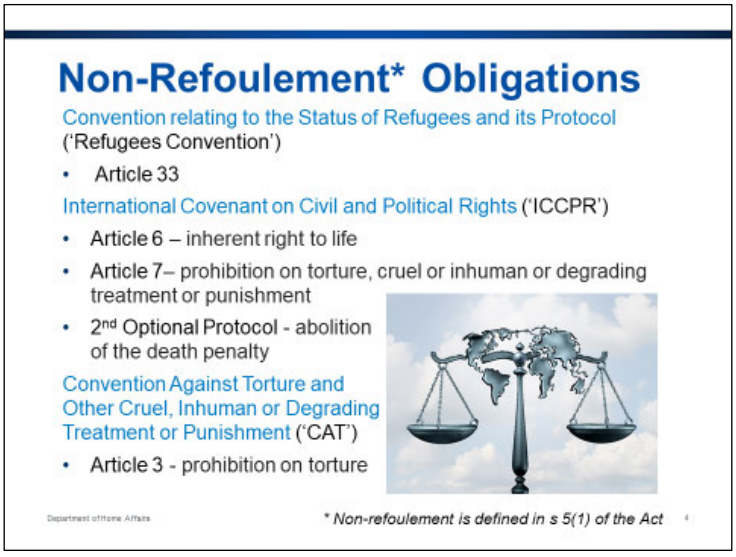
- 9 September 2012: designation of Papua New Guinea (PNG) as a Regional Processing Country (RPC).
- 12 September 2012: designation of Nauru as a RPC.
- 5 October 2012: *Plaintiff M47/2012* High Court case – PIC 4002 (relating to ASIO security assessment) found invalid.
- 16 May 2013: Parliament passed the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (UMA Act), which implements recommendation 14 of the Expert Panel on Asylum Seekers seeking to reduce any incentive for people to arrive in Australia by irregular means. Result is that all non-citizens who enter Australia from 1 June 2013 by sea without a visa in effect (UMAs) are liable for transfer to a Regional Processing Country.
- 19 July 2013: the Prime Minister announced the Regional Resettlement Arrangement (RRA) between Australia and PNG whereby PNG will resettle (in PNG) people transferred from Australia to PNG and found to be refugees.
- 3 August 2013: Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues signed.
- 6 August 2013: Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues signed.
- 18 October 2013: Re-introduction of TPVs under Class XA, subclass 785.
- 2 December 2013: TPV Regulations disallowed by the Senate, meaning any TPVs granted were invalid.
- 14 May 2014: *Migration Amendment Bill* passed by Parliament containing significant changes to the Act including that a criterion for a PV is not having an adverse security assessment issued by ASIO.
- 5 December 2014: *Maritime and Migration Legislation (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act) passed. Some measures came into effect on 16 December 2014, being the day after Royal Assent; and others came into effect 6 months after Royal Assent). Introduces statutory definition of 'refugee', 'well-founded fear' and other matters. Also re-introduces TPVs.
- 25 March 2015: *Migration Amendment (Protection and Other Measures) Act* 2015 (POM Act) passed. Some measure came into effect on 14 April 2015, being the day after Royal Assent; others came into effect on Proclamation on 18 April 2015. Introduces amendments to the application bars (s 46A; 46B and 91K) and amendments to strengthen the integrity of processing of PVs (s 91W, s 91WA and s 91WB).
- From 1 October 2017, legacy caseload IMAs who have not applied for a TPV or a SHEV are barred from applying for any type of temporary or permanent visa in Australia. They also no longer have access to support services including income support and rental assistance and can be granted a BV with permission to work and access to Medicare and education for school-aged children while they make arrangements to leave Australia.

Comparison TPV / SHEV / PPV

Element	TPV/SHEV	PPV
Who	IMA, UAA	Onshore applicant
How arrived	boat / air arrival no visa	Lawful arrival then claimed protection
When arrived	2008-2014	Forever
Subclass	785, 790	866
Grant	TPV 3 Years SHEV 5 Years	Permanent
Identity	Questioned	Generally established
Legislation	Visa Subclass Provisions: Schedule 2 Application requirements: Item 1403 Schedule 1 (TPV) Item 1404 of Schedule 1 (SHEV)	Visa Subclass Provisions: Schedule 2 Application requirements: Item 1401 Schedule 1
Comments		

Protection Visa Legal Framework





Principle of 'non-refoulement'

A key aspect of finding a person to be a refugee is that such a person cannot be expelled or returned to a place where their life or liberty will be threatened for a reason for which a person may be determined to be a refugee. This is one of the central reasons why the protection visa scheme was originally established, to facilitate a visa scheme that allowed persons to whom Australia had a non-refoulement obligation under the Refugees Convention.

There are exceptions to non-refoulement for persons excluded from being refugees or who fall within the 'exceptions'. Section 36(1C) of the Act provides for the exceptions that are derived from Article 33(2) of the Refugees Convention. Section 5H(2) provides for the exclusions to being a refugee (derived from Article 1F of the Refugees Convention).

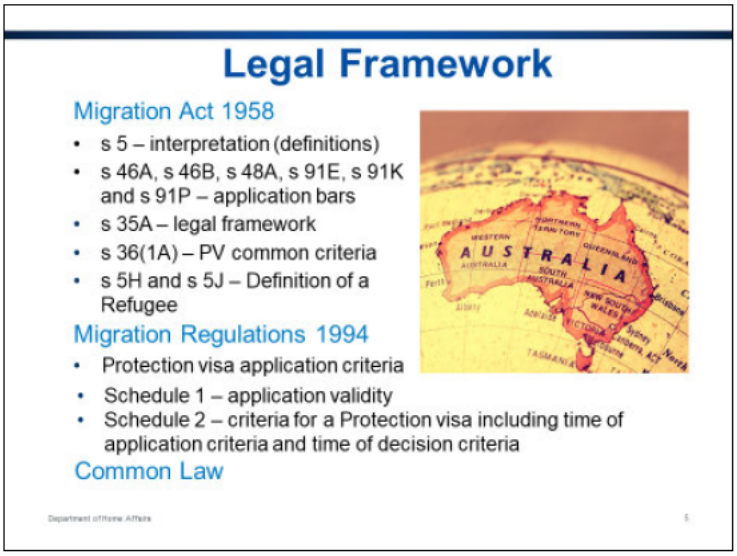
Australia accepts that it has non-refoulement obligations in addition to those under Article 33 of the Refugees Convention under the following international human rights treaties:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment **(CAT) – Article 3** provides 'no State Party shall expel, return ('refouler') or extradite a person to

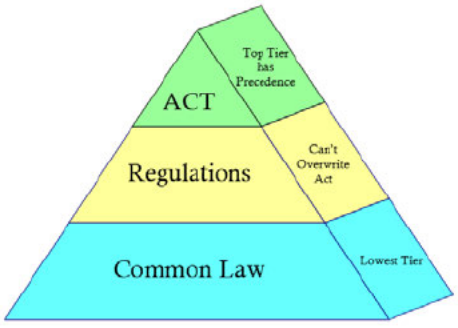
another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture [defined in Article 1]'

- International Covenant on Civil and Political Rights **(ICCPR)** – Non-refoulement obligations are implied in respect of the fundamental rights contained in **Article 6** ('every human being has a right to life') and **Article 7** ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'). Non-refoulement obligations also arise under the **Second Optional Protocol** in relation to persons who will have the death penalty carried out on them.

These additional non-refoulement obligations are considered under the complementary protection provisions



Sources of Law



The legal framework relevant to protection processing derives from the the Act and the Regulations.

Decision makers are bound by domestic legislation. This means that decision makers must consider the relevant provisions in the Act and Regulations when making a decision for a PV and in making assessments with respect to a person seeking Australia's protection.

Australian case law is also an important source of law in developing an understanding of protection processing and, where it interprets the applicable provisions, is binding on decision makers.

Practical component: references to law

The information below is not referred to in the formal training. However, this has been included to assist PV decision makers in referring to legislation and case law in their decision records.

How do I refer to legislation?

The Act and Regulations should be referred to as follows:

- *The Migration Act 1958* (the Act) or (the Migration Act); and

- *The Migration Regulations* 1994 (the Regulations) or (Migration Regulations).

Hereafter, they are referred to as the Act and the Regulations.

Where a section is referred to you may begin a sentence with 'Section 5J(4) states…' and within a sentence you may write "As stated in s 5J(4)…".

If you refer to a part of a section, depending on the level you are referring to, it may be a subsection, paragraph, or subparagraph. Examples when beginning a sentence:

Subsection 57(1) provides …

Paragraph 57(1)(a) states…

Within a sentence it is generally now acceptable to put an 's' before the reference. For example, 'In s 57(1) the Act states…'; Under s 57(1)(a) relevant information means…'. When referring to multiple sections you can use 'ss'. For example, "Both ss 46A and 46B are bars to lodging a valid protection visa application."

The regulations follow similar referencing, substituting 'Regulation' for Section, Subregulation for Subsection, and 'reg' for 's'.

The Act makes no reference to the 1951 Convention relating to the Status of Refugees as amended by its 1967 Protocol (Refugees Convention) in the context of PVs. For this reason this training manual will make no substantial reference to the Refugees Convention. It is useful to note that historically s36(2)(a) of the Act used to refer to a criterion for a PV being that a person must satisfy the Minister that they are a person with respect to whom Australia has protection obligations under the Refugees Convention. The definition of a refugee is now codified within the Act with references to the Regulations for certain provisions as noted in the Act.

This training manual may still refer to the Refugees Convention and terms used prior to the *Migration and Maritime Legislation (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act) when referencing historical case law that is still applicable given the intention of some amendments under the RALC Act was to reflect the same meaning of aspects of the refugee assessment understood under the Refugees Convention.

How do I refer to case law?

Case law references should be accurate and consistent in decision records. Of the two parties in a case, one will be the applicant or the plaintiff, or the appellant if the matter has been appealed through the courts. This will usually be the person seeking protection and their name will usually be a bunch of randomly allocated letters to form their pseudonym. This is to protect the identity of the person and complies with s 91X of the Act.

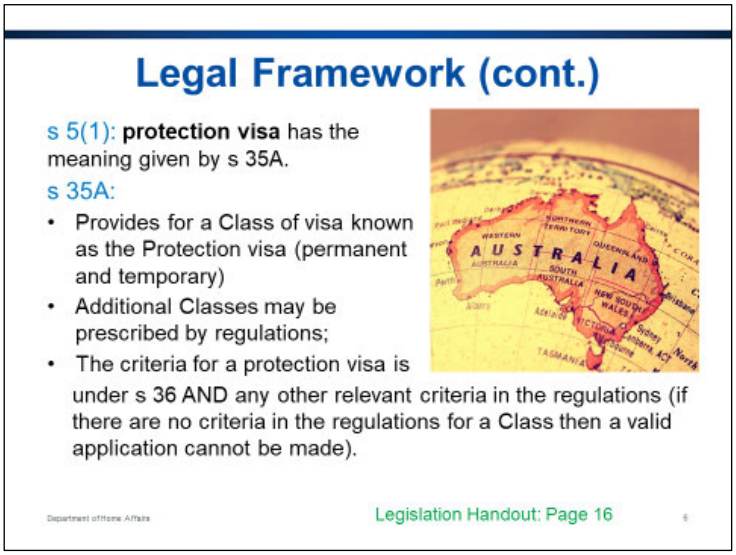
The other party will be the defendant or respondent; this is usually the Minister for Home Affairs or for older cases, whatever the portfolio was called at the time of litigation. It is only the parties that are italicised.

For example:

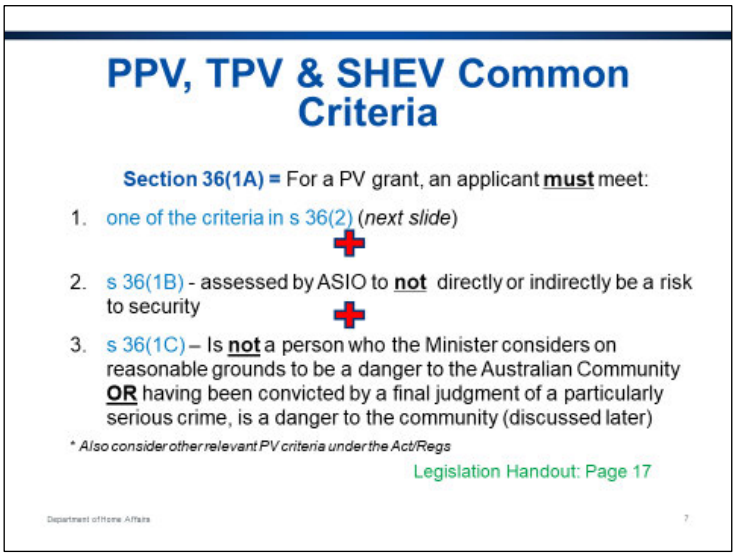
Applicant pseudonym v Minister for portfolio name [year] Court abbreviation Judgment number.

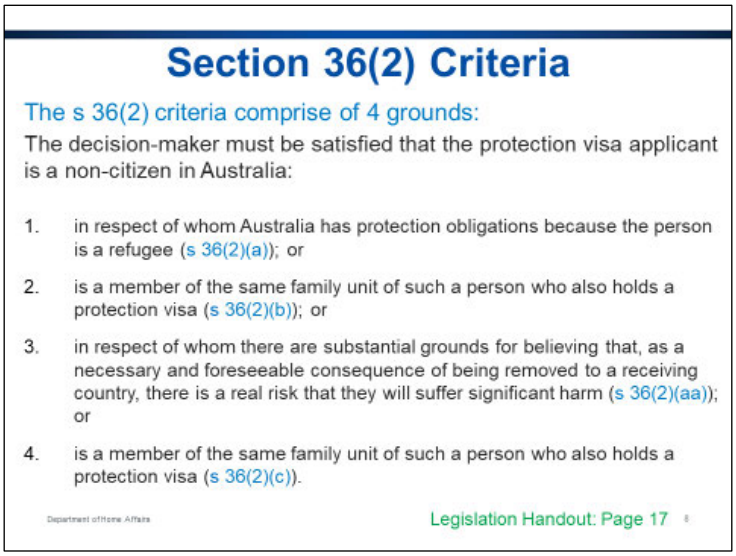
SZATV v Minister for Immigration and Citizenship [2007] HCA 40.

Common criteria for a protection visa



Section 35A of the Act sets up the legal framework for PVs. Section 35A(1)(a) states that a PV is a class of visa provided for within that section. Section 35(2), (3) and (3A) create a distinction between the different PV classes of PPV (Permanent Protection Visa),and SHEV(Safe Haven Enterprise Visa). Additional PV classes may be made by the Regulations.





All PVs have 'common criteria' under s 36(1A) of the Act and each may have its own additional criteria in the Regulations. The common criteria under s 36(1A) is that for a PV grant, an applicant must meet ALL of the following:

1. **One of the criteria in s 36(2), that is either**:

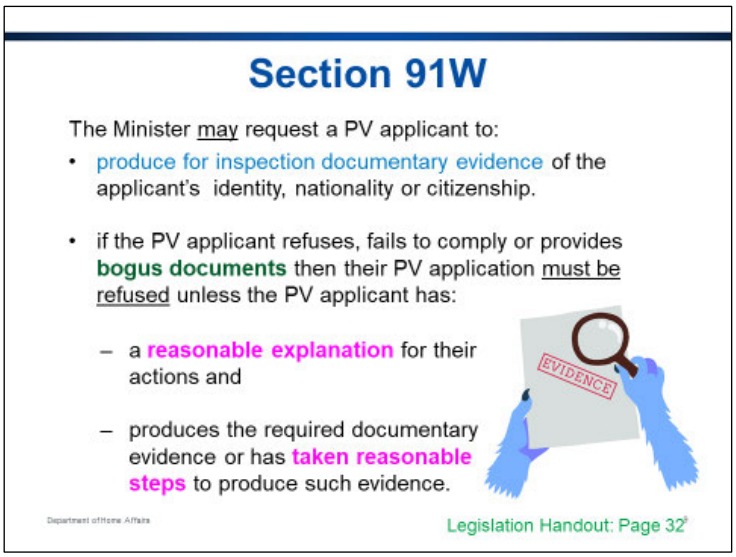
- Must be a refugee under s 5H; or
- Meet the complementary protection (CP) criteria under s 36(2)(aa); or
- Be a member of the same family unit (MSFU) of someone who is a refugee under s 5H or
- Be a member a MSFU of someone who meets the CP criteria under s 36(2)(aa) AND

2. **Section 36(1B)** – Not assessed by ASIO to be directly or indirectly a risk to security AND

3. **Section 36(1C)** – Provision that closely follows Article 33(2) of the Refugees Convention (discussed in more detail later in this training manual)

Section 46AA provides that in order for a valid visa application for certain visas covered by that section, the Regulations for the visa class must prescribe the criteria for validity or grant for that visa class. Section 46AA(4) makes it plain that an application for a visa covered under s 46AA must satisfy the validity requirements in both the Act and the Regulations to be a valid application. Further, the application must satisfy both the criteria in the Act and the Regulations in order to be granted the visa. PVs are a type of visa covered under s 46AA of the Act (amongst other visa subclasses).

Documentary Evidence of Identity, Nationality or Citizenship - s 91W and 91WA



Section 91W

Section 91 W of the Act provides that the Minister or delegate may, either orally or in writing, request a PV applicant to produce evidence of identity, nationality or citizenship. If the applicant refuses or fails to comply with the request or produces a bogus document in response to the request the PV application must be refused even if they are found to be owed protection.

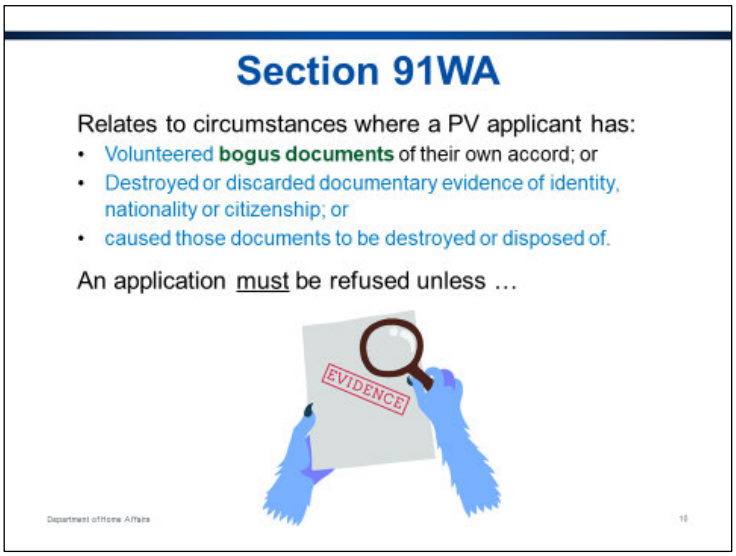
The 91W refusal power will not be engaged if the decision maker is satisfied that the applicant:

- has a reasonable explanation for refusing, failing to comply, or producing bogus documents; and either
- produces the documentary evidence requested; or
- has taken all reasonable steps to do so.

What is evidence?

Prima facie evidence of nationality is a passport. PV applicants may or may not have passports and documentation. They may also have fraudulent documents, which can make it harder to determine their identity.

Section 91WA



Section 91WA of the Act is not request-based and relates to circumstances where a PV applicant has:

- volunteered bogus documents of their own accord; or
- destroyed or discarded documentary evidence of identity, nationality or citizenship; or caused those documents to be destroyed or disposed of.

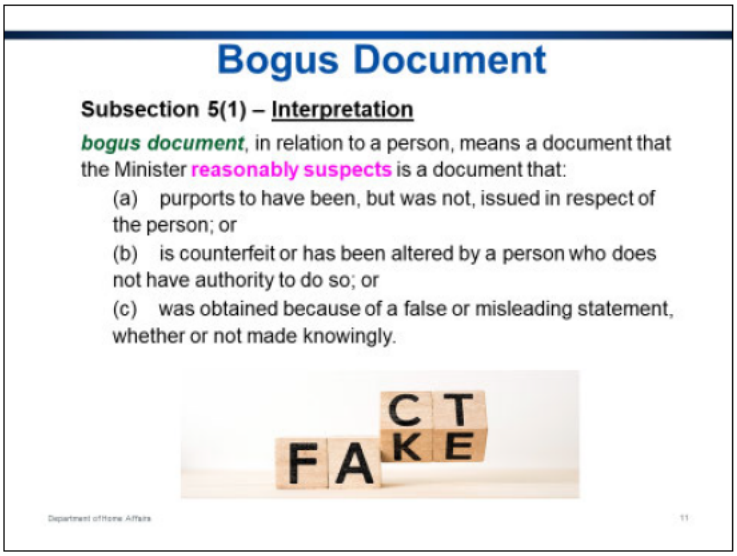
An application must be refused unless the decision maker is satisfied that the applicant:

- has a reasonable explanation for providing bogus documents, or for the destruction or disposing of the documentary evidence; and either
- provides documentary evidence of identity, nationality or citizenship; or
- has taken reasonable steps to provide such evidence.

Section 91W refers to “an applicant for a protection visa” and cannot be used to request documents from persons who have not yet made a PV application, for example because they are barred by s 46A and the bar has not yet been lifted.

See the ‘Use of sections 91V, 91W and 91WA’ within the Protection Visa Processing Guidelines (VM-4825) on LEGEND.

Bogus document



Section 5(1) of the Act defines a bogus document, in relation to a person, as 'a document that the Minister reasonably suspects is a document that:

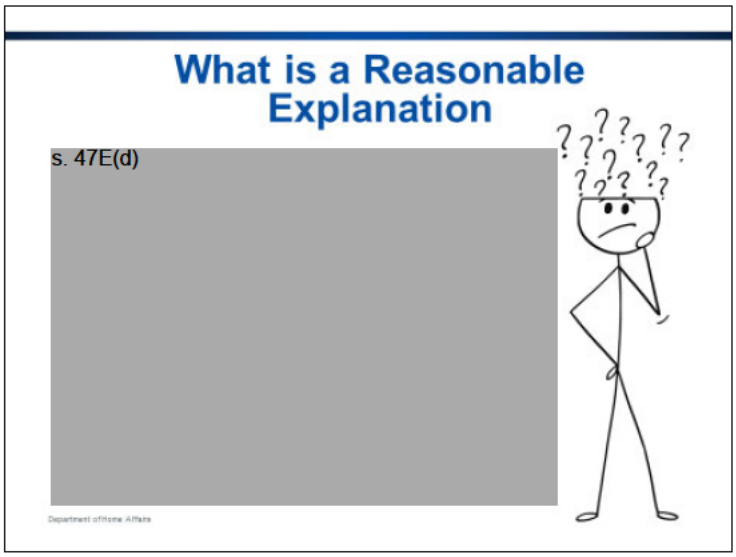
(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

A reasonable suspicion that a document is bogus will in most cases require some evidentiary basis and logical analysis. The reasonable suspicion is to be confined to the three parameters given in s 5(1) that relate to the meaning of 'bogus documents'.

Reasonable explanation



The Act does not define what amounts to a 'reasonable explanation' for the purposes of s 91W and s 91WA (s 91WA will be discussed below). Decision makers must make an assessment on the individual merits of each case as to whether the applicant has given a 'reasonable explanation' or undertaken 'reasonable

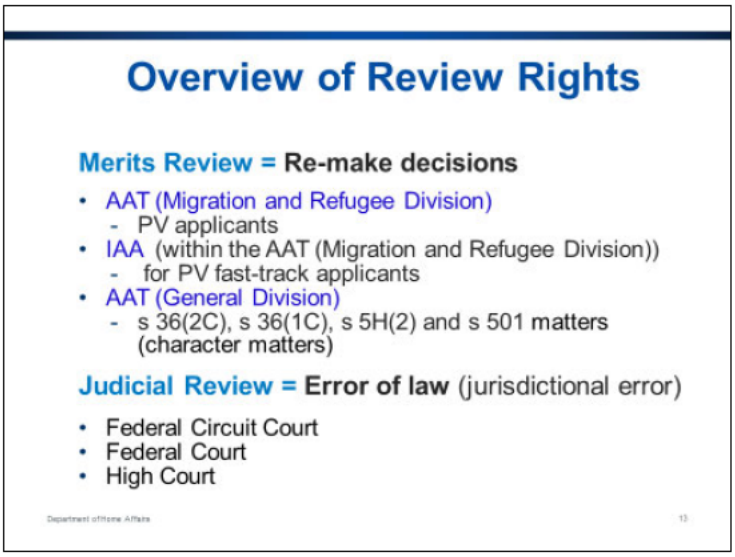
steps' for the purpose of these sections. Such an assessment should be objective and proportionate to all available relevant information, including country information

Failure to comply

A failure to comply may rest on whether the person was in fact issued the request to produce the evidence which may be questionable in circumstances where the request is made in writing and the service requirements for giving the document have not been complied with. For further information see the Notification Requirement PPCF document (LS-1818) on LEGEND. Decision makers should ensure that all requirements in issuing the request have been met before making a conclusive determination that there has been a failure to comply.

Review Rights

On 1 July 2015, the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) were merged with the Administrative Appeals Tribunal (AAT) under changes introduced as part of the Tribunals Amalgamation Act 2014. Decisions that could be reviewed by the former MRT and RRT are now reviewed in the AAT's Migration and Refugee Division.



Merits review

Certain applications for a visa that are refused may have a legal right for the decision to be reviewed on the 'merits of the case'. This means that another 'decision maker' considers the facts of the case within the bounds of the law and comes to a fresh decision.

Section 411 of the Act provides what decisions are reviewable by the AAT (Migration and Refugee Division), s 500 for matters reviewable by the AAT (General Division), and s 473BB provides for decisions reviewable by the Immigration Assessment Authority (within the Migration and Refugee Division of the AAT). The 'Fast Track' section of the Protection Visa Processing Guidelines (VM-4825) on LEGEND contain more information about 'Fast Track' applicants and which decisions are reviewable by the Immigration Assessment Authority. Generally speaking, most IMAs are Fast Track applicants.

If a decision is merits reviewable, the Tribunal usually has powers to:

- affirm the original decision; or
- vary the original decision; or
- remit the matter for reconsideration by the department, with or without a direction as to certain findings; or

- set aside the original decision; or
- substitute a new decision.

The AAT (Migration and Refugee Division) may review decisions to refuse or cancel a PV other than character or security matters under s 5H(2), s 36(1C) and s 36(2C) of the Act. The AAT (General Division) has jurisdiction to review decisions to refuse a PV where the decision was made on character or security grounds relying on s 5H(2), s 36(1C) or s 36(2C).

There are some exceptions where certain decisions may not be merits reviewable, for example, if the Minister issues a conclusive certificate for such decisions. In addition, decisions to refuse under s 36(1B) are not merits reviewable.

If the Minister considers it in the public interest to intervene, the Minister has the power to substitute a more favourable decision than that of the Tribunal (see s 417 and s 501J).

Judicial review

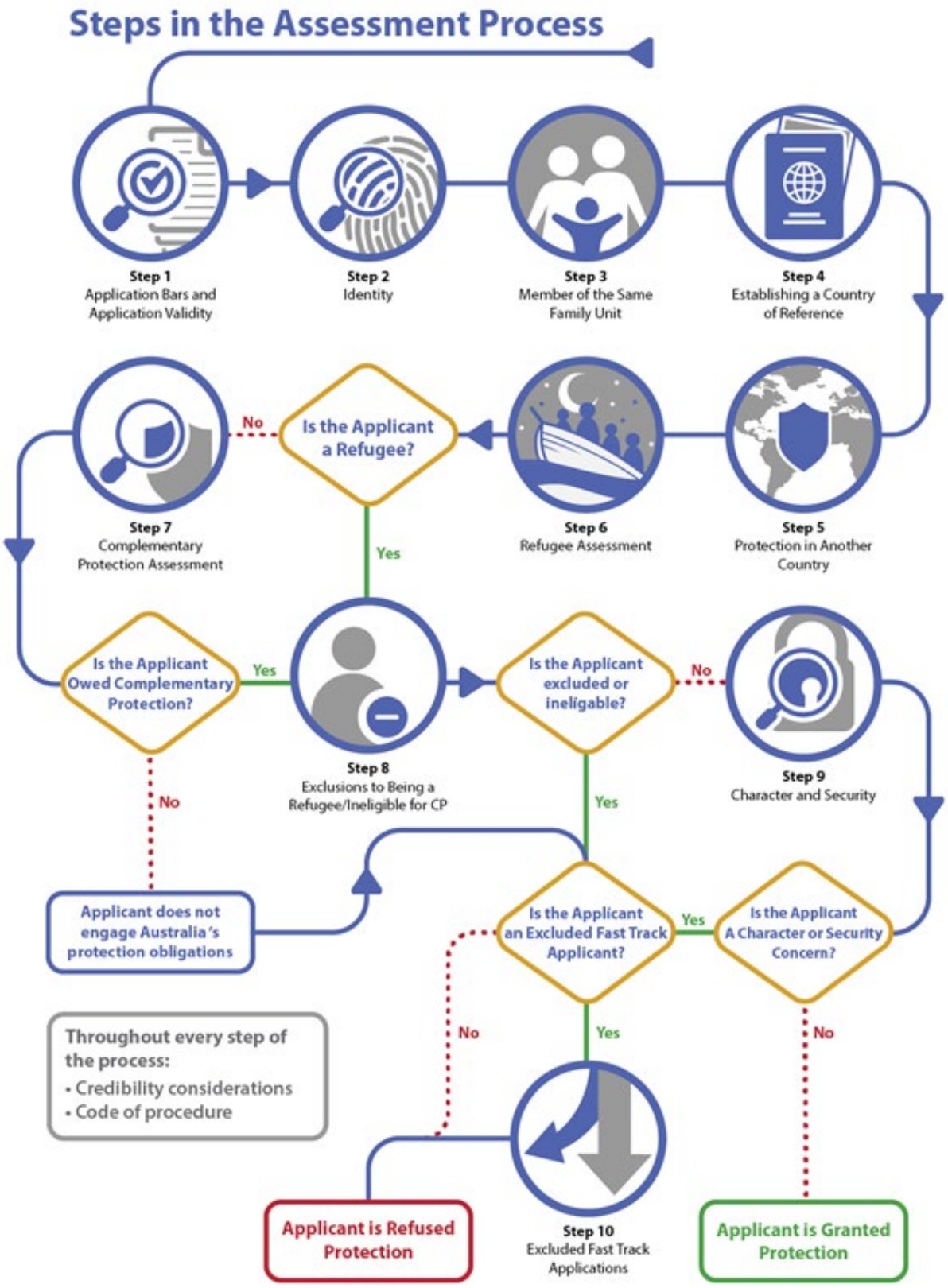
Judicial review is where the courts determine whether there has been an error of law, that is, jurisdictional error in the decision. Courts do not consider the merits of the case, only whether the conclusion was reached according to law.

Judicial review may be heard by:

- Federal Circuit Court;
- Federal Court;
- High Court (by special leave to appeal or by way of original jurisdiction).

The courts cannot review a 'privative clause decision' as provided for under s 474 of the Act. However, the Act allows that the Federal courts (see s 476 and s 476A) have the same original jurisdiction of the High Court (per s 75(v) of the Constitution), meaning that certain errors of law may be reviewable even if they are privative clause decisions.

Steps in the assessment process

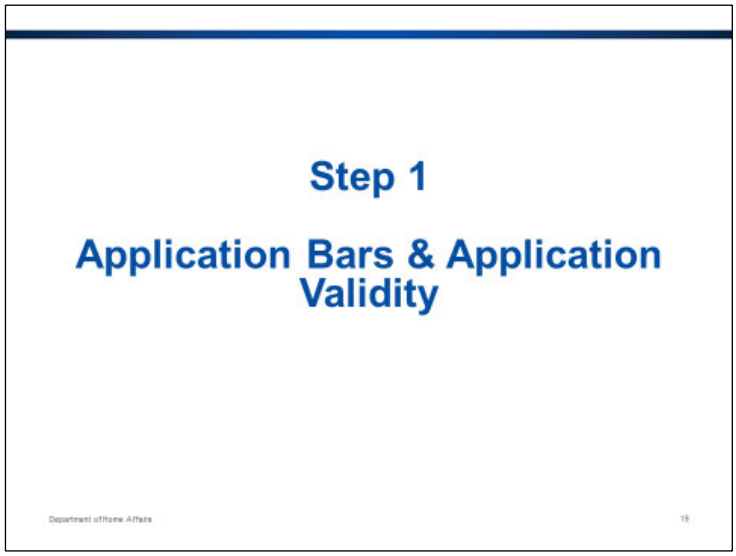


Steps in the assessment process

1	Application bars and application validity
2	Identity (*outside the scope of this module*)
3	Member of the same family unit (s 36(2)(b) and (c)) (outside the scope of this module)
4	Establishing country of reference and receiving country
5	Protection in another country (s 36(3) – (7))
6	Whether the person is a refugee (s 36(2)(a)) - s 5J - well-founded fear of persecution including: ▪ refugee protection reason (s 5J(1)(a)) ▪ real chance of persecution in relation to home region and the real chance relates to all areas of the country (s5J(1)(b) and (c)) ▪ persecution (s 5J(4) and (5)) ▪ effective protection measures (s 5J(2) and 5LA) ▪ modification of behaviour so as to avoid a real chance of persecution (s 5J(3)) ▪ bad faith sur place refugee actions (s 5J(6)) - s5H(2) - exclusions to being a refugee
7	Whether the applicant meets the CP criterion (s 36(2)(aa)) - CP assessment: ▪ significant harm (s 36(2)(aa) and 36(2A)) ▪ real risk (s36(2)(aa)) ▪ what is taken not to be a real risk of significant harm (s 36(2B)): · where it would be reasonable in the sense of practicable to relocate · where there is adequate state and non-state protection · where the real risk is one faced by the population of the country generally ▪ necessary and foreseeable consequence of removal (s 36(2)(aa)) - Section 36(2C) CP ineligibility provisions
8	Exclusion to being a refugee and ineligibility from meeting the CP criteria (s 5H(2) and 36(2C)(a))
9	Character and security exceptions (s 36(1A)(a)): - Does not have an adverse security assessment (s 36(1B)) - Is not a person who is a danger to Australia's security (s 36(1C)(a)/ 36(2C)(b)(i)) - Having been convicted by final judgment of a particularly serious crime, is a danger to the Australian community (s 36(1C)(b)/ 36(2C)(b)(ii))
10	Excluded Fast Track review applicant (consideration only if on a refusal pathway)
Note	Throughout the assessment process: - Credibility considerations - Code of procedure (subdivision AB)

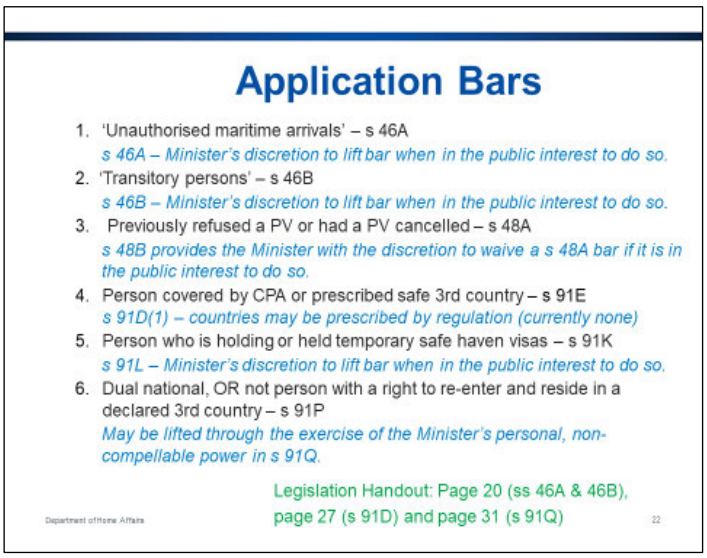
Step 1
Application Bars and Application Validity

Step 1: Application Bars and Application Validity



Application validity is important as under s 47 of the Act, the Minister cannot consider invalid applications and a determination that a visa application is invalid is not a decision to refuse the visa. This point is significant since if a person makes an invalid PV application another application is not prevented by s 48A of the Act.

Even though PV applications are assessed for application validity prior to allocation to decision makers, if you are a decision maker, it is still important to understand application validity to ensure you can identify any potential issues that arise during the course of processing. For example, new information may arise during the PV interview s. 37(2)(b)



Application Bars

There are six application bars under the Act which prevent a person from making a valid application for a PV.

Unauthorised maritime arrivals (s 46A)

An unauthorised maritime arrival ('UMA') (as defined in s 5AA of the Act) who is an unlawful non-citizen, a bridging visa holder, a TPV holder or the holder of a temporary visa prescribed for the purposes of this provision cannot make a valid application for a visa.

Section 46A was amended by the POM Act so that the s 46A valid visa application bar applies to all UMAs who hold a bridging visa, TPV or a prescribed class of temporary visa. Prior to the introduction of the POM Act, s 46A only applied UMAs who were unlawful non-citizens only.

Subsections (1A) and (1AA) were inserted into the Act by the RALC Act to make clear a child born in the migration zone or in a regional processing country (RPC) to UMA parents is also a UMA.

Under s 78 of the Act, non-citizen children born in Australia to parents who are non-citizens are taken to hold the visas that the parents hold. Prior to the RALC Act, s 46A applied to UMA persons who were 'unlawful non-citizens in Australia', meaning that if the UMA holds a visa they are considered 'lawful' and therefore not subject to s 46A. The RALC Act, however, has amended the Act to ensure that s 46A applies to children born in Australia to UMA parents even if the child holds, by operation of s 78, one of the following visas:

- a bridging visa;
- a temporary safe haven visa;
- a temporary (humanitarian concern) visa; or
- a temporary protection visa granted before 2 December 2013.

Transitory persons (s 46B)

Section 46B of the Act provides that transitory persons, who are in Australia and are unlawful non-citizens, cannot make a valid visa application unless the Minister determines that it is in the public interest to do so. 'Transitory person' is defined in s 5 as (amongst other types of persons) a person who was taken to a

regional processing country under the regional processing arrangements under s 198AD but who has had to be brought to Australia for a temporary purpose.

Children born in the migration zone or in an RPC to transitory person parents are also transitory persons. Similarly to s 46A above, s 46B also bars children who hold bridging visas or certain temporary visas.

Persons who have been refused protection visas (s 48A)

Section 48A of the Act provides that once an application for a PV has been refused, or a PV has been cancelled, a person cannot apply for a further PV on any other grounds while in the migration zone. This would apply regardless of whether they held a substantive visa at the time of the second PV application. It does not matter whether the person is seeking merits review of the decision to refuse or cancel the PV.

Section 48B of the Act allows the Minister to determine that s 48A does not apply to a non-citizen where the Minister thinks that is in the public interest. This power may only be exercised by the Minister personally, and the Minister does have a duty to consider whether to exercise the power or not.

Persons from prescribed safe third countries (s 91E)

Non-citizens, to whom Subdivision AI of the Act applies, are prevented by s 91E from making a valid PV application unless the Minister uses his or her personal, non-compellable power under s 91F to lift the application bar.

Subdivision AI applies to certain refugees covered by the Comprehensive Plan of Action (CPA) or persons covered by a safe third country agreement. The CPA was approved by the International Conference on Indo-Chinese Refugees in June 1989 and provides Vietnamese nationals in the PRC already recognised as refugees do not engage Australia's protection obligations because they have protection by the PRC.

Subdivision AI, s 91D(1)(a), provides that countries may be prescribed by regulation as safe third countries in relation to certain persons or classes of persons. There are currently no prescribed safe third countries.

Temporary safe haven visa holders (s 91K)

The effect of s 91K of the Act is that a current or former temporary safe haven visa holder, who are not UMAs, cannot make a valid application for any visa other than a temporary safe haven visa unless the Minister has exercised the personal non-compellable public interest power under s 91L to allow them to do so.

The s 91K visa application bar is not applicable to UMAs because the POM Act contained a provision that meant the s 91K will no longer apply to UMAs and that the s 46A application bar would be applicable. This allowed for the same application bar to apply for all UMAs regardless of whether they are an unlawful non-citizen or hold a bridging visa, a TPV or a prescribed temporary visa.

Dual nationals, OR persons with a right to re-enter and reside in a declared 3rd country (s 91P)

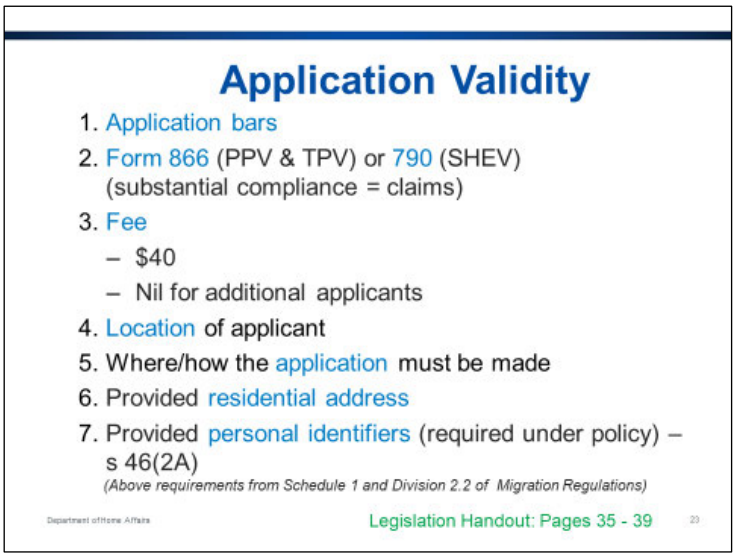
Subsection 91N(1) of the Act, along with s 91P provide that an application for a PV by a person who is a national of two or more countries is not a valid application. Where a law of a country provides certain persons to be nationals decision makers should consider whether the circumstances of the applicant fall within the ambit of the nationality laws: *SZQYM v Minister for Immigration and Citizenship* [2014] FCA 427. Furthermore, It does not matter whether the person has been to the countries concerned, is able to achieve protection there, or is able to 'put into effect' anything to do with the nationality: *SZOUY v Minister for Immigration and Citizenship* [2011] FMCA 347.

Subsection 91N(2) along with s 91P prevents a valid PV application being made by persons who have a right to enter and reside in an 'available country' and the person has been in that country continuously for at least 7 days and the Minister has declared the specified country to be an available country. The Regulations may prescribe a period longer than 7 days.

The application 'bar' under s 91P may be lifted through the exercise of the Minister's personal, non-compellable power in s 91Q.

Whether or not matters will be assessed or referred to the Minister to consider exercising s 91Q is guided by policy. Refer to the Refs Help Onshore mailbox s. 47E(d) for further assistance if required.

Other validity requirements for a protection visa application



As well as the 'application bars', s 46 of the Act provides for the making of valid visa applications and allows the Regulations to make provisions for making valid applications.

Schedule 1 of the Regulations contains provisions for making valid visa applications. In general, Schedule 1 provisions describe the Form that must be used for making an application, the fee that is to be paid and if there are instalments, where the applicant must be to make the application and where the application must be made. Some visas require the applicant to be outside Australia but the application to be made in Australia (by sending it to a designated place). PVs require the applicant to be in Australia and the application to be made in Australia.

When filling out an application form, the forms require an applicant to comply with all directions on it, which does not necessarily mean the person must complete all questions or provide full details to each question. The *Acts Interpretation Act 1901* and *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91 consider that for PV applications only 'substantial compliance' with the form is needed.

What is 'substantial compliance' for a protection visa application form?

In *Bal v Minister for Immigration and Multicultral Affairs* [2002] FCAFC 189 the court considered that a 'bare bones' claim will be sufficient for an applicant to substantially comply with the requirements for the making of a valid application. What is a 'bare bones claim' will depend upon the facts of the case. In *BYE15 v Minister for Immigration and Border Protection* [2016] 241 FCR 258, the court affirmed the earlier judgment that stated *Bal*, and the cases it referred to, does not stand for the proposition that substantial compliance means the claims made in the application disclose, on their face, claims of persecution or for protection. The court affirmed that a person can make a valid claim for a protection visa by making a substantial, clearly articulated argument that relies upon establish facts. Where this is provided, the application will be valid, even where the claim itself does not expressly identify a Convention ground (or refugee protection reason for post RALC Act applications). It is not necessary to analyse the nature of the claims made in the protection visa application form for the purpose of determining whether the decision maker, could or should have been satisfied that any of those claims gave rise to an entitlement to a protection visa as part of

assessing whether an application is valid. This is a matter for the decision maker in assessing whether the applicant meets the protection visa criteria under the Act.

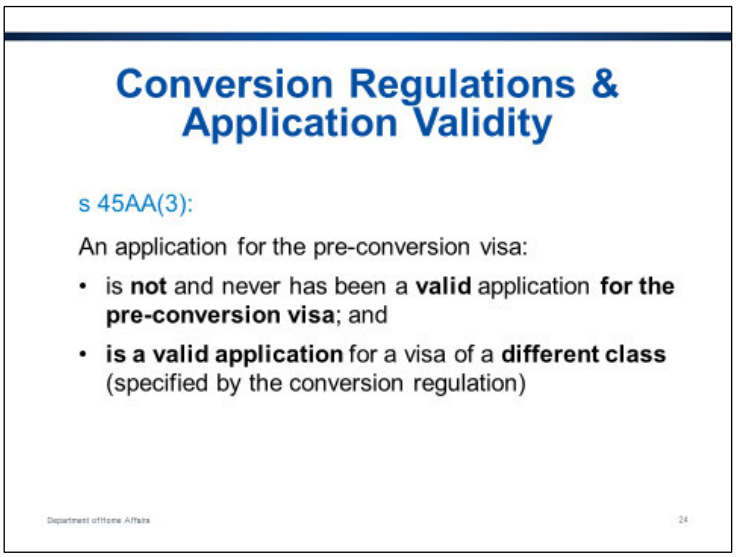
A signature on a prescribed visa application form is not required in order to meet the substantial compliance requirement. Under s 46(2A) of the Act, if prescribed circumstances exist, an officer may request an applicant to provide personal identifiers. A PV application is a prescribed circumstance. A type of personal identifier that may be request is a signature: s 46(2AA). If the person does not comply with a request to supply a personal identifier then the application is invalid.

Regulation 2.07 requires that the applicant provides a residential address in the application.

The RALC Act has amended Schedule 1 to provide that UMAs, as well as certain other persons (generally those that fall into the term 'unauthorised air arrivals') cannot make a valid application for a PPV. Such persons can only make a valid application for a TPV or a SHEV.

In addition, any UMAs or unauthorised air arrivals that had made valid PPV applications prior to the amendments made by the RALC Act have had those applications converted to applications for a TPV instead.

Conversion of visa applications and criteria in the Regulations



Under s 45AA of the Act, from time to time visa classes may be prescribed as being subject to conversion regulations. Where a person has made a valid application for a 'pre-conversion visa' and a decision has not been made on that application, but an event such as a criteria change, criteria omitted, or a change in the criteria for making a valid application of that class occurs, the Regulations may convert the application for the pre-conversion visa into an application for another visa class. The pre-conversion application is taken never to have been valid and the converted application is taken to always have been valid.

Under the s 45AA power, reg 2.08F prescribes certain applications for PPVs to be taken to be applications for a TPV. They are those made by:

(a) an applicant who holds, or has ever held, any of the following visas:

(i) a Subclass 785 (Temporary Protection) visa granted before 2 December 2013;

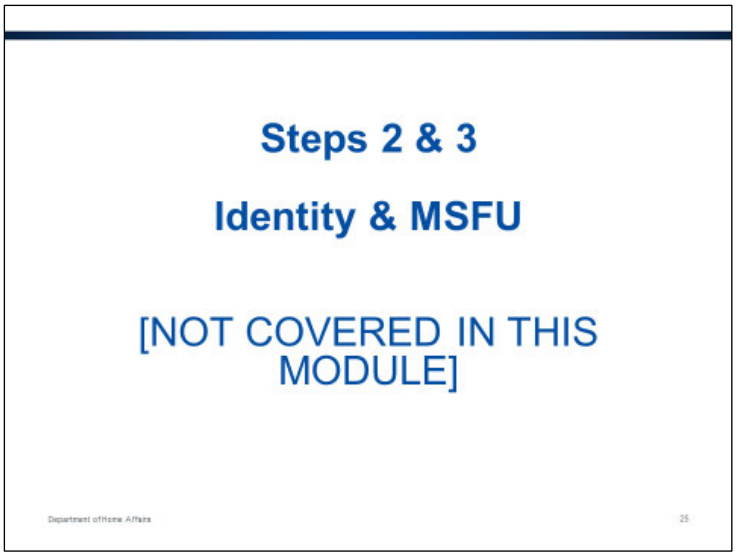
(ii) a Temporary Safe Haven (Class UJ) visa;

(iii) a Temporary (Humanitarian Concern) (Class UO) visa;

(b) an applicant who did not hold a visa that was in effect on the applicant's last entry into Australia;

(c) an applicant who is an unauthorised maritime arrival;

(d) an applicant who was not immigration cleared on the applicant's last entry into Australia.



Step 2
Identity

Step 2: Identity

This is covered in the Advanced Identity Awareness Module of the PODM Essentials Training course.

Step 3
Member of the Same Family Unit

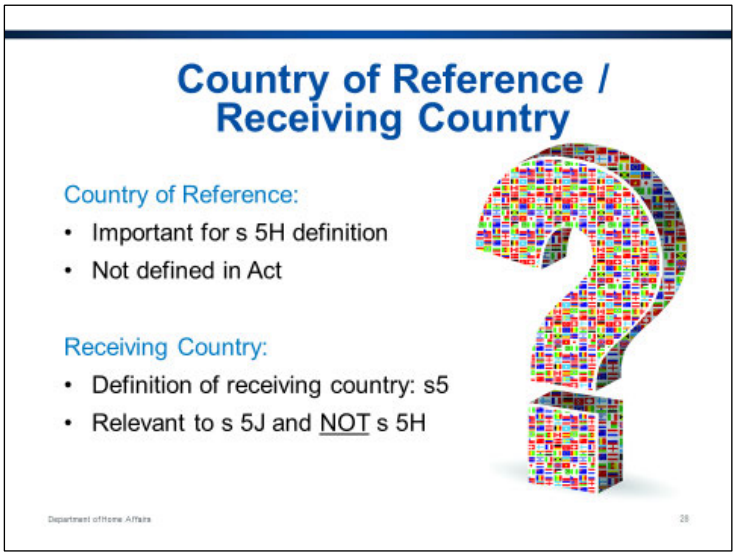
Step 3: Member of the Same Family Unit (MSFU)

This is covered in the Member of the Same Family Unit module of the PODM Essentials Training course.

Step 4: Country of Reference and Receiving Country

The terms country of reference and receiving country are important because they form the basis of establishing which country to assess the applicant's refugee and CP claims against, including reviewing relevant country of origin information. Once the country of reference and receiving country are established then the PV decision maker can also conduct other aspects of the refugee law assessment such as whether the applicant is outside the country of his or her nationality or former habitual residence (required under s 5h(1)) and whether there is protection in another country (s 36(3) – (7)).

Country of reference and receiving country



The meaning of a refugee is set out in s 5H(1) and provides:

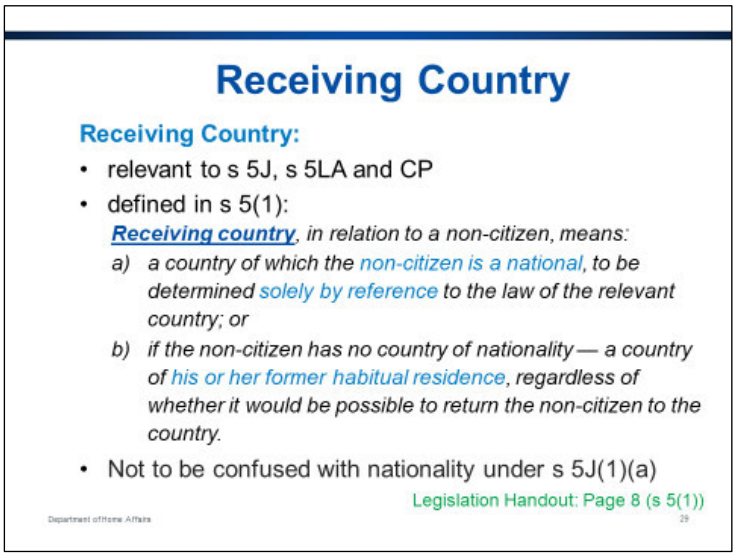
(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

(a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

(b) in a case where the person does not have a nationality —is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it. […]

The term 'receiving country' is discussed in light of considering 'well-founded fear of persecution.' This is found in s 5J of the Act which requires consideration of the applicant's 'receiving country.' This is also referenced in s 5LA (effective protection measures).

Receiving Country



Establishing the receiving country is a necessary step in assessing a well-founded fear of persecution not only because the definition in s 5J of the Act requires it but because a point of reference is needed to determine whether or not the person faces a real chance of persecution. In most cases determining a receiving country may not be difficult. Cases where the applicant claims against a country to which they have not been for a significant time, where there is little evidence the person belongs to the country, or where there are questions about whether an area is in fact a country are more difficult and could arise.

As s 5H(1) was intended to incorporate the meaning of Article 1A(2) of the Refugees Convention by incorporating similar wording. The department's position is that the case law surrounding Article 1A(2) is also applicable to s 5H(1). This is the case in relation analysing 'what is a country' for the purposes of country of reference and receiving country.

Definition of receiving country

In s 5(1) the Act defines 'receiving country' in relation to a non-citizen to mean a country of which the non-citizen is a national or if the non-citizen has no country of nationality, the country of the non-citizen's former habitual residence (regardless whether it is possible to return the person to that country).

Nationality

Whether a non-citizen is a national of a country is to be determined solely by reference to the laws of the country. If the applicant provides no evidence of nationality, but you consider by operation of law of a country the person is a national of the country, you will have to consider the applicant's circumstances and

how they fall within the scope of that law (*SZQYM v Minister for Immigration and Citizenship* [2014] FCA 427).

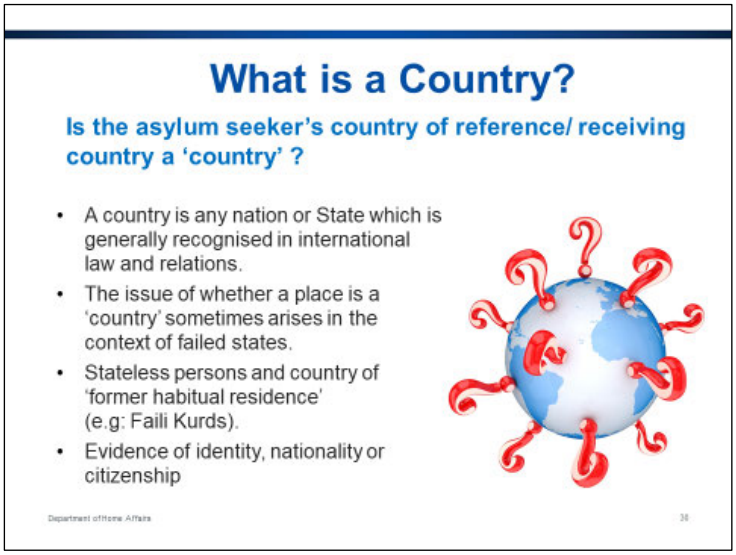
Country of former habitual residence

If an applicant is stateless (e.g. Faili Kurds, Rohingans, Palestinians), then decision makers should consider their claims against their country of former habitual residence. Some factors relevant for determining an applicant's country of former habitual residence are:

- the applicant must have been admitted to the country with a view to continuing residence of some duration without some qualifying minimum period of residence;
- the applicant must have established a significant period of de facto residence in the country in question;
- residence or settlement of some duration that is more than a short term or temporary stay;
- there is continuity of stay or a settled intention or purpose to stay;
- nature of residence – e.g. whether the applicant has made the country his abode or the centre of his interests; and
- there is no requirement for formal permanent residence or domicile.

However, it is not necessary to establish any one factor to show that the residence was habitual.

What is a country?



The courts have established that there are several factors for considering whether a territory is a 'country':

- Is the nation or State generally recognised in international law and relations?
- Does the territory have a distinct area with identifiable borders?
- Does it have its own immigration laws?
- Does it have a permanent identifiable community?
- Is it autonomous (to some degree) in its own administration?
- Would a person, in everyday language, be identified as coming from that country?

These factors were considered as consideration whether in *Kwet Koe v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 289. In this case, when considering whether Hong Kong prior to handover to China was a country, the Court held that for the purposes of Art 1A(2) of the Refugees Convention, Hong Kong did constitute a country.

Sometimes questions arise whether autonomous regions within a State are considered to be 'countries' under the guiding factors given above. Generally, an autonomous region is given certain allowances to do things that may be different from that of the State that 'controls' the region. While those allowances may include the ability to make immigration laws or immigration decisions it is unlikely that the regions are 'countries'. If there is doubt, seek further guidance from the Refs Help Onshore mailbox

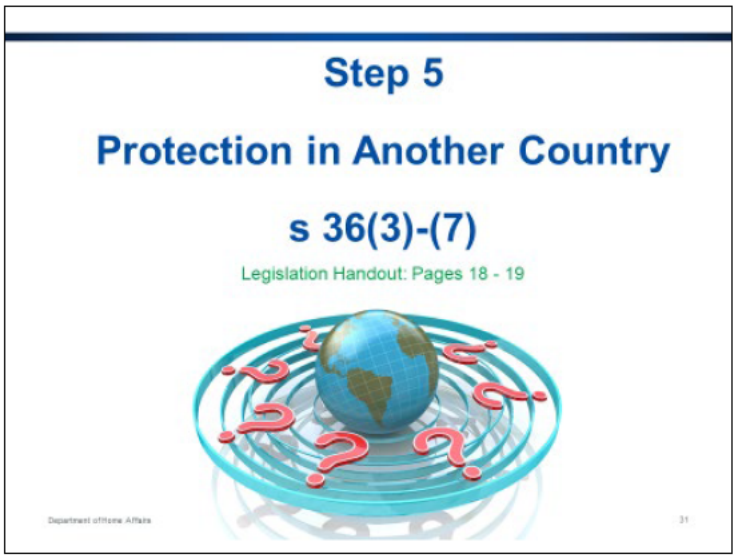
Al-Anezi v Minister for Immigration and Multicultural Affairs [1999] FCA 355 (applicant had more than one country of FHR)

Applicant was a stateless "Bedoon" who feared persecution in his country of birth, Kuwait. He had subsequently lived in Iraq for a number of years and received a residency permit in Jordan, which was subsequently renewed. The Federal Court held that once a well-founded fear of persecution for a Convention reason (now referred to as a s 5J(1)(a) reason) was established, a claimant with more than one country of former habitual residence need not satisfy the Convention definition (now referred to as the s 5H definition of a refugee) in relation to each such country to be considered a refugee.

NB: The country of FHR could be Jordan and/or Iraq. The next step for a decision maker is to look at whether Jordan or Iraq could offer protection in another country (s 36 (3)-(7)).

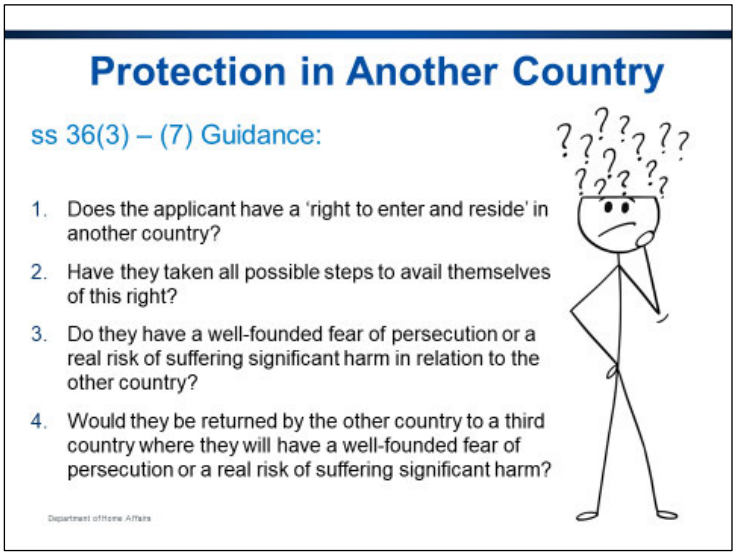
Step 5
Protection in Another Country

Step 5: Protection in Another Country



Protection in another country was previously referred to as statutory effective protection, however, this terminology changed to avoid confusion with effective protection measures referred to in s 5J(2) and 5LA of the Act which was introduced as part of the RALC Act. The purpose of this is to highlight the importance of ensuring that applicants/claimants have taken all possible steps to avail themselves of an existing right to enter and reside in a third country before you progress to detailed consideration of the protection claims.

What is 'protection in another country'?



The concept of 'protection in another country' embodies s 36(3) to (7) of the Act which includes an obligation of an applicant to have taken all possible steps to avail themselves of a right to enter and reside in a country where they have such a right and that the exceptions do not apply to the applicant. Therefore, Australia is taken not to have protection obligations in respect of a person that has certain rights to enter and reside in a country where they will not have a well-founded fear of persecution for one of the s 5J(1)(a) reasons or a real risk of suffering significant harm in relation to that country; or another country where they may be returned to by that country and they fear such harm.

Subsections 36(6) and (7) state that whether a person is a national of a country is to be determine solely by reference to the laws of the country and that this reference to laws and nationality does not affect any other provision in the Act.

The key elements in the phrasing of s 36(3) are:

- 'right to enter and reside';
- 'all possible steps';
- 'whether temporarily or permanently'; and
- 'however that right arose or is expressed'.

The key elements of the exceptions to s 36(3) are:

- Do they have a well-founded fear of persecution for one of the s5J(1)(a) reasons or a real risk of suffering significant harm in relation to the other country? (s36(4))
- Do they have a well-founded fear that the other country will return them to a third country (either their country of nationality or former habitual residence or another country) where they will be persecuted for one of the s5J(1)(a) reasons or face a real risk of suffering significant harm? (s36(5) and s36(5A))?

Meaning of 'right to enter and reside' – overview

The right to enter and reside must be in existence at the time of decision and must be a right to enter and reside (see *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194). If the applicant had a right (such as a visa) that has expired at the time of decision then the right is not in existence and s 36(3) does not apply to that person. There is nothing in the legislation that allows a decision maker to consider whether the right to enter and reside lapsed because of a deliberate action of the applicant or other 'bad faith' considerations.

What if the right is only for a short period or has a short time remaining when the decision is being made? The length of time remaining for the right is not relevant to s 36(3) because the right may be considered even if it is only 'temporary' (see *SZRTC v Minister for Immigration and Border Protection* [2014] FCAFC 43). However, if the person claims they will be returned to the country where they claim persecution after the visa expires then s 36(5) and (5A) will have to be considered.

Some visas may allow a right to enter and transit (such as tourist visas) which are typically not considered to give rise to a right to 'reside' – See 'Meaning of reside', below.

Meaning of 'right'

In *Minister for Immigration and Citizenship v SZRHU* [2013] FCAFC 91 the court stated that the right takes the form of "a liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement" to enter and reside in a third country.

It is important to note that this does not require that right to enter and reside be expressly codified in the domestic law of the State and even if it is in the law it need not be capable of enforcement. The right may be 'expressed' or 'arise' by operation of edicts from the members of the government of the State, by regular and authorised actions of the authorities or agencies of the State. In such situations, country information will assist in determining what the State does in practice. The actions of State officials cannot be discretionary to give rise to the 'right' being in existence.

Meaning of 'reside'

The definition of "reside" in the Macquarie Dictionary (3rd edition) is – "to dwell permanently or for a considerable time; have one's abode for a time". Therefore transit is not considered to amount to "reside". See also *WAGH v Minister for Immigration and Multicultural and Indigeous Affairs* [2003] FCAFC 194.

Recent case law (*SZMWQ v Minister for Immigration and Citizenship* [2010] FCAFC 97) supported the Minister's view that s 36(3) is concerned with the right to reside and not the practical ability of a person to establish a residence. This demonstrates the changing nature of the interpretation of the definition of refugee in Australian jurisprudence and decision makers are reminded to keep up to date with their knowledge and materials, including the Refugee Law Guidelines, available through LEGEND.

Connection with country

It is not necessary that an applicant has a connection with the country to have a right to enter and reside. The focus of s 36(3) is on the applicant possessing a relevant right.

However, an applicant's connection with the relevant third country may form part of the evidence in determining whether the applicant has a right to enter and reside there (e.g. a connection with the country may add weight to a finding of a right to enter and reside).

Countries and freedom of movement agreements

Some countries have joined unions or leagues that offer economic, social and other development incentives. Some of those unions have agreements to allow some freedom of persons moving from one State to another. However, for each union it is not enough to consider the terms of the agreement or directives, the laws and sanctioned actions of the States concerned must also be considered.

Some examples of unions or leagues under agreements include:

- European Union (EU);
- Economic Community of West African States (ECOWAS);
- East African Community (EAC);
- Arab Maghreb Union (AMU).

Since States sometimes cede from these unions the most current information of member States should be considered.

Other countries sometimes enter a treaty with another to allow certain mutual benefits which may include freedom of movement across borders or right of residence. An example is the Treaty of Peace and Friendship 1950 made between India and Nepal. The case examples below deal with the Treaty between India and Nepal.

SZLAN v Minister for Immigration and Citizenship [2008] FCA 904

Bilateral treaty between Nepal and India. Article 7 of the treaty states:

The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature".

At [60], in Applicant C, Stone J stated:

It should also be recognised that a right of entry such as I have postulated may arise other than by grant of a visa. A country's entry requirements may be met by proof of identity and citizenship of a nominated country being provided at the border, for example by production of a valid passport, without the necessity for a visa. This would explain the use in s 36(3) of the phrase, "however that right arose or is expressed."

The Federal Court found that:

India accepted the Treaty of Peace and Friendship between India and Nepal and that the Treaty had been incorporated into the domestic law of India and as such, could be accessed by the [applicant]. In the circumstances, if it were necessary the [applicant] had a right of entry

as explained by Stone J in Applicant C then no more was required than the matters which the Tribunal found.

SZGXK v Minister for Immigration and Citizenship [2008] FCA 1891 (facts below)

The 1950 Treaty of Peace and Friendship between India and Nepal does not, of itself, confer rights on Nepalese which would engage s 36(3) of the Act. However, it was open to the RRT to conclude that s 36(3) was engaged, having regard to the treaty and other information provided by the Department of Foreign Affairs and Trade that showed that the officials of India in certain circumstances allowed Nepalese citizens entry into India based on showing identity information and a current passport.

Taken all possible steps to avail themselves of that right

Once you are satisfied that the applicant has a right to enter and reside in a third country, you need to go on and consider whether they have taken all possible steps to avail themselves of this right. This will be a **question of fact.**

The Federal Court has held that "all possible steps" is to be interpreted as meaning exactly that. The court has **rejected** different formulations, such as:

- "All steps reasonably practicable in the circumstances",
- "All reasonably available steps" or
- "All reasonably possible steps" (NBLC, NBLB v MIMIA [2005] FCAFC 272).

The obligation is on the applicant for a PV to satisfy the decision maker that they have taken all possible steps to avail themselves of a right to enter and reside in another country (see *SZLAN v MIAC* [2008] FCA 904).

SZLAN v Minister for Immigration and Citizenship [2008] FCA 904

In the circumstances of this case, the evidence was that the applicant took no steps (inference from the applicant's statement that he had no relatives in the third country and could not do business there), and he failed to establish that there were no possible steps available to him which he could have taken.

SZGXK v Minister for Immigration and Citizenship [2008] FCA 1891

RRT: found 'as a Nepalese national, the applicant has the right, in accordance with the 1950 Treaty of Peace and Friendship between India and Nepal, to enter and reside in India on presentation of his passport…. the applicant has not taken all possible steps to avail himself of this right as required by subsection 36(3) of the Act. ... Having regard to the advice of [DFAT] that Nepalese nationals can live and work freely in India ... I ... do not accept that the applicant has a well-founded fear that India will return the applicant to Nepal, the country where he claims to fear being persecuted…. I find, therefore, that Australia is taken not to have protection obligations to the applicant, in accordance with subsection 36(3) of the Act.'

FC: at [32] "the material which was before the Tribunal was such that it was entitled to conclude that the appellant had failed to satisfy the Tribunal that he had taken all possible steps to avail himself of a right to enter and reside in India and had failed to satisfy the Tribunal that he did not have such a right. In my opinion, it was entirely appropriate for the Tribunal to have regard to the right conferred by the treaty on the appellant to reside in India and, further, to have regard to the Departmental evidence indicating that India generally gave Nepalese persons who were outside its territory a right to enter and reside there."

Whether temporarily or permanently

Temporary rights

Section 36(3) of the Act makes it clear that the right to reside can be permanent or temporary. In that context, 'temporary' does not require any qualification on how long the person may enter and reside, particularly, it does not require a consideration whether the right to enter and reside is 'co-extensive with the period during which the applicant stood in need for protection' (see *SZRTC v Minister for Immigration and Border Protection* [2014] FCAFC 43, at [28]). If an applicant claims, or it arises on the facts, that the right to enter and reside is of short duration and there is a possibility of the applicant being sent to another country (including return to the country of nationality or former habitual residence), where it is claimed there is a well-founded fear of persecution, then that is a consideration under s 36(5) and (5A) rather than s 36(3).

If 'temporary' is taken to be of any fleeting duration, the qualification of the use of the term comes from the nature of the word 'reside'. The definition of 'reside' in the Macquarie Dictionary (3rd edition) is – 'to dwell permanently or for a considerable time; have one's abode for a time'. There is no minimum period specified as being sufficient, but the term 'right to reside' suggests more than a right to a mere transitory presence.

Despite cautions prior to *SZRTC* in applying s 36(3) to any temporary right to enter and reside, or to consider whether the right lasts as long as protection is needed (as expressly overturned in *SZRTC*), decision makers only need to ascertain that there is a right to enter and reside for the purposes of s 36(3). The temporary nature of the right and possible need for protection are considerations to be made under s 36(5) or (5A) if they arise in the case.

Lapsed rights

If a right to enter and reside has lapsed it is self-evident that the right is no longer current and cannot be exercised. Decision makers may consider what an applicant may need to do in order to renew the right but the same considerations apply to examining the initial right, that is, if the person has to undertake steps that require discretionary or decision making processes then there is no current right.

If it is deemed that an applicant has allowed a right to enter and reside in another country to lapse there is no 'bad faith' element in s 36(3) and it is not conduct that is considered to fall under s 5J(6).

However the right arose or is expressed

The phrasing in s 36(3) seems to embody a range of ways a State may allow persons to enter and reside in the country.

A right to enter and reside could arise from a declaration of the government of a State to allow certain persons a right to enter and reside and the declaration may be written or verbal. Treaties or agreements between certain countries may allow freedom of movement between the citizens of each and the requirements to put that into effect by an individual may vary according to the agreement (for example, only showing identity documents at the border may suffice or it may include having a valid passport). It also includes uses of visas and other written documents of permission. There may be consistent customary action of the agents of the State such as border officials to allow persons of certain nationality the right to enter and once having entry the government of that State allows the right of residence. These are not exhaustive examples, but illustrate different ways a right may arise and be expressed.

Where a right to enter and reside arises through means other than a visa, decision makers should ascertain whether the actions of the country concerned support the expression of the right. For example, if a State declares that persons from country A may enter and reside within its territory for humanitarian reasons, country information should be obtained that shows the State is putting the declaration into effect and whether there are circumstances of the applicant that may preclude them from exercising that right.

Well-founded fear of harm in a third country

If the decision maker finds that the applicant has a right to enter and reside, and has not taken all possible steps to avail themselves of that right, then the submissions of the applicant and the facts of the case need to be considered to determine:

- Whether a claim is made that the applicant has a well-founded fear of persecution or a real risk of suffering significant harm in relation to that third country; or
- Would otherwise be returned by that third country to another country where they will be persecuted for a s 5J(1)(a) reason or be at a real risk of suffering significant harm.

If the fear of harm is satisfied then s 36(3) does not apply to that person.

When protection in another country does not apply

Section 36(3) does not apply if:

- the applicant has a well-founded fear of persecution for a s 5J(1)(a) reason in the third country (s 36(4)(a)); or
- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing themselves of the third country's protection, there would be a real risk of suffering significant harm (s 36(4)(b)); or
- the applicant has a well-founded fear that the third country will return them to another country where they will be persecuted for a s 5J(1)(a) reason (s 36(5)); or
- the applicant has a well-founded fear that the third country will return them to another country where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing themselves of the third country's protection, there would be a real risk of suffering significant harm in that other country (s 36(5A)).

If s 36(3) is found to apply to the applicant and the exceptions under s 36(4), (5) or (5A) are not applicable, there will generally be no need to assess the refugee or complementary protection criteria, as the applicant is taken not to engage protection obligations. However, there may be policy reasons for assessing s36(2)(a) and s36(2)(aa) even if s 36(3) is found to apply, in order to provide a fuller understanding of the applicant's claims. This should be considered on a case-by-case basis, having regard to the applicant's circumstances.

s. 47E(d)

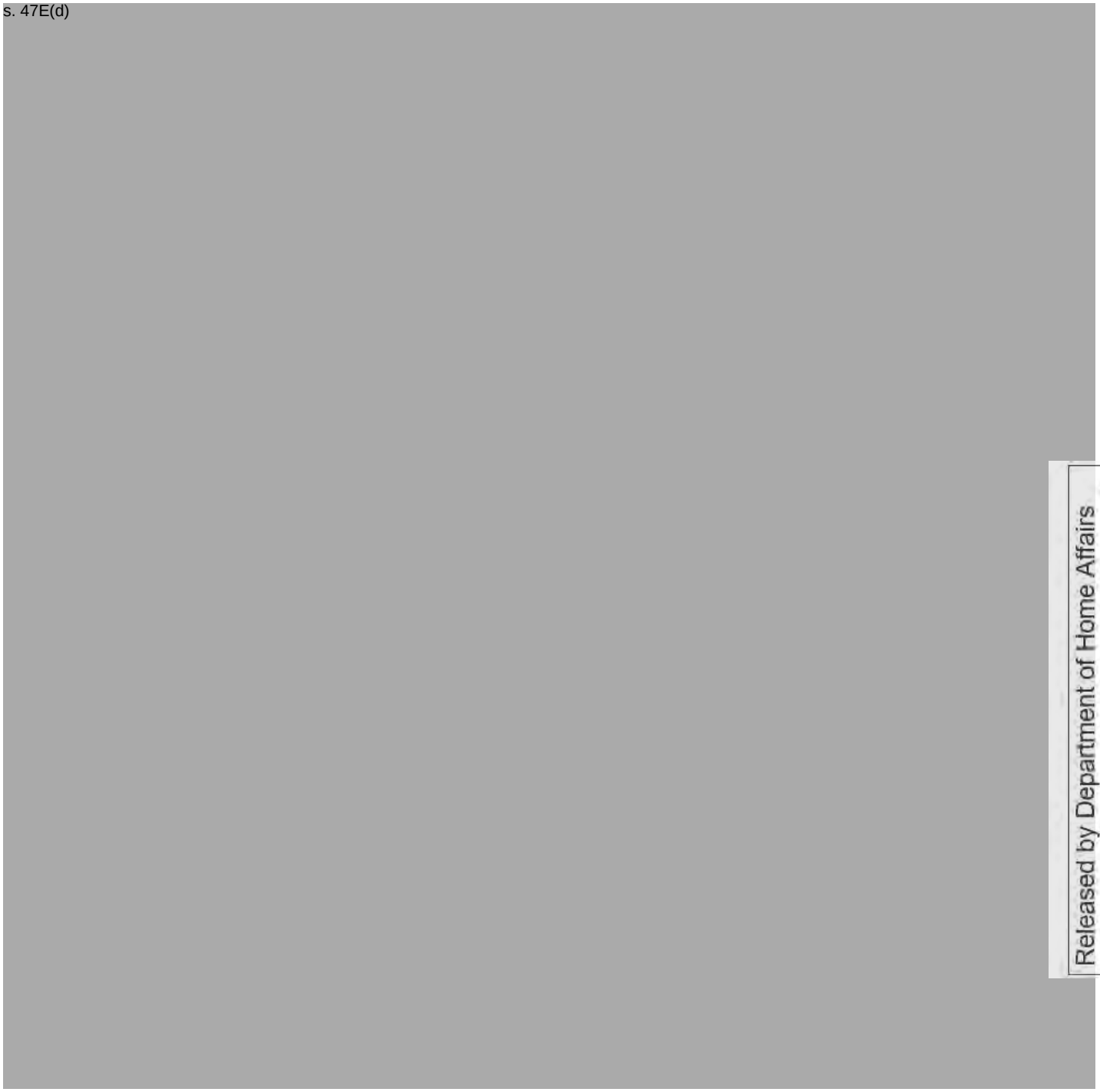
[redacted]

Activity 1- Protection in Another Country

Aim:	The aim of this activity is to consider whether a person has protection in another country.
Method:	Read the below scenario and various parts (A, B and C). Discuss the questions in your table groups. Record your response to each question in the space provided.

Scenario

s. 47E(d)



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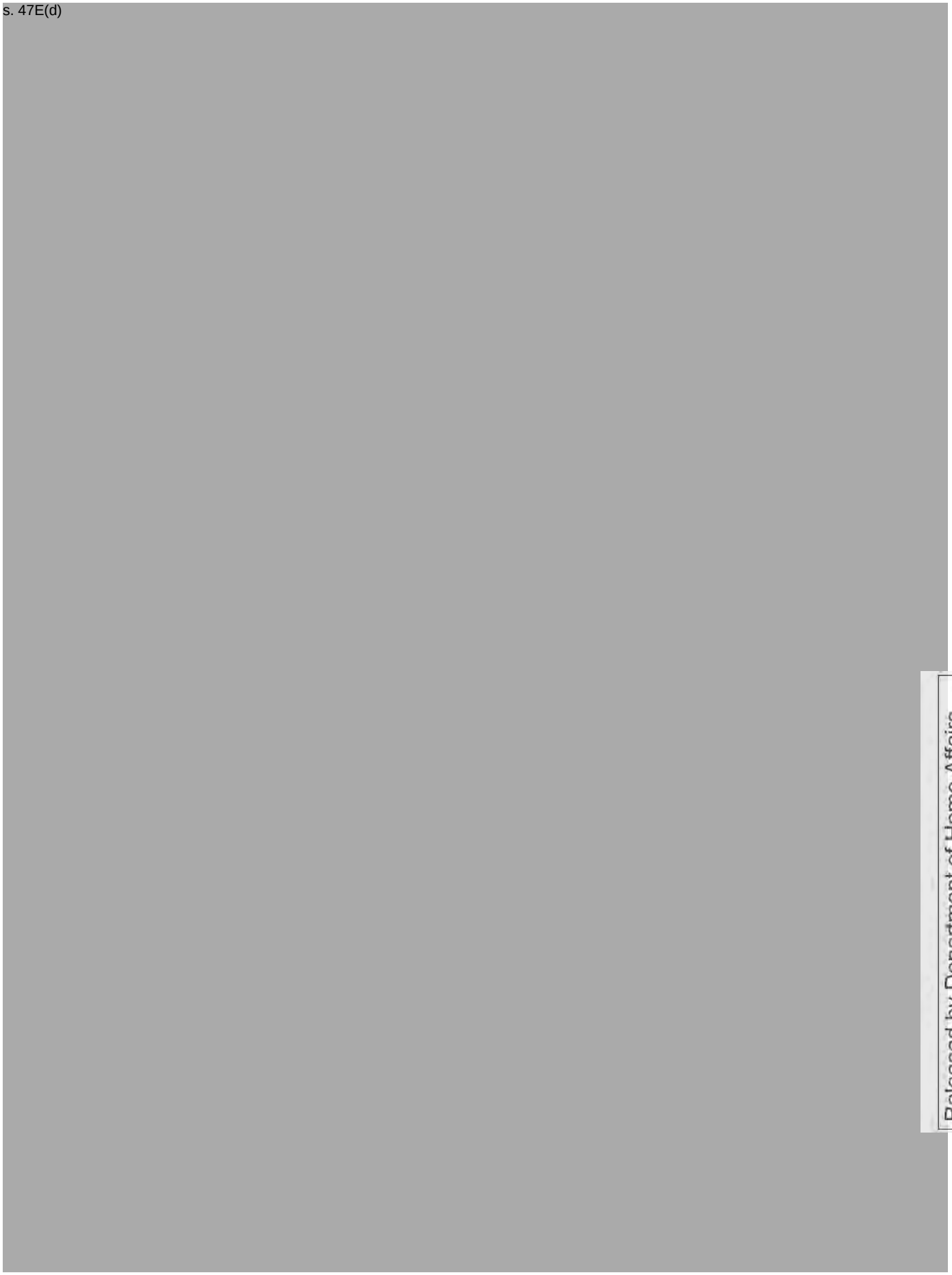
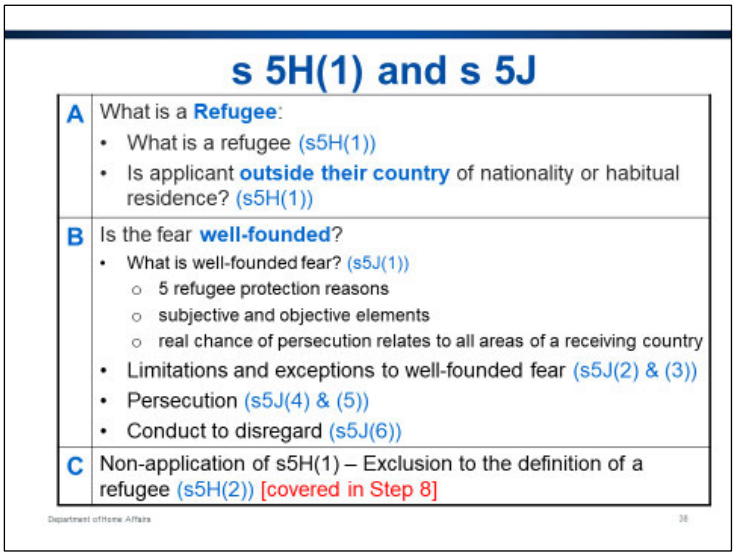


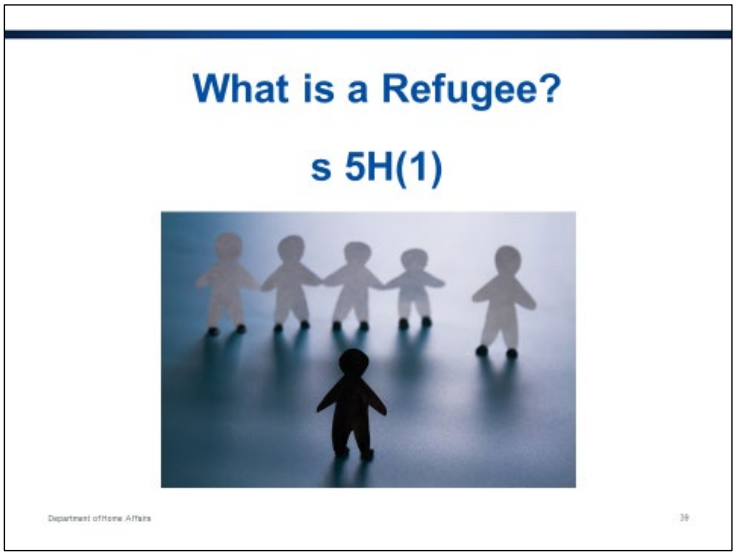
Step 6: Is the Person a Refugee?

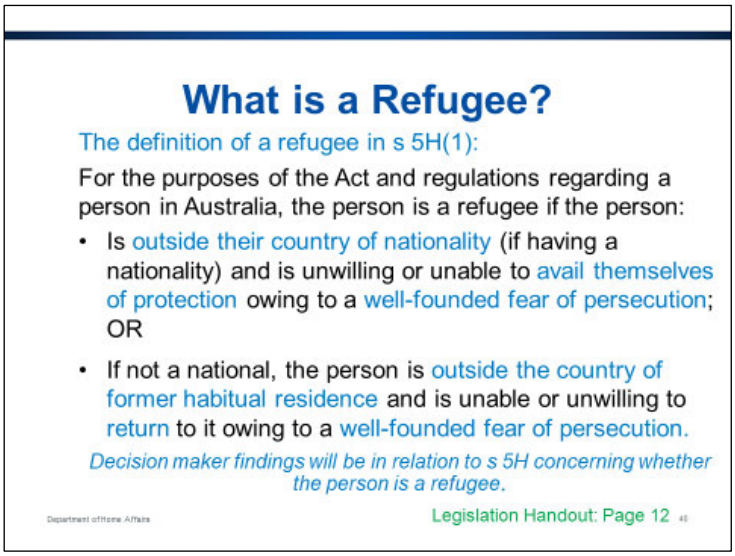
Step 6
Refugee Assessment

This section provides details on the steps and processes involved in determining whether an applicant is a refugee as provided for in the Act. The purpose of this is to ensure you are aware of the general issues you need to consider in determining whether an applicant is a refugee.



What is a refugee for the purposes of the Act?

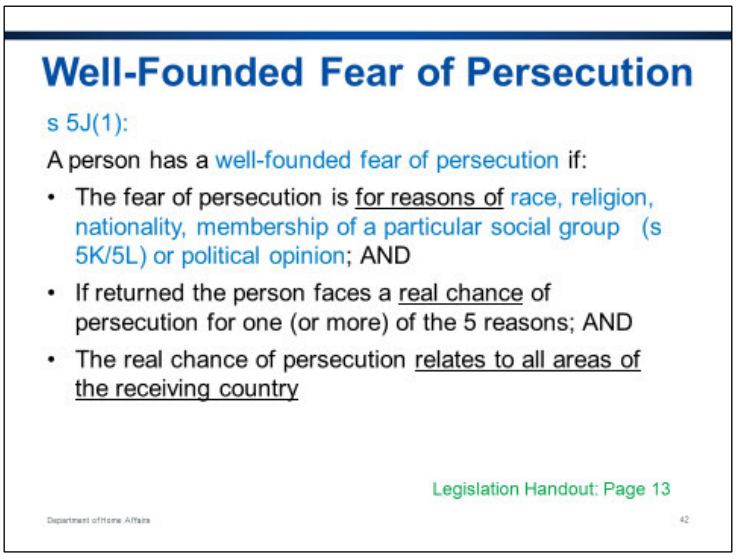




Section 36(1A) of the Act requires that an applicant for a PV meets the criteria in s 36(1B) and (1C) and *at least one of the criteria* in s 36(2). Subsection 36(2)(a) is one of the criteria, which states that:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.

The definition of who is a refugee is given in s 5H of the Act. The key component of s 5H(1) is that the applicant is outside their country of nationality or former habitual residence owing to a well-founded fear of persecution.



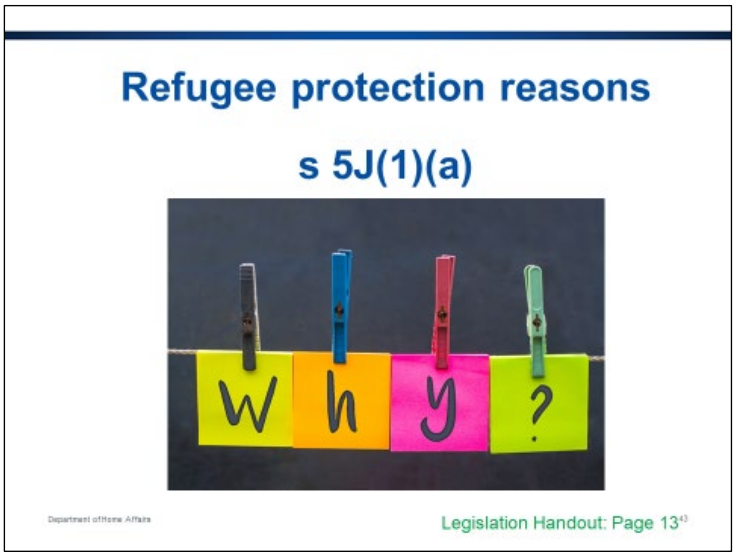
At this stage, decision makers should have considered the country of nationality or former habitual residence. Whether or not there is a well-founded fear of persecution is determined by considering s 5J of the Act which we will deal with next. The structure of s 5J leads decision makers to consider the four elements that form a basis for having a well-founded fear of persecution (s 5J(1)):

- the three elements where there is a well-founded fear of persecution (s 5J(1))
- the two elements where there is not a well-founded fear of persecution (s 5J(2) and (3)),
- the two parts that constitute persecution (s 5J(4) and (5)), then
- conduct that is to be disregarded in assessing a well-founded fear of persecution (s 5J(6)).

You will note that s 5H(2) disqualifies 'who is a refugee'. Since it is preferred that an assessment is made on determining if the person engages protection because they are a refugee first, we will look at s 5H(2) later in the module.

Refugee protection reasons – s 5J(1)(a)

Overview of the s 5J(1)(a) elements



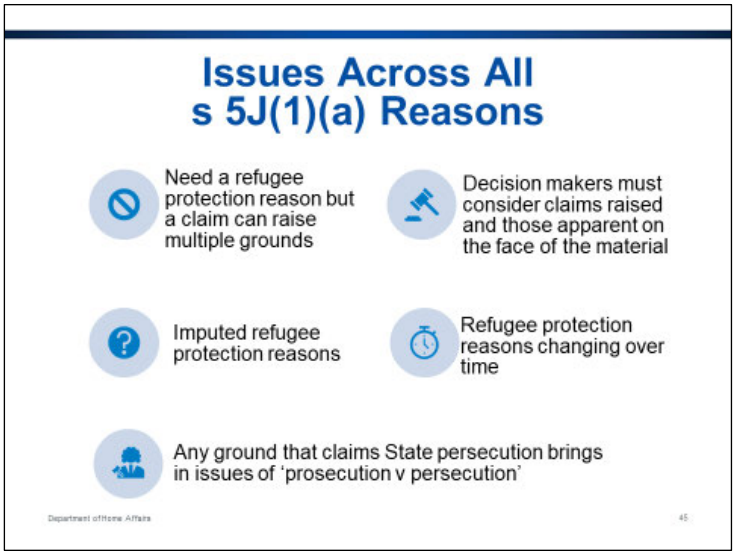
Earlier we saw that s 5J(1)(a) of the Act requires that for there to be a well-founded fear of persecution, the reasons for the persecution are confined to five grounds:

1. Race
2. Religion
3. Nationality
4. Particular Social Group (PSG)
5. Political opinion

A person needs only to claim fear of persecution on one ground although usually applicants claim a number of grounds and sometimes one claim may involve more than one ground.

With the exception of PSG, the refugee protection reasons are not defined under the Act, instead the definitions of these reasons can be found in case law. The case law relates to these reasons as specified in Article 1A(2) of the Refugees Convention. Section 5J(1)(a) incorporates the Article 1A(2) refugee protection reasons into the Act. The department's position is therefore that the case law surrounding

convention reasons is applicable to the refugee protection reasons specified in s 5J(1)(a). The exception is PSG, which is now defined under the Act.



What is the claim?

Decision makers must regard all claims made and consider whether the claim falls within s 5J(1)(a) of the Act. If the information accepted, or not rejected by a decision maker, raises a case on behalf of an applicant that is not articulated by the applicant then it must be considered (*Paramanathan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1693). Facts that require a constructive or creative reading to formulate a claim are not facts that raise a claim, but the claim that arises because it is apparent on the information before the decision maker that must be considered (*NABE v Minister for Immigration and Multicultural and Indigeous Affairs* (No.2) [2004] FCAFC 263).

If a decision maker requests further information from a party (including the applicant) because it is thought to be relevant and that information is supplied within the timeframes, then the decision maker must give regard to the information (s 56; see *DZADQ v Minister for Immigration and Border Protection* [2014] FCA 754).

Imputed grounds

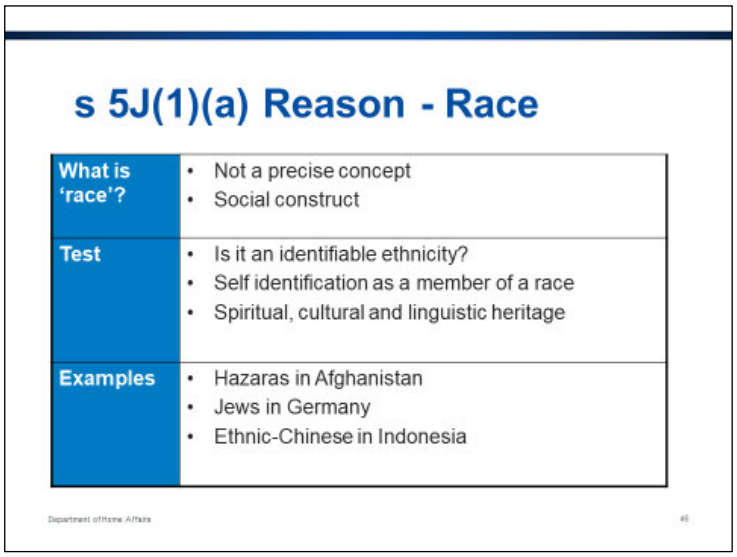
A person may sometimes claim harm not on the basis that they actually possess one of the grounds but rather that somebody else will persecute them because it is *believed* by the persecutor that the ground is attributed to the applicant. Such claims are sufficient for s 5J(1)(a) because the fear of persecution will still be for *reasons of* one of the grounds.

Modifying behaviour to avoid persecution

Under s 5J(3), a person will not have a well-founded fear of persecution if the person could take reasonable steps to modify behaviour to avoid a real chance of persecution occurring in the receiving country. However, there are exceptions to what behaviour may be considered to be the subject of a reasonable step to modify. We will consider this issue more under 'Well-founded fear in relation to all areas of the country'.

As a general principle, the scope of protection for the five reasons given in s 5J(1)(a) of the Act would be defeated if an applicant could be expected to renounce or conceal those attributes, so the Act has provided some exceptions to the 'modification of behaviour' provision (see also *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71).

Race



"Race" is a social construct. There are no real genetic markers as such, although you might be able to prove that you are related to someone else.

The following factors are regarded as significant in identifying a person's race:

- Biological ancestry;
- Self-identification as a member of a race;
- Spiritual, cultural and linguistic heritage; and
- Recognition by others as a member of a race.

Self-identification and recognition as part of a race may often be the most important factors.

Relevant case law

Commonwealth of Australia v Tasmania (1983) 158 CLR 1

This case did not address a refugee issue, but it reviewed international literature on the meaning of race. Justice Brennan then formulated his understanding of that concept as follows:

…the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities… Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide.

When considering race, the courts have indicated that one should look at the "popular" understanding of the term – physical appearance, skin colour and ethnic origin (*Calado v Minister for Immigration and Multicultural Affairs* (1997) 81 FCR 450).

The UNHCR handbook provides that race should be understood in its widest sense to include ALL ethnic groups, including members who form a specific group of common descent forming a minority within a larger population.

Race can be tied to another ground, for example, PSG and political opinion.

Examples of race:

- Hazaras
- Rohingyas
- Tamils
- Indo-Chinese / Fijian Indians

Note: caste is not a race, rather it would be a PSG.

A finding for a s5J(1)(a) reason based on race does not necessarily require that victims be a minority. For example, in the early 1960s (prior to the Rwandan genocide) the ruling Tutsi minority persecuted the Hutu majority in Rwanda.

SZDTM v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 188
Background: applicant was an Indonesian national of Chinese ethnicity. Her claims were based on the risk of harm arising from anti-Chinese riots and other anti-Chinese activity in Indonesia.

RRT characterised the harm feared as criminal rather than refugee related, and also found that there was only a remote risk of the applicant being harmed in future anti-Chinese activity.

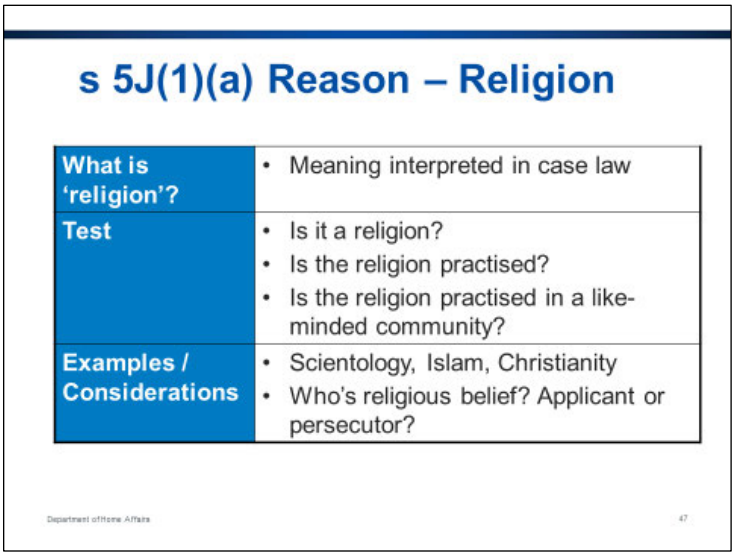
FC: Bennett J did not accept the Tribunal's finding that the "criminal acts" referring to the anti-Chinese riots and acts committed against the Chinese community in Indonesia by State and non-state elements, was due to the economic position and the perception of wealth of the Chinese community and that these offences described as 'random and sporadic in nature' did not attract protection as a refugee.

The court did not agree with the Tribunal's finding that the offences perpetrated on the community because of its economic position were merely "criminal in nature and not racially based."

Bennett J states (at [38]):

'If action is taken against members of a racial group because of a characteristic, actual or perceived, that is common to and attributed to the racial group, the action is based on the race of that group. It is irrelevant whether the reason for the action is disapproval or resentment of that characteristic.'

Religion



There is no fixed legal definition or formula for what religion is; however, case law can provide guidance.

Church of the New Faith v Commissioner for Pay-Roll Tax (Vic) (1983) 154 CLR 120

The court considered whether Scientology was a religion for taxation purposes. The following criteria may indicate the existence of a religion:

- Involve a belief in the supernatural
- Relate to a man's nature and place in the universe and the supernatural
- An observance to codes of conduct and specific practices
- Adherents constitute an identifiable group
- Adherents see the system as constituting a religion

While the above criterion provides some guidance for decision makers, there is no formulated legal test for seeking protection as a refugee for reasons of religion. Courts have generally taken a broad view as to whether something constitutes a religion. It is important for decision makers not to undertake any assessment of the intrinsic 'worth', 'intellectual quality' or 'truth' of the claimed religion, but simply attempt to characterise it as a religion or otherwise according to the above general guide.

Questions to assist decision makers to determine whether persecution is for reasons of religion:

1. Is it a recognised religion? E.g. Scientology, Catholicism, Muslim, etc.
2. Is the religion practiced in a like-minded community? E.g. Falun Gong was not considered a religion because it need not be practised in public or in communion with others: *Minister for Immigration and Multicultural and Indigenous Affairs v VWBA* [2005] FCAFC 175 . **NOTE: Falun Gong has been considered a religion by the tribunal in some of its decisions but is more commonly considered a PSG or political opinion.**
3. Does the applicant fear persecution because of the religious beliefs of the persecutor?

Claims that may be for a s 5J(1)(a) refugee protection reason of religion

Persecution for religious reasons may include:

- Persecution for reasons of a perception that a person has a particular religion (i.e. an imputed religion).
- Where there is a State religion (e.g. religion is intrinsically bound up with custom and law) and despite the law appearing to be one of general application, its effect is that the applicant is treated differently because of the applicant's actual or imputed religion (remember to apply s 5J(1)).
- Prohibition of, or restrictions on, membership, worship both public and private and religious instruction.
- Serious measure of discrimination because the person belongs to a particular religious community.

Minister for Immigration and Multicultural Affairs v Zheng [2000] FCA 50 at [42] and [57] and *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599

Applicants were required to register and practise their religion in the registered church.

In Zheng, RRT had found that there was no doctrinal difference in the religious practice between an underground Catholic church and a registered Catholic church and that the requirement of registration did not amount to persecution for reasons of religion. The Federal Court (per Hill J at [42-43]) found it was open to the RRT to accept that while problems were encountered by members of the underground Catholic church, there was not prohibition upon Catholics practising their religion. The fact that religious congregations were required to register was not itself persecution …The difference between [two churches]… lay only in the need for registration…"

By contrast, in *Wang*, the RRT had accepted that there were significant differences between practising religion at an unregistered and a registered Protestant church. As a result, the court held that a law regulating the practice of religion was not a law of 'general application' and that the fear of punishment for breach of that law by practising religious beliefs in an underground church could give rise to a well-founded fear of persecution for reason of religion: *Wang* at [66].

The key issue for decision makers is whether the applicant has a well-founded fear of persecution for reasons of religion, not whether they can exercise religious practices and beliefs in a manner and at a church that is different from the one in which the applicant wishes to practise his or her religion: *Wang*.

Merkel J in *Wang*, in considering the objects of the [refugee protection], suggested decision makers needed to be mindful of two elements to the concept of religion:

"… the first is as a manifestation or practice of personal faith or doctrine, and the second is the manifestation or practice of that faith or doctrine in a like the -minded community …"

To resolve this issue, decision makers need to assess how the applicant would be likely to manifest his or her beliefs in accordance with the central tenets of that religion and the likelihood of this attracting a persecutory reaction from the authorities: *Pei Lan He v Minister for Immigration and Multicultural Affairs* [2001] FCA 446.

NASJ v Minister for Immigration [2005] FMCA 124

Applicant had been harassed for handing out (proselytising) Scientology leaflets. RRT held that the applicant did not have a well-founded fear of persecution for reasons of religion, as proselytising was not an integral practice of scientology in Moscow and that the applicant was under no past or present or future obligation to undertake that activity.

The Tribunal found that the applicant could practise her religion openly in Russia and any chance of harm would be remote if she refrained from handing out leaflets.

Barnes FM found no error in the Tribunal's finding. It was held that this was not a case where the applicant had modified her conduct or been required to hide her membership of the

Church of Scientology in response to a fear of persecution for a refugee protection reason under s 5J(1)(a).

There is some authority for the proposition that persecution 'for reasons of religion' can include:

- The applicant does not have a particular religion;

Prashar v Minister for Immigration and Multicultural Affairs [2001] FCA 57

Applicants were nationals of India who came from the city of Jalandhar. Before their marriage the applicants had the same ancestral name. Under the religious law practiced in Jalandhar, such a union is forbidden.

Held: persecution for reasons of religion may extend to include cases of reprisal because the applicant does not have a particular religion.

- An applicant has no religion at all but may be imputed to have a religious belief;

Chan Yee Kin v Minister for Iimmigration and Ethnic Affairs [1989] HCA 62 - Where a persecutor mistakenly believes that an applicant holds a particular belief, they may be persecuted for 'reasons of religion' although they do not actually profess to hold a particular belief.

Cameirao v Minister for Immigration and Multicultural Affairs [2000] FCA 1319
The applicant was a citizen of the Philippines who feared persecution as a woman from a failed marriage. She claimed this persecution was attributable to the religion of her persecutors (e.g. they were Catholic).

The Court indicated that this could still potentially found a claim for persecution for reason of religion. "For reason of religion" can include persecution because the applicant does not have a particular "religion" or the applicant's conduct offends a religion of the persecutor.

- Conduct of the applicant offends the religion of the persecutor but need not be a clash of religious doctrines.

NAQJ v Minister for Immigration and Multicultural and Indigeous Affairs [2004] FCA 946
Persecution on religious grounds need not involve a clash of religious doctrines. A person who does not wish to comply with all the rites and passages of a particular religion may as a consequence face persecution for reasons of religion.

Testing applicant's knowledge of religion

Decision makers have to determine whether the fear of persecution is for reasons of religion which, in some cases, may involve determining whether or not the applicant actually is a follower of the claimed religion. While decision makers can readily ask an applicant what they know about a religion that cannot be converted into a test about what a person is required to know about the religion unless there is a clear dogma from the religious group stating what its adherents should know.

s. 47E(d)

s. 47E(d)

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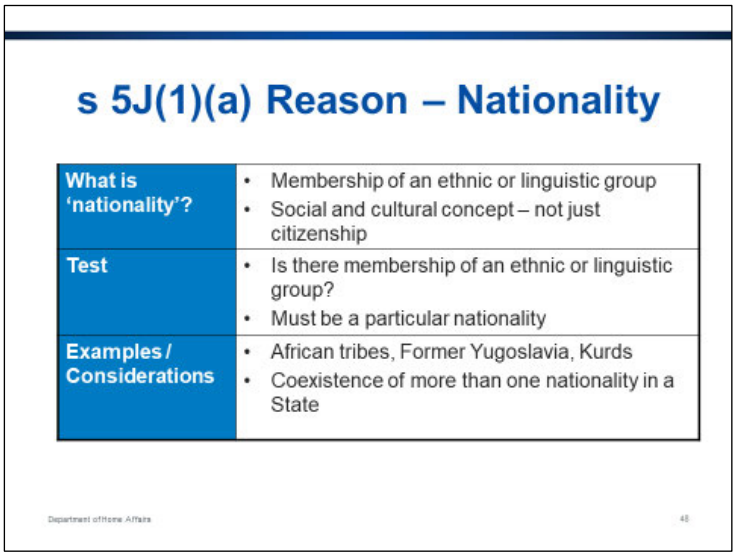
Nationality



Nationality is usually considered to be a broad term not confined to citizenship of a country. For the purposes of s 5J of the Act and reference to the term 'receiving country', nationality is to be determined solely by reference to the laws of the country. In s 5H(1)(a) the term 'nationality' is used as a requirement for a person to be outside their country of nationality. While 'nationality' is not defined for the purposes of s 5H(1)(a), since being outside the country of nationality is closely related to the later considerations of nationality in a receiving country, it would seem logical to consider nationality for s 5H(1)(a) based on the laws of the country concerned.

However, s 5J(1)(a) includes the term 'nationality' as a reason for which a person may claim a well-founded fear of persecution. The basis for claiming a fear of persecution for reasons of nationality has been seen

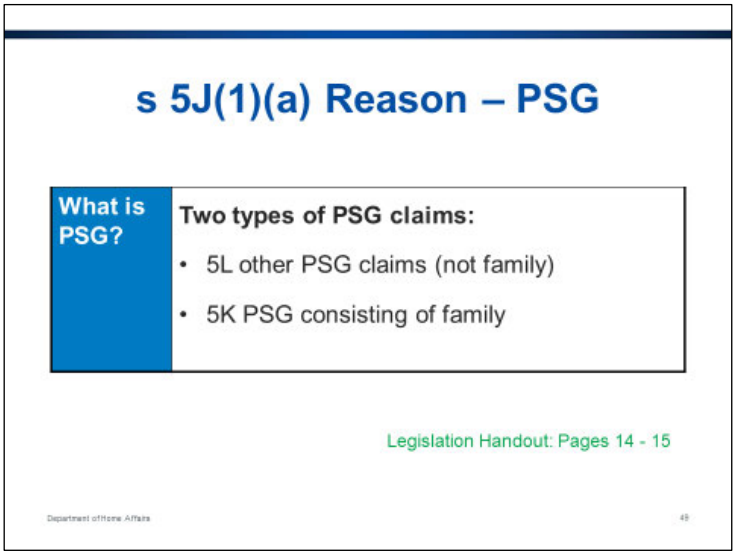
as a term that encompasses ethnic, cultural and linguistic groups rather than as a matter of citizenship in a country.

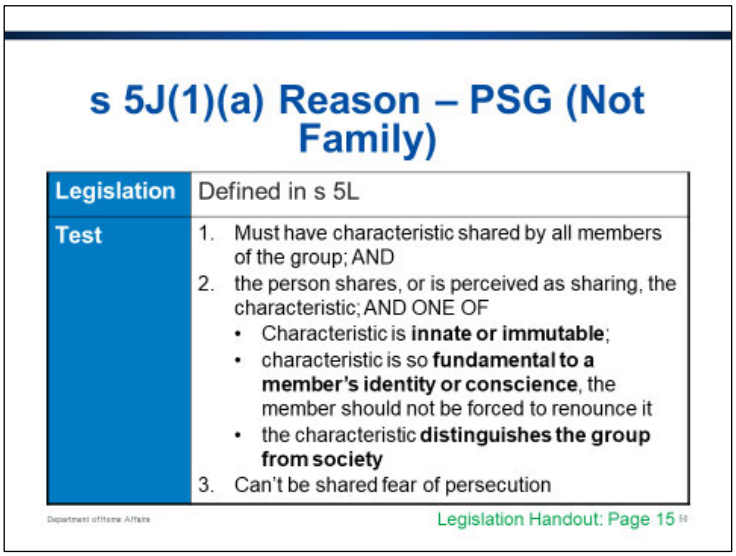
Using the broader sense of nationality as including cultural, linguistic and ethnic groups, the claims made for being persecuted for that reason would in most cases overlap with race, religion or political opinion and, in some instances, possibly fall within membership of a PSG.

s. 47E(d)

If the applicant claims fear of persecution on the basis of 'nationality' then persecution must be considered on that basis, recognising the possibility that the other bases for making the claims may also arise on that fact.

Membership of a particular social group (PSG)





For the purposes of the Act, membership of a particular social group ('PSG') is divided into two categories:

- PSGs consisting of family (s 5K); and
- PSGs *other than* family (s 5L).

Membership of a particular social group other than family

The Act provides the definition of PSG (other than family group) in s 5L of the Act. The definition seeks to incorporate existing case law which is why we will refer to some of the case law in order to give guidance on some of the wording in the Act.

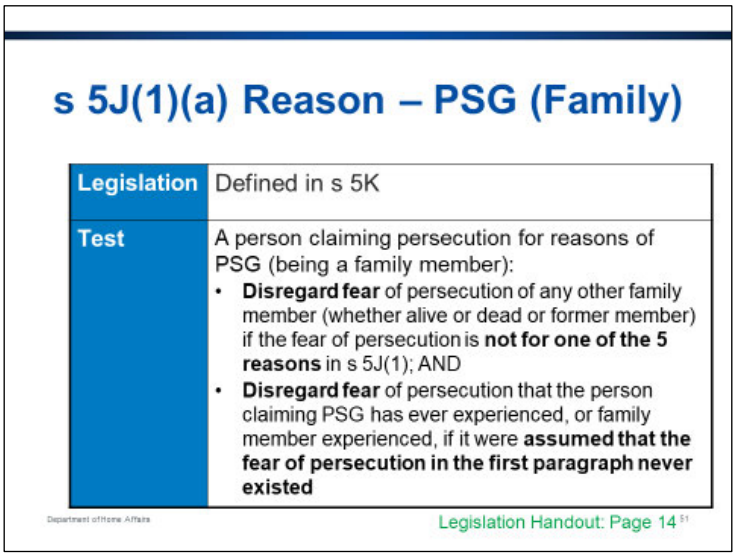
Three elements that must be established:

- there is a characteristic shared by each member of the group;
- the person claiming to be a member of the group shares (or is perceived as sharing) the characteristic; and
- the characteristic is not a fear of persecution.

Additional one element – MUST have one of:

- the characteristic is innate or immutable;
- the characteristic is so fundamental to a member's identity or conscience the member should not be forced to renounce it;
- the characteristic distinguishes the group from society; or
- the characteristic is not a fear of persecution.

Membership of a particular social group consisting of family



The definition of membership of a PSG consisting of family is in s 5K of the Act.

It is implicit in s 5K that families do constitute a PSG. However, what s 5K does is add an additional requirement to establish that such a group *must also* fall within at least *one* of the *reasons for persecution in* s 5J(1)(a). Therefore, in order for s 5K to be established, a person must be:

- a member of a family group; and
- the reason for the persecutor targeting that person must be because one or more of their family members would otherwise be persecuted for a s 5J(1)(a) reason.

For example, an applicant may have a brother who is persecuted by the government of his country of origin because of his political opinion. The applicant does not share the same political beliefs as his brother and there is evidence to suggest that this is known by the government. Because of the government's persecution of the applicant's brother, the brother flees his country of origin and, as such, the government cannot access him. The government then targets the applicant and the applicant is persecuted by the government in his brother's absence. The persecution of the applicant is not because the government believes the applicant has the same political opinion as his brother (and therefore an imputed political opinion), but rather, he is persecuted because of his family relationship to a person who is being persecuted for a s 5J(1)(a) reason.

Some family groups do not fall within s 5K. This is because s 5K requires decision makers to disregard any claims of persecution and/or fear of persecution where a person is claiming to have a well-founded fear of persecution for reasons of membership of a PSG consisting of family and the reason for such persecution and/or fear of persecution is not a s 5J(1)(a) reason. For example, claimed PSGs involving Albanian blood feuds are not considered to meet the requirements of s 5K. This is because fear of persecution due to a blood feud is not a s 5J(1)(a) reason and therefore must be disregarded by decision makers for the purposes of the refugee assessment under s 36(2)(a).

Elements of s 5L

Characteristic shared by each member of the group

The person must share, or be perceived as sharing, a characteristic that is shared by each member of the group. This part of the definition does not require the individual to have any more distinguishing characteristics than that held in common by group members.

Innate or immutable characteristic

The Act does not define 'innate characteristics'. Essentially, an 'innate' characteristic is one that the individual was born with. Skin colour, congential disorders, or other genetic traits, such as blue eyes or brown hair are examples of innate characteristics. When considering whether a particular characteristic of an applicant is 'innate', a decision maker should consider whether it is a characteristic that the applicant was born with.

While this term may be capable of wider expression, such as incorporating 'instinctive or intuitive' definitions, it is difficult to see how the wider expression would be able to be ascertained as belonging in common to members of a group.

An immutable characteristic is one that is not inborn or natural. Rather, it is a characteristic about a person that cannot be changed. For example, a former victim of human trafficking or someone who has HIV are examples of immutable characteristics. If a person is a member of a group that has a characteristic that cannot be changed then they will be a member of a PSG. Keep in mind that 'masking' or hiding a characteristic does not mean it falls short of 'immutable' since the characteristic remains because it cannot be changed, it is simply hidden.

A PSG is established with respect to the cultural, social, religious and legal norms of a country, and while acts may identify a person holding a characteristic, the acts themselves are only the manifestation of a characteristic rather than being a characteristic themselves. For this reason, a person claiming a PSG on the basis of acts alone will unlikely to establish there is an innate or immutable characteristic.

s. 47E(d)

Fundamental to identity or conscience

The term 'fundamental' is synonymous with a 'necessary base or core' or 'of central importance'. This aspect of the definition will relate to characteristics that are not 'innate or immutable' (since if the characteristic meets the first description there is no need to consider it under this aspect of the definition).

Acts of certain kinds may fall under this description if the acts are of central importance to the identity or conscience of the group.

s. 47E(d)

Similarly, if the country information shows that the religious, social, cultural or legal norms of a society identify a group by certain actions, and it is considered that the act is fundamental to the identity of the group, then it will still have to be considered whether it is fundamental to the *member* of the group.

Distinguishes the group from society at large

It appears to be inherent in the descriptions of 'innate or immutable' and 'fundamental to identity or conscience' that such characteristics will most likely already distinguish the group from society at large. This means that the express inclusion of that description of a 'characteristic' is aimed at groups that do not meet the other two descriptions.

If a person has a characteristic that is common to all members of a group that is not innate or immutable, is not fundamental to identity or conscience, but is a characteristic that nonetheless distinguishes the group from society at large, then the group will be a PSG.

In the sense that a group can be distinguished from society at large by a characteristic it is arguable to say that the group is recognisable in the society because of that characteristic. However, decision makers should adopt the wording of the Act and establish whether or not the group is distinguishable. Country information on the legal, social, cultural and religious norms of the society concerned will assist to determine whether the fact that a claimed group is distinguished from society at large exists.

Characteristic is not a fear of persecution

Clearly, a group comprised of people claiming to fear persecution does nothing to distinguish the basis for the fear and does not necessarily raise consideration of a group that ought to be protected as refugees on the basis of protection of certain fundamental rights since it will serve to protect anyone who has a fear of persecution for any reason.

Decision makers should be careful to assess the facts and claims before them and determine if the applicant is making an underlying claim for a fear of persecution if it seems on the surface that the claim of membership of a PSG is formed of members fearing persecution.

Guidance for decision makers

Remember that if you find that there is a PSG of which the applicant is a member, a finding still needs to be made as to whether there is a well-founded fear of persecution for reasons of membership of the group.

Section 5J(3) of the Act states that a person will not have a well-founded fear of persecution if they can take reasonable steps to modify their behaviour. This does not apply to PSGs which have characteristics meeting the description of 'innate or immutable' or 'fundamental to identity or conscience' but could apply to 'distinguishes the group from society at large'. However, decision makers will have to consider all the elements in s 5J(3)(a), (b) and (c) before arriving at such a conclusion. We will deal with s 5J(3) later.

Assistance with using facts

Breaking down the term 'PSG' in this way may assist establishing in fact whether there is such a group:

- Particular = distinct/separate from the rest of the society in which it is found.
- Social = its existence and reality is from its social context – consider the social, cultural, religious and legal norms of the society (*Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14).
- Group = members who are distinct from non-members in society.

Description of claimed PSG

The description of a claimed PSG provides the starting point for deciding whether an applicant is a member of the claimed PSG.

- Frequently the group will be formulated or expressed by the applicant.
- The decision maker may also provide the description of the PSG claimed if it arises on the facts of the case. In such instances, decision makers should not be creative and invent claims but be consistent with the nature of the applicant's claims and the actual social context involved.
- Membership of a PSG may be raised on the facts before the decision maker, even if it is not raised expressly by the applicant.

In *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25, the Tribunal was held to have made an error when it failed to consider a PSG of "young, able-bodied Afghan males" despite the applicant not having raised this social group expressly. In such cases, decision makers should note that where the facts of an applicant's case squarely indicate a group, decision makers may be obliged to consider the membership of a PSG ground even when a claim on this ground has not been formulated: see *Saliba v Minister for Immigration and Ethnic Affairs* (1998) 89 FCR 38, *VXAB v Minister for Immigration and Multicultural Affairs* [2006] FMCA 857, *MZXAE v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1087.

It can be difficult to describe a claimed PSG arising from facts and the applicant's story (where it has not been clearly articulated). If the formulation of the group is too narrow you may find that the person is not a *member* of the group and formulating the group too widely may lead to difficulties establishing that there is persecution for reasons of membership of the group (*Applicant A and the Minister for Immigration and Ethnic Affairs* [1997] HCA 4).

s. 47E(d)

[redacted]

Potential types of particular social group claims

Gender-based particular social group claims

In principle, membership of a PSG may be based on gender. Some groups that have been accepted in the past include 'single women in India'[1], 'married women in Tanzania'[2] and 'young Somali women'[3]. However, it has also equally been found that 'young single women in China',[4] 'single women without protection in Sri Lanka'[5], 'unwed mothers in Japan'[6] and 'females in Thailand'[7] were probably not PSGs.

Previous case law on gender based groups is unlikely to have much utility in informing whether such groups exist since under s 5L of the Act gender is an 'innate' characteristic that is shared by a group. The distinguishing feature will be whether a gender based PSG has a unifying factor of a fear of persecution or otherwise whether there is a real chance of persecution occurring (s 5J(1)(b)) for the essential and significant reason of membership of the group (s 5J(4)(a)).

Occupation based particular social group claims

The essential requirement in determining whether a PSG comprising of acts such as employment exists is to determine whether there is evidence supporting the consideration that such a group is distinguished from the society. Some groups may have other overlapping refugee protection reasons, whether actual or imputed. Typically, employment related claims overlap with imputed political opinion or religion. Decision makers should be careful not to dismiss considering a claim of a PSG and make findings on some other ground such as political opinion, unless it is clear that the characterisation of the group does not add any further elements to single the member out for persecution.

If it is evident that the PSG and the other claim are inextricably entwined then decision makers may proceed to consider one of the claims and explain in how doing so the other claim is also addressed. If an occupational group is established as a PSG by being distinguished from society at large and any other claim related to that claim is for imputed reasons, decision makers should consider whether s 5J(3), 'modifying behaviour' may apply to the circumstances of the applicant.

[1] *Thalary v Minister for Immigration and Ethnic Affairs* [1997] FCA 201

[2] *Minister for Immigration and Multicultural Affairs v Ndege* [1999] FCA 783

[3] *Minister for Immigration and Multicultural Affairs v Cali* [2000] FCA 1026

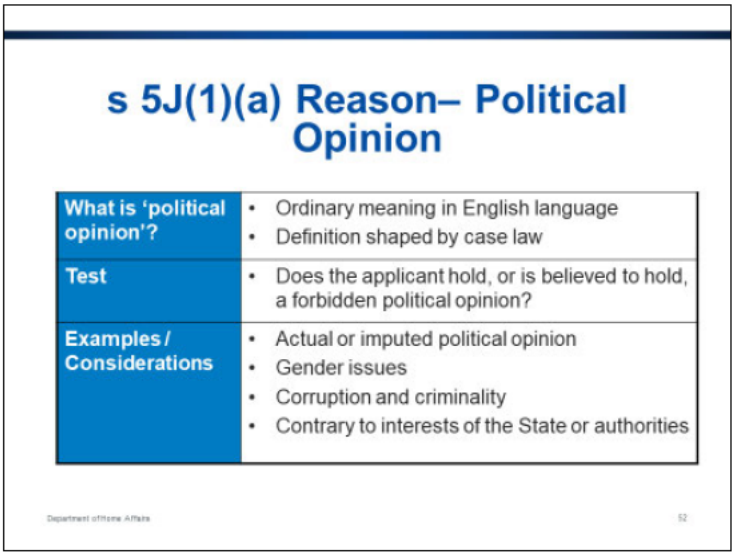
[4] *Lek v Minister of Immigration, Local Government and Ethnic Affairs (No. 2*) [1993] FCA 297

[5] *Jayawardene v Minister for Immigration and Multicultural Affairs* [1999] FCA 1577

[6] *Minister for Immigration and Multicultural Affairs v Kobayashi & Anor*, unreported, Federal Court of Australia, Foster J, 29 May 1998

[7] *Applicant S469 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 64

Political Opinion



'Political opinion' is not defined in the Act, nor are there any definitive guidelines on how decision makers should interpret the term. The words 'political opinion' in the context of s 5J(1)(a) of the Act has not been interpreted by the Courts but is likely to be interpreted in its ordinary meaning (see the *Acts Interpretation Act 1901*; *Minister for Immigration and Multicultural Affairs v Y* (unreported, Davis J, 15 May 1998)). Some judicial consideration has been given to the term for persons seeking status as a refugee for reasons of political opinion as stated in the Refugees Convention (similar in terms to how it is referred to in s 5J(1)(a)).

The term 'political' may relate to a Government's views contained in a political platform or acts that are reflective of an unstated political agenda.

V v Minister for Immigration and Multicultural Affairs [1999] FCA 428

Applicant claimed to have a well-founded fear of being persecuted for reasons of political opinion, being his opposition to institutionalised corruption in the Russian Federation.

RRT: did not accept that there was any political motivation for the harm inflicted on Mr V. The acts committed against him were criminal acts, motivated by a desire to obtain money and directed against him because he was seen to have money. The acts were not part of a course of systematic conduct directed against him for any Convention reason (now referred to as a s 5J(1)(a) reason).

FC: Dismissed the appeal; however Hill J gave guidance on the meaning of political opinion [at 32–33]:

…the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion.

The term 'political opinion' is not limited to membership of a particular political party or support for a particular party or leader (see *C and S v Minister for Immigration and Multicultural Affairs* [1999] FCA 1430). It is enough that a person is believed to hold views conflicting with the instruments of government (such as the Armed Forces, security institutions and the police) and is persecuted for that reason (a position expressed by Davies J in *Minister for Immigration and Multicultural Affairs v Y* and affirmed by Hill J in *V*).

C and S v Minister for Immigration and Multicultural Affairs [1999] FCA 1430

Applicant worked in a Colombian nightclub and witnessed parties at the nightclub attended by Mafia leaders and heard conversations between those people and government officials including police about such matters as the transportation of drugs and the provision of financial support for political campaigns. Applicant reported these activities to the police through anonymous phone calls.

RRT found that the applicant was being targeted as an individual because of what he knew, what he exposed and what he might expose and not for the reasons of his actual or imputed political opinion.

FC held the Tribunal member used the term `political opinion' to refer only to the type of political opinion commonly manifested in Australian society; that is, adherence to a political party or support for its policies. The Tribunal should have been alive to the point that resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending upon the circumstances.

Decision makers should remember that simply holding controversial political opinions is not in itself a ground for claiming refugee status. Applicants must fear persecution for reason of their actual or imputed political opinion. A key consideration for decision makers is the perception and motivation of the persecutor.

Guidance for decision makers

Gender as the basis of holding a political opinion

Restrictions in some societies prevent women from demonstrating a political opinion or participating in political life. In such contexts, opinions relating to, for example, wearing a veil, women's education and employment, choice of partner, reproductive rights or violence against women, may also be considered as opinions of a political nature. The case of *SZHHK* (below) considered whether a woman would be targeted by fundamentalist Hindu or Muslims because of human rights activities, however, the applicant was not able to provide details of her activities.

In *SZHHK v Minister for Immigration and Multicultural Affairs* [2006] FCA 1471, the applicant, an Indian citizen, claimed to have a well-founded fear of persecution for her human rights activities and political opinion. She also claimed to have been a women's rights activist in Gujarat who was persecuted by radical Hindu and Muslim fundamentalists.

RRT: affirmed refusal decision. Applicant appealed to Federal Magistrates Court where the matter was dismissed, then appealed to the Federal Court.

FC held: that the FMC rightly concluded that there was no substance in the appellant's assertion that the substantive merits of the case had not been addressed. The FMC pointed out that the Tribunal had identified the claims made in the protection visa application and 'referred to the patent inadequacies in the details of what was said'. The Tribunal had recited the information that the appellant provided about her claims in her protection visa application and then discussed the inadequacies and deficiencies in that material: *"…based on the insufficient detail that she provided, the Tribunal is not satisfied the applicant invokes protection obligations in Australia. For instance the applicant did not provide much if any detail as to why she would be 'persecuted because of [her] human rights activities and political opinion'; what these human rights activities were; how she fought for the rights of 'poor women'; or why she feared she would be 'targeted by fundamentalist Hindu and Muslims.' She did not satisfactorily explain why her life was 'not safe' in India and how and when she may have been 'tortured by [religious fanatics]."*

Criminality, corruption and whistle blowing as the basis of holding a political opinion

Where criminality or corruption is endemic in the government or public affairs, expressions of opposition to such behaviour, such as whistle blowing, may be considered to be expressions of political opinion (see *Minister for Immigration and Multicultural Affairs v Y* [1998] FCA 515).

Minister for Immigraiton and Multicuiltural Affairs v Y [1998] FCA 515 –

stance against police criminal activity falls under 'political opinion'

Y and others claimed a fear of persecution in Brazil arising out of Y's activities with a friend in investigating and reporting an assault by police. The authorities to whom he made the report took no action. Y and the friend were abducted and tortured. The friend was later killed. Y moved to a different city where he received threatening telephone calls. His wife was abducted and raped and his daughter was threatened. The applicant identified corruption activities and was considered a "whistle-blower".

RRT: set aside the refusal decision, finding that the applicant suffered circumstances amounting to persecution due to his political opinion and the political opinion attributed to him by officers of the State. The Tribunal decided that the applicant's stance against criminal activity of police officers led to the persecution which he suffered, and that stance was effectively the expression of a political opinion against a pervasive aspect of Brazilian State.

FC held (per Davies J at 4-5):

"…an opinion could be thought to be a political opinion if it were such as to indicate that its holder… held views which were contrary to the interests of the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the Government and the instruments which enforce the power of the State, such as the Armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters."

The FC also commented that it understood why the Tribunal concentrated on establishing that there was corruption throughout the whole of the Government services including Brazil's Police Force, and that the complaints to higher authorities achieved little or nothing. Persons who witnessed or exposed the actions of public officials, including Human Rights lawyers and activists, were likely to be subjected to serious ill treatment.

Exposing corruption can, in some circumstances, lead to the imputation of a political opinion, but exposing the corruption of an individual is more likely to be considered the reporting of criminal conduct. This can be distinguished from exposing systemic corruption which may be seen as a form of opposition or defiance to State authority or governance See *Zheng v Minister for Immigraiton and Multicultural Affairs* [2000] FCA 670).

Zheng v Minister for Immigration and Multicultural Affairs [2000] FCA 670

The applicant, a PRC citizen, claimed to be persecuted on the basis of political opinion from his exposure of the corruption of his superior who held a high position in the Loans Department of the government owned Construction Bank of China.

RRT found that the failure of the authorities to act on the applicant's complaint and their corruption investigation of him was not politically motivated, did not arise from any political ground, was not for any political reason and did not constitute persecution for reasons of political opinion.

FC dismissed the matter and stated [at 39] that "The difficulty with the applicant's claims is that although he might have viewed his acts as "political" there was no material that suggested that the authorities had viewed, or might view, his acts in exposing [his superior] as having any political aspect."

The FC provided guidance on the circumstances for when exposing corruption would fall under political opinion: [at 32] "…exposure of corruption in circumstances where it so permeates government as to become part of its very fabric can quite easily lead to a fear that the exposure, of itself, may be imputed to be an act of opposition to the machinery, authority or governance of the State. Likewise, refusal to participate in a corrupt State system can also be seen as an expression or manifestation of political opinion as the refusal to participate may be imputed by the authorities to be a challenge to the machinery, authority or governance of the State…."

Resistance to systemic corruption and criminality can also fall under 'political opinion'

Nicholson J commented on the matter of *Y* (above) in the matter of *V* [at 18] and stated that he rejected "the submission that an attitude of resistance to systemic corruption of, and criminality by, government officers **cannot** fall within the description `political opinion'. Whether particular resistance amounts to an attitude having a political dimension, or whether it is simply a product of other causes such as fear of detection, is, of course, a question of fact for determination in the particular case."

Reporting crime to authorities would not fall under 'political opinion'

Whitlam J in *V* (above) stated that even in cases of official corruption, merely reporting crime to the authorities would not normally suggest a 'political opinion', nor would the exchanging of tales of woe and plotting of revenge by victims of the same type of crime.

Investigation undertaken in the course of employment which subsequently exposed criminal behaviour was not considered to be a campaign against political corruption in *MZXDQ v Minister for Immigration and Multiculutral Affairs* [2006] FCA 1632. However, knowledge of a fact may amount to political opinion.

Knowledge of a fact can amount to a 'political opinion'. Heerey J held that:
In a political context an assertion of fact can be perceived by those in authority (or by others whom those in authority cannot control) as just as dangerous, perhaps even more so, than an expression of opinion (in the strict sense) and thus warranting the persecution of those who state such facts.

Expression of political opinion

Expression in the form of crime

In some limited circumstances, the commission of a crime may be considered to be the expression of a political opinion. We are guided by the meaning of a political crime for the purposes of s 5H(2) (based on Article 1F(b) of the Refugees Convention) which relates to exclusion of refugee status for persons who have committed a serious non-political crime (discussed later in the course).

A crime has been described as a political crime where:

- the crime was done genuinely and honestly for political purposes, i.e. to change or influence an oppressive government or its policies; and
- the means employed, while being criminal according to the law of the country, are reasonably adapted to that purpose.

(*Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7 [per Callinan J at 168])

An applicant must still demonstrate a fear of persecution for reason of political opinion, rather than fear of prosecution for the commission of the crime.

Expression of political opinion in the past

Examples of expressing a political opinion **directly** include: publishing political works; speaking out in public; or having political profile.

Examples of expressing a political opinion **indirectly** include: adopting values of a particular nation; or dressing in a way that is prevented by customs.

Political opinion may be expressed through **repeated conduct** that is never (or rarely) converted into articulated political protest. Thus, an accumulation of different activities may provide the grounds for establishing a 'political opinion': *Minister for Immigration and Ethnic Affairs v Guo Mei Rong & Anor* Matter No S151 of 1996 HC.

Political opinion may be expressed by way of a **mere act or refusal to act.** In this sense the applicant need not express their opinion in writing or in words, since the applicant's actions can disclose true opinions and potentially give rise to a legitimate fear of persecution.

Expression of political opinion in the future

There may be applicants who have not given any expression to their opinions, but who can be considered to have a well-founded fear of persecution for reasons of political opinion. This may be the case where, due to the strength of his or her convictions and/or profile, it may be reasonable to assume that the applicant's opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities.

Decision makers should also remember the operation of s 5J(6) in this context. This section prevents decision makers, in determining whether a person has a well-founded fear of persecution, from considering any conduct engaged in by the applicant while in Australia unless they satisfy the decision maker that they engaged in the conduct otherwise than for the sole purpose of strengthening their claim to be a refugee.

Omar v Minister for Immigration and Multicultural Affairs [2000] FCA 1430

Applicant was not politically active in the past, but published political poetry and articles while abroad. Applicant submitted that he had strong genuine views about the political situation and would be politically active if returned.

FC: accepted that the '**spontaneous voluntary expression of political opinion'** can support a claim for refugee status.

Intention to act reasonably versus requirement to act reasonably

In assessing the risk of future persecution, decision makers may, in appropriate cases, have regard to how the applicant would give 'reasonable' expression to his or her political opinion.

In *Omar* (above) the Court held that in some cases reasonableness may be used in an appropriate way to predict what may happen. The Court said that in some cases - and perhaps in many - it may be entirely appropriate to proceed upon the footing that a person will in fact act 'reasonably' to avoid harm and will, indeed 'reasonably' modify his or her conduct so as to avoid the risk of persecution.

However, the Court distinguished this proposition from requiring or assuming that an applicant with strongly held beliefs or opinions should act 'reasonably' and compromise that belief to avoid persecution. This, their Honours held, would be quite contrary to the humanitarian objects of the Convention.

This consideration will likely further arise when considering s 5J(3) (reasonable step to modify behaviour).

Prosecution under law of general application

Enforcement of a generally applicable law does not ordinarily constitute persecution (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225). That is, '…governments cannot be expected to tolerate political opinion or conduct that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution' (per McHugh J at 259).

An example of a law of general application applicable to fear of persecution for reasons of a political opinion is compulsory military service.

In *Mehenni v Minister for Immigration and Multicultural Affairs*: [1999] FCA 789 Lehane J held that conscientious objection, whether the objection of a pacifist to all military service or a 'selective' objection, may reflect political opinions. However as a general rule, a law of

conscription is a law of general application, so that failure to comply will usually not entitle an applicant to be considered a refugee.

Mehenni demonstrates that conscription can be seen as a law of general application, which can be contrasted to the case of *Applicant S* where conscription was found not to be a law of general application because of the conscription method.

Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25

Applicant claimed the Taliban military recruitment was persecutory. The counter contention was that the recruitment method was a law of general application.

Gleeson CJ, Gummow and Kirby JJ stated [at 46], "The Taliban can be taken to have been the de facto authority in Afghanistan at the relevant time, but it does not necessarily follow that it pursued legitimate national objectives…". The conscription method was described as "random and arbitrary" conducted by "a ruthless and despotic political body founded on extremist religious tenets" . It was concluded that on the facts before the Tribunal the Taliban was not pursuing a legitimate national objective and therefore the conscription method was not a law of general application.

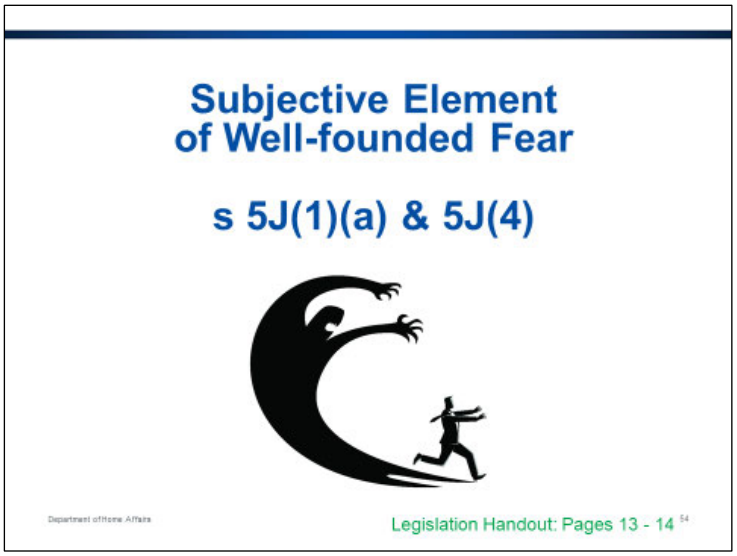
Activity 2 – Section 5J(1)(a) refugee protection reasons

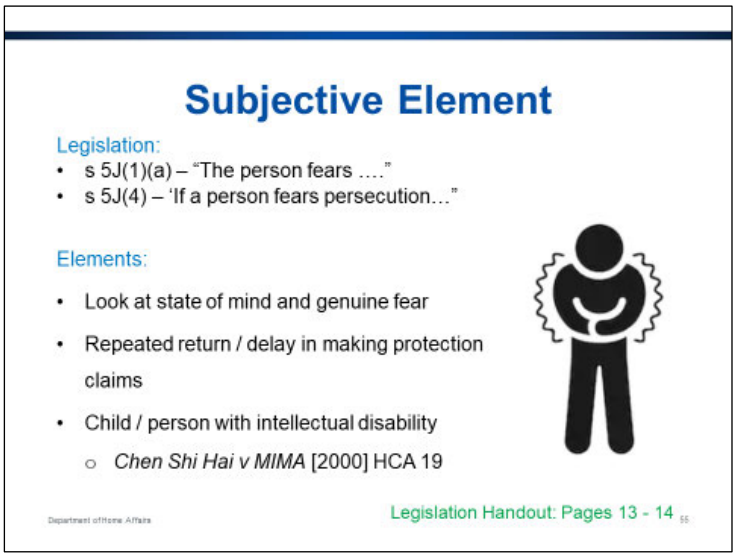
Aim:	The aim of this activity is to consider whether an applicant has a well-founded fear of persecution under the requirements under s 5J(1)(a).
Method:	Read the scenarios and discuss the questions within your table group. Record your answers in the space provided.

Scenario

s. 47E(d)

Subjective element: Does the applicant fear persecution?





In additional to the s 5J(1)(a) considerations in the previous sessions, the decision maker also needs to make an assessment whether the applicant fears the persecution. This is the subjective element of whether an applicant has a well-founded fear of persecution. Decision makers should consider whether the applicant fears persecution. In most cases this will not be difficult; however, there may be occasions where there is doubt the applicant actually holds fear of persecution.

Repeated returns to the receiving country after claiming to have left for reasons of persecution, delays in claiming protection, or continued dealing with the government of the country where the government is alleged to be the persecutor, may at first, give rise to question whether the applicant is fearful of persecution.

s. 47E(d)

[redacted]

Where the decision maker finds that the fear is not held, use reasonable and logical inferences from the evidence and take into account any responses from the applicant which have reasonably been considered

to detail why the fear is not held. In such cases the applicant will not meet s 5J(1)(a) because they cannot meet the phrase in the Act that 'the person fears being persecuted…'.

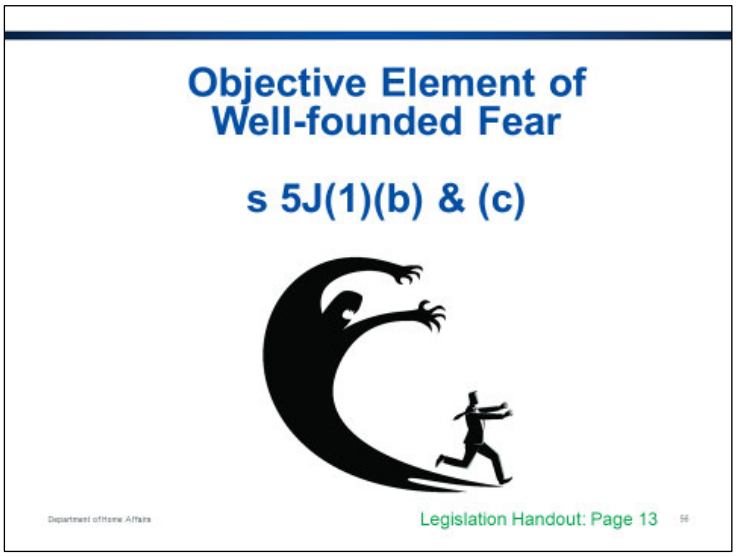
If the person has a mental disability, mental health illness, or is a child unable to clearly express the fear, then the fear expressed on behalf of that person by an agent or carer can be taken into consideration (see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19).

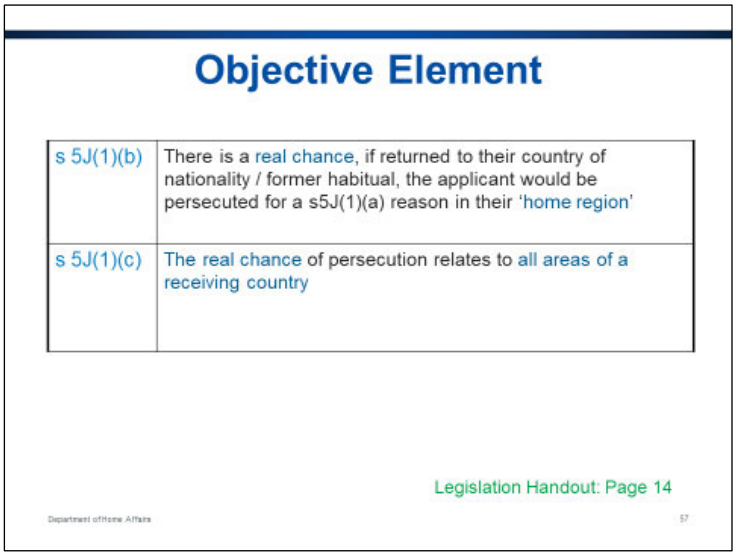
Objective element: Real chance of persecution under s 5J(1)(b) and (c)

The 'objective' element of the refugee assessment is contained in s 5J(1)(b) and (c) of the Act. As such, it relates to the well-founded fear assessment under s 5J.

As previously outlined, the structure of s 5J of the Act leads decision makers to consider the 4 elements that form a basis for having a well-founded fear of persecution):

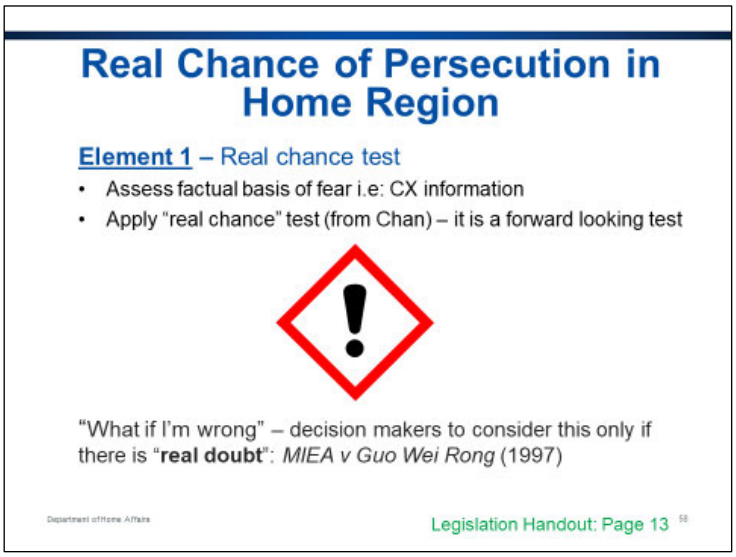
- the three elements where there is a well-founded fear of persecution (s 5J(1))
- the two elements where there is not a well-founded fear of persecution (s 5J(2) and (3)),
- the two parts that constitute persecution (s 5J(4) and (5)), then
- conduct that is to be disregarded in assessing a well-founded fear of persecution (s 5J(6).

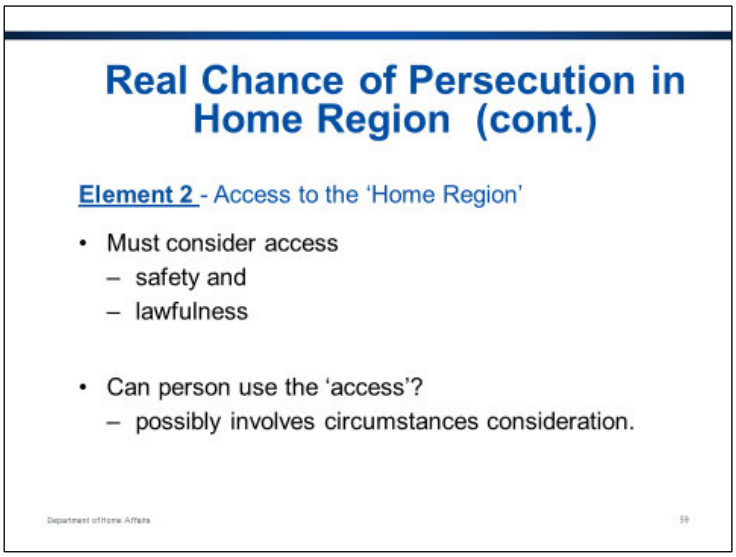




We have already considered the reasons of persecution (s 5J(1)(a)). We will now consider the two factors required to establish whether there is a well-founded fear of persecution under s 5J(1)(b) and (c).

Real chance of persecution – s 5J(1)(b)





The Department's position is that the s 5J(1)(b) assessment requires decision makers to assess whether there is a real chance of persecution for a s 5J(1)(a) refugee protection reason in the applicant's *home region*, that is, the area where the applicant previously lived or other area to which the applicant had similar or substantial ties. This is because as a matter of policy, it will be practical for decision makers to first consider whether an applicant will be persecuted in their home region before anywhere else in their country of reference. In *SZQEN v Minister for Immigration and Citizenship* [2012] FCA 387, the Federal Court stated that the terms *home region* or *home area* (or similar expressions) should not be given a narrow or restrictive meaning to refer, for example, only to the place where the applicant happened to be living at the time of the feared persecution, or that a *home region* or *home area* is necessarily limited to one location if similar and substantial ties exist at another location. Whether such ties exist and whether a particular location can be appropriately characterised as a *home region* or *home area* are matters of fact.

Therefore, in order for a person to have a well-founded fear of persecution for the purposes of being determined to be a refugee, decision makers must be satisfied that if the applicant is returned to the receiving country, they have a *real chance* of persecution for a *s 5J(1)(a) refugee protection reason* in their *home region*. If the decision maker is not satisfied of this, the applicant will not satisfy s 5J(1)(b).

In assessing s 5J(1)(c), the following should be considered by decision makers:

- Whether the applicant has a real chance of persecution for a s 5J(1)(a) refugee protection reason in their home region (including making a real chance assessment and whether this real chance is for the reasonably foreseeable future)?
- Is there safe and lawful access for the applicant in reaching the *home region,* taking into account the applicant's particular circumstances?

What is real chance?

To establish if there is a well-founded fear of persecution, s 5J(1)(b) of the Act requires a finding whether there is a *real chance* that the person would be persecuted if returned to the receiving country. It follows that a key feature of establishing whether there is a well-founded fear is determining what indicates the threshold when the fear can be said to be 'well-founded'. The High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62 considered that in order to establish there is a well-founded fear of persecution in the context of the Refugees Convention, there must be a 'real chance' of it occurring.

The RALC Act Explanatory Memorandum to the insertion of s 5J(1)(b) into the Act states (at p 10):

…Under the new statutory framework a person will continue to be assessed as to whether they have a 'real chance' of being persecuted. The 'real chance' test is consistent with the High Court's decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. New paragraph s 5J(1)(b) is a statutory implementation of this test.

What constitutes a 'real chance' of persecution is therefore to be considered in the context of *Chan.*

A real chance:

- discounts what is remote or insubstantial;
- is one that is not remote, regardless of whether it is less or more than 50%;
- an applicant may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be persecuted, however, a far-fetched possibility of persecution must be excluded.

A 'real chance' is therefore a possibility which is not remote or far-fetched, and is not measured by percentage.

While statistics may assist to determine the probability of persecution, a superficial statistical analysis without regard to the characteristics of the applicant or circumstances of the case will be insufficient to draw a conclusion there is no real chance of persecution. For example, in *DZADQ v Minister of Immigration and Border Protection* [2014] FCA 754, the Tribunal stated in its record of decision:

The Tribunal accepts that sectarian violence is a problem in Pakistan. However, as put to the applicant at hearing, when the Tribunal considers that there are estimated to be over 40 million Shia Muslims in Pakistan, it is of the view that there is only a very remote chance that the applicant will be the victim of an incident of sectarian violence if he returns to live with his family in their home in Peshawar, Pakistan. The Tribunal does not accept that there is a real chance that the applicant that the applicant will be persecuted in the context of the sectarian violence in Pakistan if he returns to that country now or in the reasonably foreseeable future.

The court concluded that such an approach was in error because a mere numerical analysis does not engage with the underpinning evidence, such as the circumstances of the applicant. The court stated (at [65]):

"…[The Tribunal] should have considered the appellants' particular circumstances. If it be the case that there is nothing to distinguish the appellant from other Shia Muslims in Pakistan, provided the country information (common to both the delegate and the Tribunal) stands, it is hard to see how the conclusion of the Tribunal is sustainable. If there were some small or local sectarian violence, the picture the country information indicated would not be so dramatic or compelling. To the contrary, the picture appears to be that it is coordinated, pervasive and effective, and the Taliban are presented as a cogent and broadly spread instrument of its application. It should not be adequate, in the face of such data, to say in effect that although a significant number of Shia Muslims will be severely harmed or killed by that pervasive targeted violence because you as a target group are numerous, the chances of any particular one of you being as harmed or killed is not a real one or is fanciful."

Reasonably foreseeable future

Under s 5J(1)(b) of the Act the real chance of persecution occurring is to be considered on the basis of 'if the person returned to the receiving country'. In this sense, the Act requires a decision maker to consider a possible future rather than consideration of the past.

In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* [1997] HCA 22 the Court considered that while the future is not predictable the "degree of probability that an event will occur is often… assessable". The assessment could be based on:

- past events and analysis under the conditions in which those events occurred;
- the likelihood of the introduction of new events that may decrease the likelihood of the past event occurring again;
- an estimation of what events will give rise to the likelihood or not of an event recurring. An applicant does not necessarily have to show that they have had some past harm befall them to find that there is a real chance of it occurring, but there needs to be some evidence of either past events recurring or if a new issue, of an intervention that gives rise to events of persecution occurring to persons such as the applicant. Refer to *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA

Past events may however assist a decision maker to establish the real chance of persecution if the person returned, especially if there is no evidence showing that there have been any changes in the receiving country after the applicant left if the claims of past harm are taken to be credible. However, the central aspect of s 5J(1)(b) is the real chance of persecution 'if the person returned' so decision makers cannot merely make findings in relation to past harm and not draw express conclusions in relation to the chance of persecution if the person returned.

How far in the future to consider whether there will be harm if the person returned to the country will vary depending on the circumstances in that country. Where a receiving country has a violent and volatile political action events may change quickly and the reasonably foreseeable future may only be a week to a month. In other receiving countries, events that led to the person claiming persecution may still be in existence but reached a 'settled state' so that the forward looking could be as far as the next year or more. If there is likely to be a significant event that has a strong likelihood of affecting the stability of a country, decision makers should take that event into account (e.g. withdrawal of UN troops; elections where a group claiming to want to exterminate another group has gained power).

Circumstances where there is no real chance of persecution in areas of a receiving country

It is worth noting three broad scenarios where it may be considered there is no real chance of persecution in an area of a receiving country:

- The persecutor cannot effect persecution in another area of the country (not for reasons of effective protection measures).
- There are effective protection measures in another area of the country.

- The person could take reasonable steps to modify behaviour so there is no real chance of persecution.

The access test: safe and legal access

There is nothing in the plain wording of s 5J(1)(b) that expressly requires consideration of safe and lawful access to a *safe area* of the receiving country (that is, a place where the applicant does not have a real chance of persecution for a s 5J(1)(a) refugee protection reason).

However, it is logical to establish that the applicant would have safe and lawful access to their home region (if this has been assessed as a *safe area*) on return for the purposes of s 5J(1)(b). Therefore, as a matter of best practice decision makers, in assessing s 5J(1)(b) (and s 5 J(1)(c) where relevant), should consider whether an applicant can safely and lawfully access their home region if this has been assessed as being a *safe area* and record their considerations in the decision record.

Factors for decision makers to consider:

- having determined the area of safety, determine the likely area of return (if returned);
- consider the routes and methods of travel available and the safety of each;
- determine whether any formal legal requirements are to be met for the travel (such as having certain papers or passes); and
- consider whether the applicant has particular circumstances that may put them in danger whereas other persons in a similar position may be able to travel safely.

Finally, it is important for decision makers to note that if an applicant raises (either expressly or it clearly arises on the facts) that they would not have safe and/or lawful access to their home region, and the decision maker has determined the home region to be a *safe area,* then decision makers *must* consider this in their reasoning regarding s5J(1)(b). In these circumstances, failure to do so may amount to a legal error.

Activity 3 – Reasonably foreseeable future

Aim:	The aim of this activity is to consider how to deal with cases where there is an issue of reasonably foreseeable future.
Method:	Read the below scenario. Discuss the scenarios in your table group. Record your response to each question in the space provided.

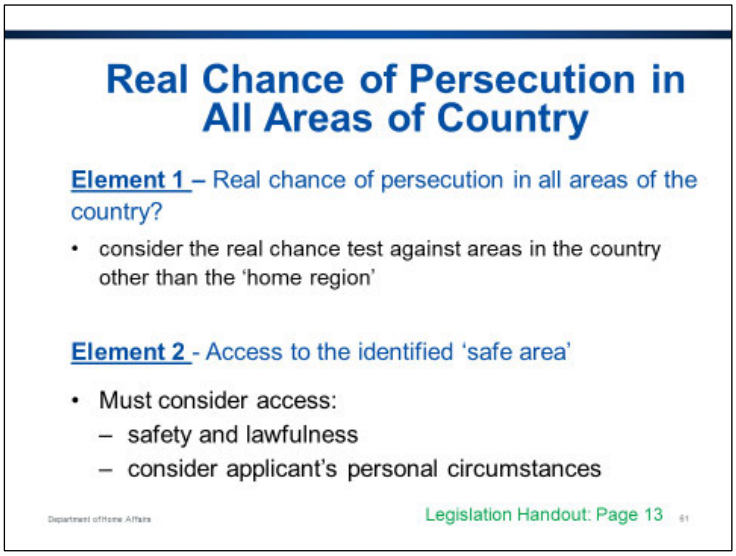
Scenario

s. 47E(d)

[redacted]

s. 47E(d)

Real chance of persecution relates to all areas of the country – s5J(1)(c)



Following the first two elements (s 5J(1)(a) and (b)), s 5J(1)(c) of the Act states that a well-founded fear of persecution exists if it 'relates to all areas of the receiving country'. While the terms 'relates to' and 'all areas' are relatively vague, the intention is to assess whether the real chance of persecution exists in all areas of the country.

The intention of this insertion into the Act (from p 10 of the RALC Act Explanatory Memorandum) is to implement in statute what is known as the 'internal relocation' principle. This principle reflects a notion that where a national of a country is in need of protection, the State should have the first opportunity to provide protection to its nationals, even if it means the person must move to another part of the country to access the protection (*Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18, at [20]; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, at [20]).

The result of the new formulation is that it will no longer encompass considerations of reasonableness and practicability in the person's individual circumstances, though decision-makers are still to take into account whether the person can access that area safely and legally. Decision makers should not refer to 'internal relocation' as a principle in their decisions since the statutory implementation has removed reference to it and instead considered it as a component of well-founded fear. *DFE16 v Minister for Immigration and Border Protection & Anor* 2017 FCCA 308 affirmed this view by concluding the reasonable in the sense of practicable consideration that was part of the old internal relocation test did not apply to s 5J.

Considerations of the s 5J(1)(c) assessment

In assessing s 5J(1)(c), the following should be considered by decision makers:

- Is there a *safe area* anywhere within the receiving country – that is, is there an area where there is not a real chance of persecution for a s 5J(1)(a) refugee protection reason in a particular area or areas of the country?
- Is there safe and lawful access for the applicant in reaching the *safe area,* taking into account the applicant's particular circumstances?

For discussions about the real chance and safe and lawful access tests, please see the discussions above in relation to s 5J(1)(b).

The findings of real chance and the relationship between that chance and all areas of the country requires a methodical approach and reasoning. Where there is not a real chance of persecution occurring in a particular area or areas of the country (safe area/s), decision makers should:

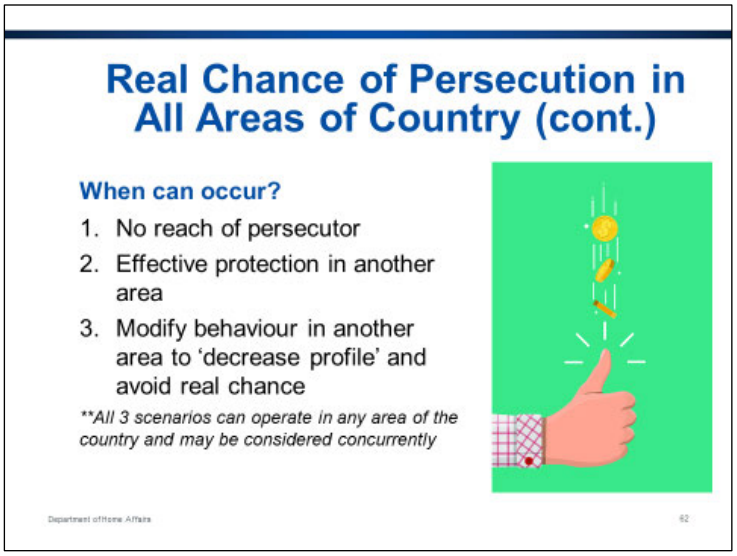
- note the factors that show an absence of the real chance of persecution in a safe area;
- ensure that the contrasted difference between the safe areas and the areas which are not safe is demonstrated sufficiently; and
- ensure that the *area* is described in the decision.

The term *area* is not defined in the Act and the context of s 5J and s 5H do not assist with giving the term a particular meaning. It follows that the ordinary meaning may give some guidance. The Macquarie Dictionary describes an area as 'any particular extent of surface; region; tract'. From this meaning, an area may be particularised by:

- Naming a township, province or broader internal border.
- Identifying a broad region where there is safety (such as the south of the country but demonstrating south of a particular point).

The larger the area that can be identified as safe, the more likely it will be that the person can access the place on return.

Common situations where s 5J(1)(c) may be relevant



Persecutor cannot inflict persecution in another area

Sometimes the alleged persecutor only operates within a limited geographical sphere and has no influence over others to inflict persecution on their behalf. In such situations, if the applicant can safely and legally enter another area of the country there will be no well-founded fear in relation to the country as a whole.

Effective protection measures

If there are effective protection measures in the State that the person can access in their home area then this is not an issue of relocation but not having a well-founded fear of persecution (see s 5J(2)). However, if the case is that to access the effective protection measures the person has to move to another area of the country, then the safety and legality of that move must be considered as well as the availability of the protection measures to that applicant if moving to that area. In some cases you may need to consider the particular attributes of the applicant to consider if persons like the applicant are able to access the protection measures. We will consider 'effective protection measures' in the next chapter.

Reasonable steps to modify behaviour

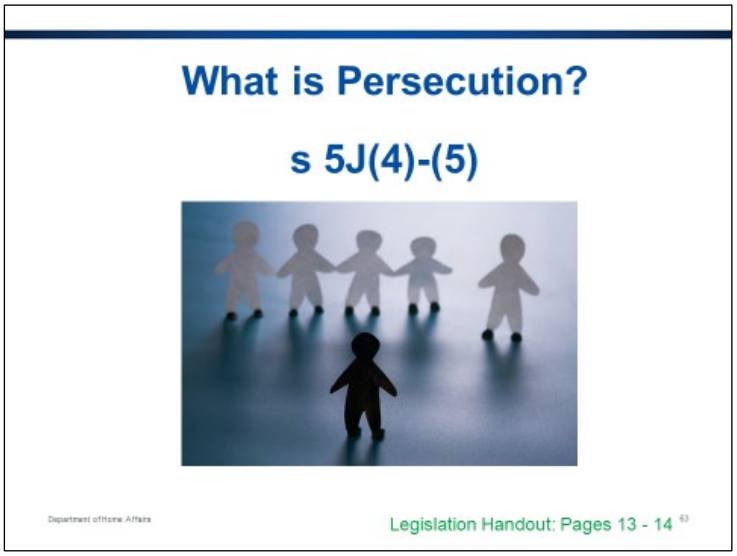
Similar to effective protection measures, this consideration under s 5J(3) can arise for both situations of a person staying in their area and avoiding persecution or modifying behaviour and moving to an area of safety. We will consider this after 'effective protection measures'. Circumstances could arise where a person could take reasonable steps to modify behaviour and having taken that step would not be persecuted in another area of the country. It may arise in circumstances where a person is engaged in certain actions in their home region and even if it was reasonable to stop they may claim they are known in that area so that it would not make a difference. Assessments could be made to determine whether it is a reasonable step to stop that action and therefore have safety in another area of the country.

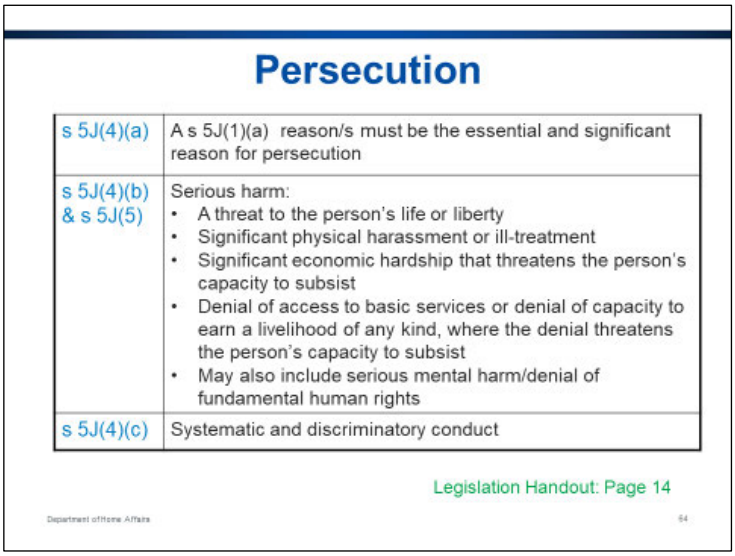
Persecution

As previously outlined, the structure of s 5J of the Act leads decision makers to consider the 4 elements that form a basis for having a well-founded fear of persecution):

- the three elements where there is a well-founded fear of persecution (s 5J(1));
- the two elements where there is not a well-founded fear of persecution (s 5J(2) and (3));
- the two parts that constitute persecution (s 5J(4) and (5)); then
- conduct that is to be disregarded in assessing a well-founded fear of persecution (s 5J(6).

We have already considered the reasons of persecution (s 5J(1)(a)) and whether there is a well-founded fear of persecution under s 5J(1)(b) and (c). We will now consider another factor required to establish whether there is persecution under s 5J(4) and (5).





The section describes the steps in assessing persecution for the purposes of determining whether the applicant has a well-founded fear of persecution and therefore whether they are a refugee.

Connection with s 5J(1)(a) reasons

It is available for decision makers to consider whether the fear of persecution is established under s 5J(4) and (5) of the Act before considering the rest of s 5J, however, there is no requirement to do the assessment in this order.

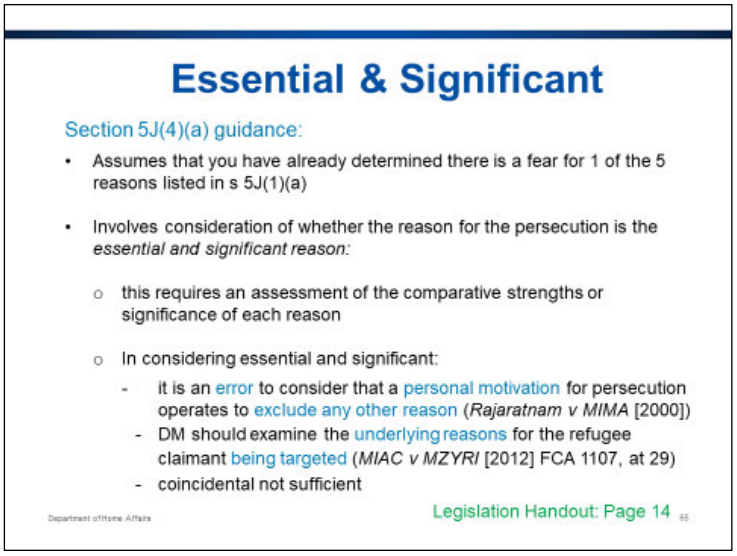
In accordance with s 5J(1)(a) an applicant can only have a well-founded fear of persecution if the person fears being persecuted for at least one of the five reasons provided:

- Race;
- Religion;
- Nationality;
- Membership of a PSG; or
- Political opinion.

If the applicant fears persecution for one or more of those reasons then the three elements in s 5J(4) need to be considered, that is, whether the person fears persecution for one or more of the five reasons given **and:**

a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
b) the persecution must involve serious harm to the person; and
c) the persecution must involve systematic and discriminatory conduct.

The essential and significant reason for the persecution – s5J(4)(a)



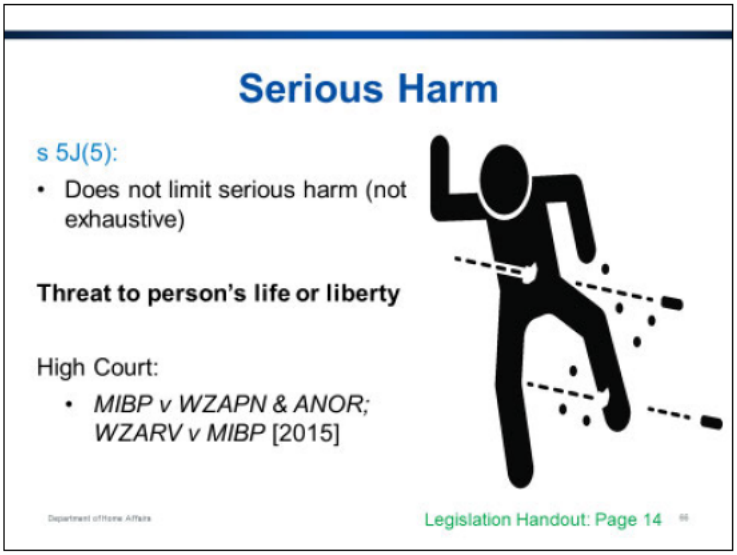
As s 5J(4)(a) of the Act was intended to reflect the same meaning of the repealed s 91R(1)(a) by incorporating almost identical wording, the department's position is that the case law surrounding 91R(1)(a) is also applicable to s 5J(4)(a).

The motivation of a persecutor for threatening or inflicting harm may be mixed (see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19 and *SZATE v Minister for Immigration* [2004] FMCA 532). Under s 5J(4)(a) of the Act, a motivation for persecution other than at least one of the five reasons given does not exclude a person from having a well-founded fear of persecution. For instance, it is an error to consider that a personal motivation for persecution operates to exclude any other refugee protection reason listed in s 5J(1)(a) (*Rajaratnam v Minister for Immigration and Multicultural Affairs* [2000] FCA 1111).

The assessment required is to consider the perspective of the persecutor and determine whether a reason, or reasons under s 5J(1)(a) are 'essential and significant reasons' for the persecution. While a persecutor may personally gain from inflicting the persecution, such as killing a person to seize their land, or extortion, the examination of the facts should continue to 'examine the underlying reasons for the refugee claimant being targeted…by its principal beneficiary' (*MZYRI v Minister for Immigration & Anor* [2012] FMCA 396, at 51).

It is clear that some acts can always be said to be actions for self-interest, the reason why the persecuting party has that interest needs to be examined to determine if an underlying reason for the targeting is for reasons of race, religion, nationality, membership of a PSG, or political opinion (s 5J(1)(a)), or whether the person was selected because they can provide the benefit with no other reason or purpose (see *Rajaratnam v Minister for Immigration and Multicultural Affairs* [2000] FCA 1111).

Serious harm – s 5J(4)(b) and 5J(5)



The persecution must involve "serious harm" to the person. Instances of "serious harm" are listed in s 5J(5) of the Act. These are:

a) a threat to the person's life or liberty;

b) significant physical harassment of the person;

c) significant physical ill-treatment of the person;

d) significant economic hardship that threatens the person's capacity to subsist;

e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

Section 5J(5) does not limit the scope of the harm as it is not an exhaustive list. Serious harm may also include the denial of fundamental human rights and serious mental harm.

As s 5J(4)(b) and 5J(5) intended to reflect the same meaning of the repealed s 91R(1)(b) and 91R(2) by incorporating almost identical wording, the department's position is that the case law surrounding 91R(1)(b) and 91R(2) is also applicable to s 5J(4)(b) and 5J(5).

Threat to liberty

In *Minister of Immigration and Border Protection* v *WZAPN & ANOR; WZARV v Minister of Immigration and Border Protection* [2015] HCA 22 the court determined that any detention will not amount to a 'threat to liberty' for the purposes of establishing serious harm under s 91R(1) and 91R(2)(a). The court found that the likelihood of a period of temporary detention of a person for a reason mentioned in the Refugees Convention is not, of itself and without more, a threat to liberty within the meaning of s 91R(2)(a) of the Act.

> *SBTF v Minister for Immigration and Citizenship* [2007] FCA 1816
>
> **Background:** The appellant is a citizen of Bahrain and of Shia Muslim faith. He claimed to have been involved in protests against the government for which he was captured, jailed and tortured. He provided a doctor's report stating "as a result of the appellant's incarceration and torture the appellant was "unfit to work or study on psychological and emotional grounds."

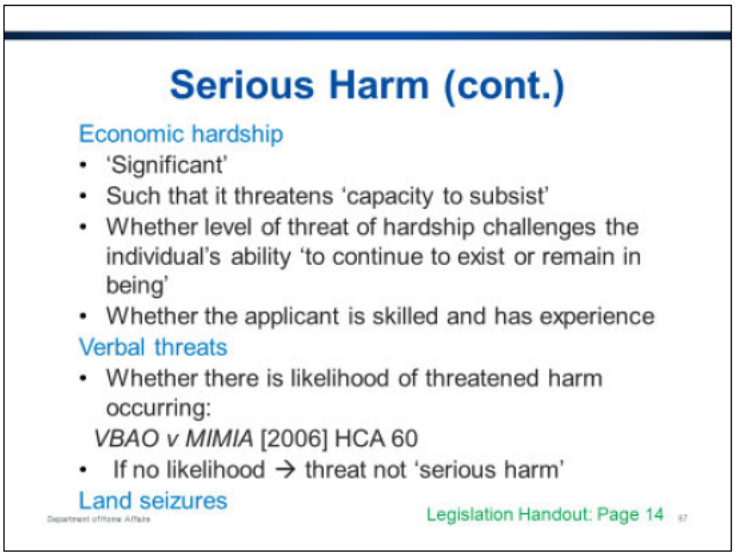
Issue: whether the Tribunal considered the appellant would suffer psychological harm if he was returned to Bahrain; and whether psychological harm may be serious harm within the meaning given by the Act.

Court held at [49]: Whether, as contended, the appellant would be at a real chance of suffering persecution if he were to return to Bahrain is a matter for the Tribunal. This Court cannot address that question. The fact is the Tribunal did not address this question because it did not consider the appellant's claim that he would suffer persecution by reason of suffering psychological harm.

The appeal was allowed and orders made for the matter to be remitted to the Tribunal for further consideration according to law.

Note: The revised Explanatory Memorandum to *Migration Legislation Amendment Bill (No.6) 2001,* which initially inserted the non-exhaustive definition of 'serious harm' also recognises that witnessing mock executions, or having a gun pointed at a family member could constitute serious mental harm.

Significant economic hardship



One of the instances of "serious harm" is that there is significant economic hardship that threatens the person's capacity to subsist.

SZIGC v Minister for Immigration and Citizenship [2007] FCA 1725

Background: The applicant was a Chinese national and claimed that as a result of his previous involvement in political movements and his interest in Falun Gong, he obtained a bad record with Chinese authorities which resulted in his family being denied the monthly allowance that most Chinese citizens are entitled to.

The Federal Court stated that a person's capacity to subsist refers to their ability 'to continue to exist or remain in being' (citing Tamberlin J in *SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCA 143).

This decision is indicative of the high threshold that must be proved in order to show that significant economic hardship amounts to persecution.

Lek v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 418

Chinese in Vietnam – to secure a government job, need to pay bribes.

Held: this did not amount to persecution, applicant denied access to a field of employment only (ie: government jobs), not all jobs.

Ahmadi v Minister for Immigration and Multicultural Affairs [2001] FCA 1070

Background: Applicant claimed persecution on religious grounds. He claimed that the persecution was that he was unable to secure employment in government run businesses because there was an adverse file against him. It was also claimed that he was specialised in the field of engineering geology and that the majority of employment in this area in Iran was in the public sector.

Held: RRT found that this did not constitute serious harm because he could seek employment elsewhere. FC held this was an incorrect finding because whether particular adverse treatment constitutes persecution is a question of degree. If there is comparable employment in the private sector, then denial of access to government employment may be a "nuisance", but where the denial has the effect of wasting a person's qualifications and destroying a person's training, it may be considered serious harm.

Verbal threats

In the context of s 5J(5) of the Act, the word "threat" refers to a likelihood of harm, rather than the communication of an intention to harm. A declaration of an intention to cause harm may or may not be evidence of a likelihood of future harm, but the question for the decision maker is whether there is such likelihood. A decision maker is required to determine the risk of future harm, rather than future communications of a similar nature.

If there is no likelihood of the threatened harm occurring, then the threat does not amount to "serious harm" (see *VBAO v Minister for Immigration Multicultural and Indigenous Affairs* [2006] HCA 60, at [3] per Gleeson CJ and Kirby J; [18]-[20] per Gummow J; [50] per Calinan and Heydon JJ).

Land seizures

SZALM & Ors v Minister for Immigration [2004] FMCA 262 – land seizures in Zimbabwe

Unjust or unlawful seizures of land by threats of violence, where the land provides the livelihood of the dispossessed person, and the seizures are part of a pattern of seizures for reasons of on race, religion, political opinion, or targeted at an identifiable social group then the elements of persecution under s 5J(4) and 5J(5) will be made out.

Note this case referenced previous legislation under s 91R(1) and (2).

This case was followed and cited favourably in *S2012 of 2003 v Minister for Immigration* [2008] FMCA 954 where Driver FM said at [23]:

As I said in SZALM at [19] it is erroneous to assume that it is reasonable to expect applicants to accept their dispossession and live their lives differently: *S395/2002 v Minister for Immigration* [2003] HCA 71. The applicant had not made a positive choice not to return to Tavua. That choice had been made for them by indigenous Fijians who drove them from their farm there, which provided both a home and a livelihood.]

Systematic and discriminatory conduct – s 5J(4)(c)

Under s 5J(4)(c) of the Act, persecution must also involve systematic and discriminatory conduct.

Persecution requires selective harassment, which discriminates against a person for a s 5J(1)(a) reason. Non-systematic or random acts are not selective or targeted and will not meet the statutory requirements.

Systematic conduct

In *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, the High Court further explained the meaning of systematic in this context stating:

- It is an error to suggest that the use of the expression 'systematic conduct'… was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War.
- McHugh J stated that it is not necessary that the applicant fears being persecuted on a number of occasions or 'must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic.'

An act of 'random violence' will not be seen as persecution for a s 5J(1)(a) refugee protection reason, however, the fear of a single act of serious harm, **done for a s 5J(1)(a) refugee protection reason**, will in some circumstances be sufficient (see *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62 at 429-430 per McHugh J).

In summary, systematic conduct:

- Does not necessarily mean "systemic" (of/or relating to a system).
- Does not necessarily mean related to a "system" in a political sense.
- Does not necessarily mean a series of persecutory acts.
- Can mean organised or methodical conduct.
- Does not mean random acts or generalised violence.
- Must be linked to one of the refugee protection reasons listed in s 5J(1)(a). It is not sufficient for the conduct to be only systematic and discriminatory.

Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62

McHugh J said that it was not "a necessary element of persecution that the individual should be a victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a … reason [under s 5J(1)(a) of the Act]…."

Minister for Immigration and Multicultral Affairs v Ibrahim [2000] HCA 55

In this case McHugh J qualified his statement in Chan's case.

The use of the expression "systematic conduct" did not mean that persecution had to be part of a systematic course of conduct by an oppressor. Rather, he had used "systematic" to mean "non-random".

SBWD v Minister for Immigration and Citizenship [2007] FMCA 1156 (Lindsay FM, 20/7/07)

FMC held that the phrase "systematic and discriminatory conduct" in what is now s 5J(4)(c) should be interpreted consistently with the comments of Justice McHugh in Ibrahim. "Systematic" means non-random, selective, premeditated, and intentional. It does not mean regular or methodical. Therefore, sporadic outbursts of religious violence can involve systematic and discriminatory conduct.

Discriminatory conduct

As mentioned above, whether acts that are feared amount to persecution also requires a determination that the actions are systematic and discriminatory (see s 5J(4)(a)).

Accordingly, punishment of a non-discriminatory kind for contravention of a criminal law of general application will ordinarily not amount to persecution (see *Applicant A v Ministef for Immigration and Ethnic Affairs* [1997] HCA 4). It is also likely that punishment under a law of general application will not be persecution for the purposes of s 5J(4)(a) either, since the essential and significant reason for the punishment will be to impose a lawful sanction.

If a person has been selected for actions because of their race, religion, nationality, membership of a PSG or political opinion then the selection of the person is discriminatory for the purposes of s 5J(4)(c) of the Act (See *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4).

Minister for Immigration and Multicultural Affairs v Ibrahim [2000] HCA 55 identifies **two distinct notions of discrimination**:

- Where people who are not different, in a relevant sense, are treated in a different manner (e.g. poorer work conditions given to people of a particular religion, where religion is of no relevance to the employment).
- Where people who are relevantly different are treated in a manner that is not appropriate and adapted to that difference (e.g. a person of a particular religion being forbidden from praying during work hours).

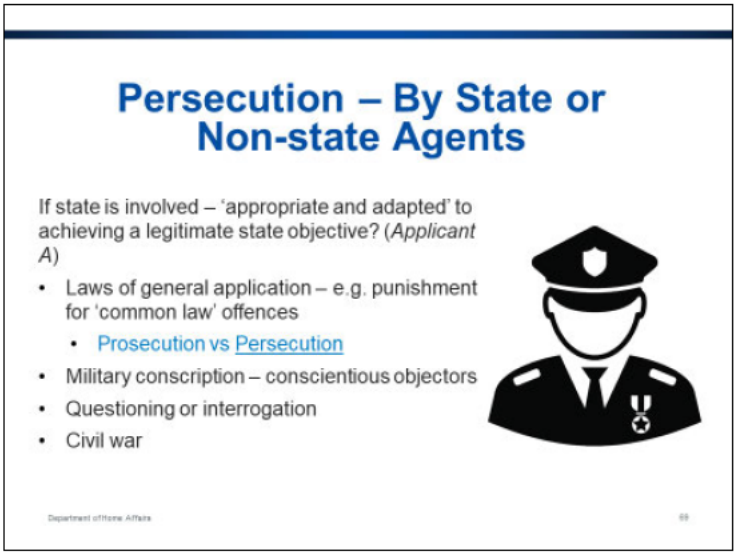
Each understanding of discrimination may meet the statutory requirement in s 5J(4)(c) of the Act.

Persecution may be manifested by discriminatory acts directed at members of a group in a way that shows that, as a class, they are being selectively harassed. In such a case it is not necessary that the conduct be directed at a person as an individual. In other cases, the applicant may be the only person who is subjected to discriminatory conduct.

SZDTM v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 188 (Bennett J, 9/3/06)

RRT characterised anti-Chinese criminal activity in Indonesia as not being for reasons of race, religion, nationality, PSG or political opinion because it was motivated by the wealth or perceived wealth of the Chinese. Federal Court held this to be incorrect because it concluded that If action is taken against members of a racial group because of a characteristic, actual or perceived, that is common to and attributed to the racial group, the action is based on the race of that group. It is irrelevant whether the reason for the action is disapproval or resentment of that characteristic. If such action amounts to persecution and gives rise to a well-founded fear of persecution on the part of a member of that race, then the person may be considered a refugee.

Persecution by State or non-state agents



When examining persecution claims, it is important to consider whether the persecutor is the State or a non- state agent.

If the State is directly involved:

If the State is directly involved in persecution the evidence to support or not support such a claim may be easier to find. s. 47E(d) Laws of general application are considered after this subsection in more detail (see subheading 'Law of General Application' below).

In some instances, protection may be provided by a non-State actor against State persecution. Please see 'Available Effective Protection Measure' for further information.

If the State is not directly involved:

If the state is **not** directly involved in persecution, decision makers would need to consider:

s. 47E(d)

If the State is indirectly involved through not providing adequate State protection this may be determined to be persecution by the State through their inability or unwillingness to take protective action:

Applicant A v Minister for Immigrtion and Ethnic Affairs [1997] HCA 4 (per Kirby J): forcible sterilisation carried out by local officials could be persecution which is attributed to the State, due to the tacit approval of the Central Government, or its incapacity or unwillingness to take protective action.

For further information of adequate State protection and willingness as an element of this please see the section on 'Effective protection measures: party or organisation'.

Law of general application

Note: Laws of general application do not apply to the 'complementary protection' criterion (s 36(2)(aa) of the Act).

A law is one said to be of 'general application' when it applies to the citizens of a State without distinction of persons or groups. For example, a law that punishes any person who exceeds the speed limit on a road is aimed at punishing behaviour contrary to the law no matter who contravenes the law.

If an applicant claims to be persecuted under a law and the law is one of general application then it will not amount to persecution for the purposes of s 5J(4)(a) and (4)(c) of the Act. However, decision makers should also make findings about how the law is implemented. While a law may be one of general application if the law is in fact differentially applied, that is, targeting persons for reason of race, religion, nationality, membership of a PSG or political opinion, the application of the law is discriminatory. Similarly, if the law punishes all who contravene it but give harsher punishments to certain groups then it may amount to persecution.

A law that treats persons or groups differently from the general population is discriminatory, but this does not necessarily mean the law is persecutory. The objective and how that law is adapted to meet the objective needs to be considered.

Discriminatory laws and legitimate State objectives

Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4, per McHugh J:

A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group.

This means that actions which appear to constitute persecution should be considered in the context in which they occur. The conduct could have been carried out on the basis of the operation of a law of general application or directed at achieving a legitimate State objective.

However, the means chosen to achieve the legitimate State objective should be appropriate and adapted to achieve that objective.

s. 47E(d)

[redacted]

Military service and conscientious objector claims

As a law of general application, military conscription (compulsory military service) will not of itself establish s 5J(1)(a) persecution if it is applied across the population without discrimination. s. 47E(d)

[redacted]

s. 47E(d) . When dealing with claims relating to compulsory military service, decision makers should be aware of s. 47E(d)

Some principles from case law:

- Where an obligation to perform military service is universal upon all males in the applicants country, and the relevant laws of that country punish those who avoid military service, these are laws of general application and not persecution (*Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834).
- Decision makers need to look further than the question of whether the law relating to compulsory military service is a law of general application. It is necessary to make a finding that the conscientious objection arises for reasons of race, religion, nationality, membership of a PSG or political opinion, and further to consider whether the punishment given for refusing compulsory military service is ultimately punishment for one of the reasons given or not. Forcing a conscientious objector to perform military service may amount to persecution (*Erduran v Minister for Immigration and Multicultural Affairs* [2002] FCA 814).

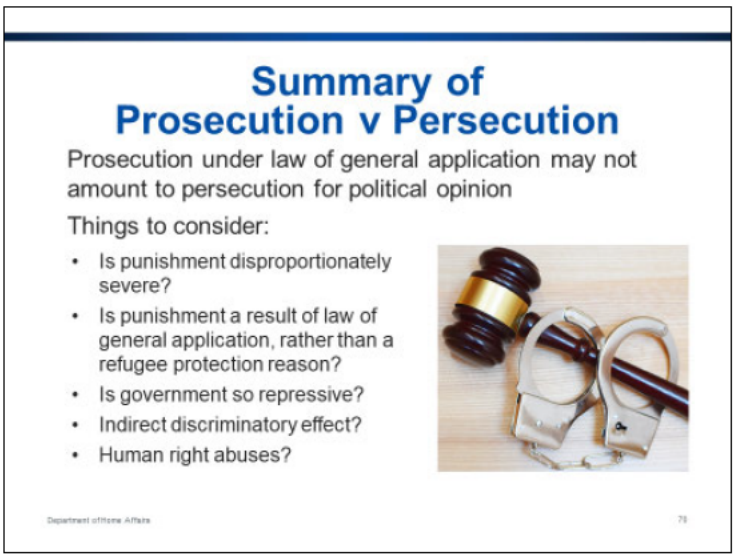
Questioning or interrogation

Ordinarily, being questioned or interrogated with no further harm has been considered not to amount to persecution. If the person faces harm during the questioning for a s 5J(1)(a) reason then the detention would be persecution (*Paramanathan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1693). If the essential and significant reason for the detention is not for a s 5J(1)(a) reason then it will not be persecution under s 5J(4)(a) (See *SZOAZ v Minister for Immigration and Citizenship* [2010] FCA 816). If a person is punished under a law of general application and those responsible for selecting the place of detention know there is a chance the person will be harmed for a s 5J(1)(a) reason, then the detention will be considered persecution as well as the acts of mistreatment (See *Nagaratnam v Minister for Immigration and Multicultural Affairs* [1999] FCA 176).

Civil war

Fear of harm from incidental or general violence during civil war or civil conflict will not amount to persecution (*Minister for Immigration and Multiciltural Affairs v Ibrahim* [2000] HCA 55). However, acts undertaken during a civil war that target people on the basis of their race, religion, nationality, membership of a PSG or political opinion will be persecution since it will meet s 5J(4)(a) and (c) and the threat of such harm should be considered for seriousness under s 5J(4)(b) and s 5J(5).

Punishment for 'common law' offences



A common law offence can be described as an offence under a country's laws of general application.

It will generally be difficult for the applicant to establish persecution where the applicant claims that they have been, or expect to be, 'persecuted' for committing a common law offence.

In such cases, decision makers should look to how the criminal code is applied in practice in that country and therefore whether the penalty for the "common law offence" is:

- harsh;
- excessive;
- cruel;
- inhuman; or
- degrading

in comparison to other offences.

Decision makers should also consider whether the common law offence is a law of general application that is appropriate and adapted to achieving a legitimate State objective (i.e., is not a violation of internationally recognised human rights).

As mentioned earlier, if the common law penalty or punishment is only applied selectively (and the selection is for a s 5J(1)(a) refugee protection reason), or is not appropriate and adapted to a legitimate State objective, then this may amount to persecution.

Lama v Minister for Immigration and Multicultural Affairs [1999] FCA 918

The Applicant was a Nepalese citizen who claims to have killed a cow for food because he was hungry and did not profess strong adherence to any particular religion (he claimed to be Buddhist but not Hindu). Cows have special status in Nepal as a Hindu Kingdom. Nepalese law states that a person killing a cow intentionally shall be imprisoned for 12 years.

The issue was whether punishment under Nepalese law for killing a cow ("bovicide") can be said to constitute persecution for a religious or political reason.

RRT: found that the law against cow killing in Nepal is a law of **general application,** for its terms apply **equally to all persons in Nepal** whether Hindu or not. It is pointed out that the law does not single out non-Hindus and permits everyone in Nepal to buy and eat imported beef, although it is very expensive. The decision maker states that the law against bovicide in

Nepal does not require compliance with Hindu beliefs or practices but only requires that people let cows live and die naturally.

FC Held (Tamberlin J):

[29] … it is apparent that the laws of a nation, both legislative and judicial, to a large extent reflect the values of that nation. Some of these religious or ethical values will be of an abiding nature and others will vary from time to time due to changes arising from social, scientific, educational or technological developments. However, the fact that the law of a country may enshrine particular religious values does not mean that such laws can be described as targeting members in that society who do not adhere to the religion in question. In the present case, **the law does not impact on the applicant in any way different to that in which it impacts upon other members of Nepalese society. It is a law of general application and the evidence does not support a conclusion that the law is applied in a discriminatory way.** Although it is unlikely that a Hindu may kill a cow, in the event that he or she does so, the prescribed penalties apply. **What is governed by the law is the act of killing the cow and not the social or political or religious beliefs of the person who commits the killing.**

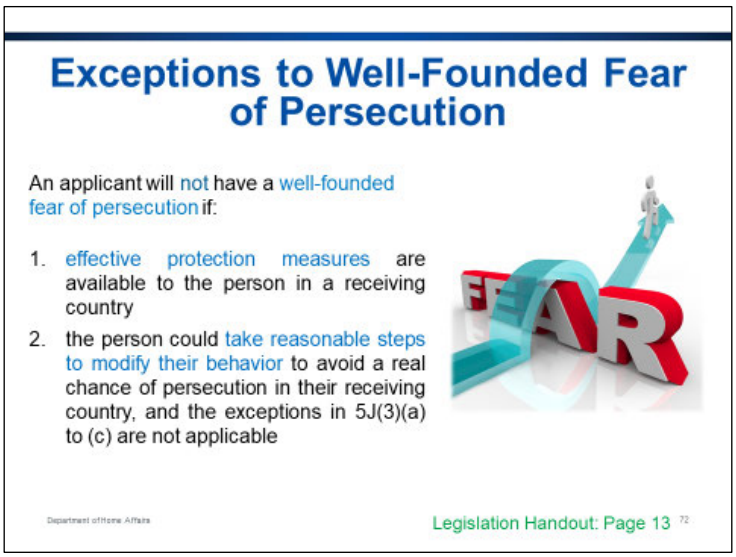
[30] In the present case it was open to the RRT to form the view that the law did not select the applicant for punishment because he was not a Hindu. There is no selective harassment to be found in the punishment imposed by the Nepalese authorities, even though viewed through Australian eyes the punishment may appear grossly disproportionate to the crime. The question to be addressed is not whether the law is inappropriate or inconsistent with Australian policy but rather whether the operation of the law gives rise to selective harassment ….

‘Exceptions’ to well-founded fear of persecution - 5J(2) and s 5J(3)

As previously outlined, the structure of s 5J of the Act leads decision makers to consider the 4 elements that form a basis for having a well-founded fear of persecution):

- the three elements where there is a well-founded fear of persecution (s 5J(1))
- the two elements where there is not a well-founded fear of persecution (s 5J(2) and (3)),
- the two parts that constitute persecution (s 5J(4) and (5)), then
- conduct that is to be disregarded in assessing a well-founded fear of persecution (s 5J(6).

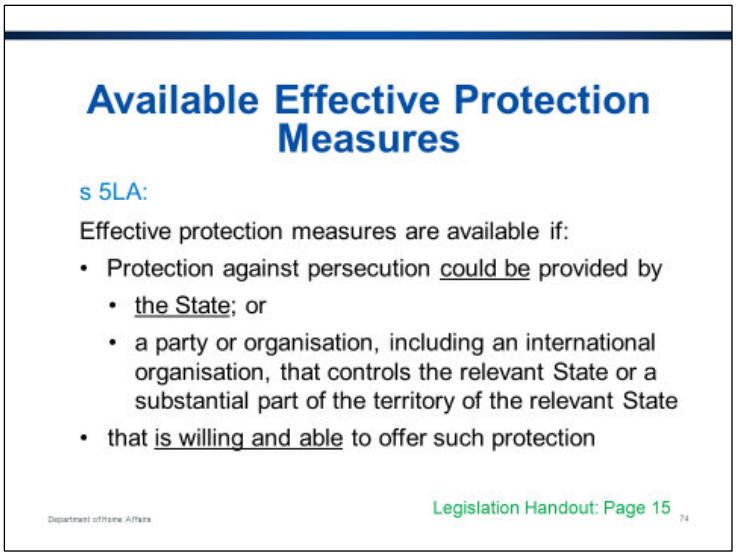
We have already considered the reasons of persecution (s 5J(1)(a)), the two factors required to establish whether there is a well-founded fear of persecution under s 5J(1)(b) and (c), and the two factors that constitutes persecution.



In this section we will turn to two ‘exceptions’ in relation to well-founded fear of persecution. This is covered in s 5J(2) (‘effective protection measures’) and s 5J(3) (‘reasonable steps to modification’) of the Act.

Effective protection measures

What are effective protection measures under s 5J(2) and 5LA?



It is important to distinguish between 'effective protection measures' in the receiving country (s 5J(2) and s 5LA) and protection in another country (s 36(3)-(7)). The two considerations are not synonymous and a determination with respect to one of them is not a finding in relation to the other. That is, a determination of protection in another country under s 36(3) does not answer any of the considerations to be made when considering effective protection measures in the receiving country in s 5J(2).

Under s 5J(2), a person does not have a well-founded fear of persecution if there are effective protection measures in the receiving country available to the person. What constitutes 'effective protection measures in the receiving country' must be determined with reference to s 5LA of the Act. We also briefly discussed this under the chapter on 'Persecution'.

Section 5J(2) of the Act states that a person will not have a well-founded fear of persecution where there are 'effective protection measures' available to the person in the receiving country. Section 5LA of the Act states that effective protection measures are available to a person in a receiving country if:

- Protection could be provided to the person by
  - the State, or
  - A party or organisation (including an international organisation) that controls at least a substantial part of the territory of the State
- That is willing and able to offer such protection.

The State, a party or organisation referred to above, are taken to be able to offer protection against persecution to a person if:

- The person can access the protection; and
- The protection is durable; and

For the State – the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

Whichever source is considered for protecting persons like the applicant, decision makers must consider whether the source is **willing and able** to offer the protection. The willingness and ability of a source to offer protection is taken in consideration of s 5LA(2).

State protection

The State is taken to be willing and able to offer protection if the person can access the protection, it is durable protection and the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

What are an appropriate criminal law, a reasonably effective police force, and an impartial judicial system?

Absolute protection of an individual is not required. A s 5J(1)(c) refugee protection reason nexus would not be made out simply by showing police maladministration, incompetence or ineptitude, or showing that the State's failure was due to a shortage of resources.

A State's failure to act on insufficient evidence, or a failure to act where the government has not been given the opportunity to respond to harm, in circumstances where protection might reasonably have been forthcoming, would not amount to a lack of protection (see *Minister for Immigration and Multicultural Affairs v Kandasamy* [2000] FCA 67, *Primatchek v Minister for Immigration and Multicultural Affairs* [2000] FCA 517 and *Guitta Levy v Minister for Immigration and Multicultural Aaffairs* [1998] FCA 1666).

In *Minister for Immigration and Multicultral Affairs v S152/2003* [2004] HCA 18, the applicant was from the Ukraine who claimed to have suffered serious harm because he was a Jehovah's Witness. He had been assaulted on two occasions and a fire had been lit outside his property on another occasion because some individuals were affronted by his religious beliefs. The applicant submitted that the Ukraine government, both directly and through State-controlled media, encouraged persecution of Jehovah's Witnesses. The Tribunal rejected this claim and on two occasions expressed the conclusion, based on evidence cited, it was not satisfied the Ukrainian authorities were unable or unwilling to protect its citizens from violence based on antagonism of the kind here considered. The High Court agreed with this approach and noted that:

A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed.' at [28] per Gleeson CJ, Hayne and Heydon JJ.

The judicial system should prosecute matters according to the laws, provided such laws are not aimed at depriving people of fundamental human rights, are of general application, or if discriminatory are for a legitimate State objective and appropriately adapted.

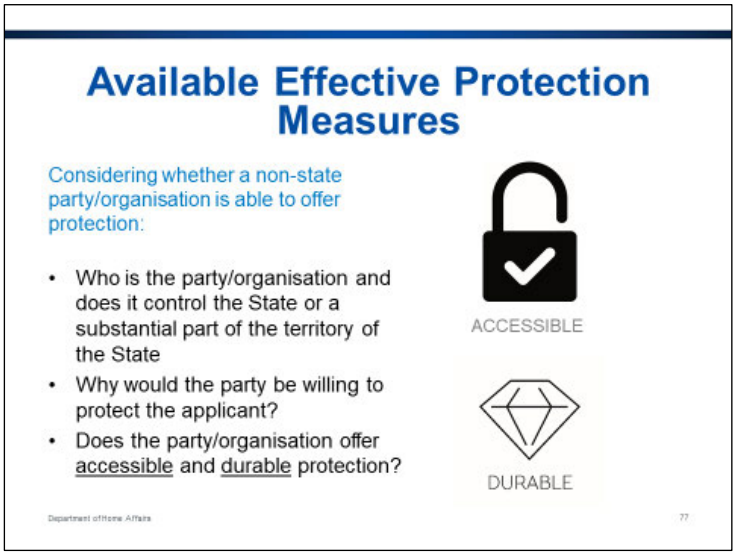
Other than the brief discussion already provided, there is no clear notion of what is an 'adequate level of State protection'. The High Court in *Minister for Immigration and Multicultural and Indigeous Affairs v Respondents S152/2003* [2004] HCA 18 has suggested that a State must meet the 'standards of protection required by international standards' and is obliged to:

> *"…take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police and justice system."*

This wording has been picked up in s 5LA, as well as some concepts found in the EU Directive on this topic.

Where there is evidence the State turns a 'blind eye' to certain situations that involve s 5J(1)(a) reasons it is likely that the police force will not be *reasonably effective* and that a person cannot access the protection afforded to other citizens. For further information about the State turning a 'blind eye' please see the heading 'willing to provide protection' below.

Party or organisation



The party, organisation or international organisation considered to be able to offer protection must 'control' the State, or a 'substantial part of the territory' of the State, to qualify as a relevant source of protection. The terms 'control' or 'substantial part' are not defined in the Act.

Consistent with *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953 control of a State or part of its territory would arguably mean where the party holds territory and effects services to the exclusion of the government or on behalf of the government where the government is unable to effect control in that area.

s. 47E(d)

Willing and able

Decision makers should consider whether the State, party or organisation is unable, or unwilling, to provide protection as this is required under s 5LA(1)(b) of the Act.

'Able' to provide protection

Section 5LA(2) of the Act defines where a State, party or organisation is able to provide protection for the purposes of s 5LA(1)(b). It states:

The State, a party or organisation referred to above, are taken to be able to offer protection against persecution to a person if:

- The person can access the protection; and
- The protection is durable; and

For the State – the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system

Whichever source is considered for protecting persons like the applicant, decision makers must consider whether the source is **willing and able** to offer the protection. The willingness and ability of a source to offer protection is taken in consideration of s 5LA(2).

Access

When considering access to the protection, decision makers should consider the processes and steps to be taken in the relevant State, party or organisation and not merely the geographical location. s. 47E(d)

Durable

While s 5LA(2)(b) of the Act requires a determination that the protection is 'durable', protection may be considered durable even if it is of a temporary nature where there is evidence showing that only temporary protection is needed from the persecution and another party provides that protection. s. 47E(d)

'Willing' to provide protection

This requires consideration as to whether the State, organisation or party effectively turns a "blind eye" to personally motivated actions. Unlike 'able to provide protection', the Act does not define where a State, party or organisation is willing to provide protection. As such, the case of *SZONJ* is relied upon to determine what consists of 'willing to provide protection:'

Minister for Immigration and Citizenship v SZONJ [2011] FCAFC 85

Facts: a visa applicant had been the victim of sustained domestic violence in Fiji. To succeed, the applicant needed to show that either her husband's violence towards her was committed for one of the five s 5J(1)(a) reasons or that Fiji's failure to protect her from this abuse could itself be seen as arising from one of those reasons: [8].

The Full Court said:

[25] …the correct inquiry was not into the adequacy or otherwise of the protection afforded to women who were victims of domestic violence in Fiji but, in contradistinction, into the motives

of the State and whether the failure by Fiji to protect such victims was itself a manifestation of a persecutory policy directed towards them.

[32] …it must be shown that the failure on the part of the state or state agents to prevent the relevant conduct is the result of toleration or condonation, not simply inability to prevent the conduct.

[33] Thus, where there is persecution by a non-state agent for a reason that has no [refugee reason], and that conduct is condoned or tolerated by the State for a [refugee] reason, the victim may be a refugee [within the meaning of s 5H(1) of the Act]. However, where there is persecution by a non-state agent for a reason that has no [refugee reason] and that conduct is not prevented by the State by reason only of the inability of the State to prevent it, such that there is no [refugee] reason that motivates the State or prevents the State from intervening, the test will not be satisfied.

Whilst *SZONJ* was prior to the introduction of the RALC Act, it can be relied upon to provide guidance on what is 'willing to provide protection' for the purposes of s 5LA(1)(b) as the intention of the s 5LA(1)(b) was to incorporate the previous understanding of the term.

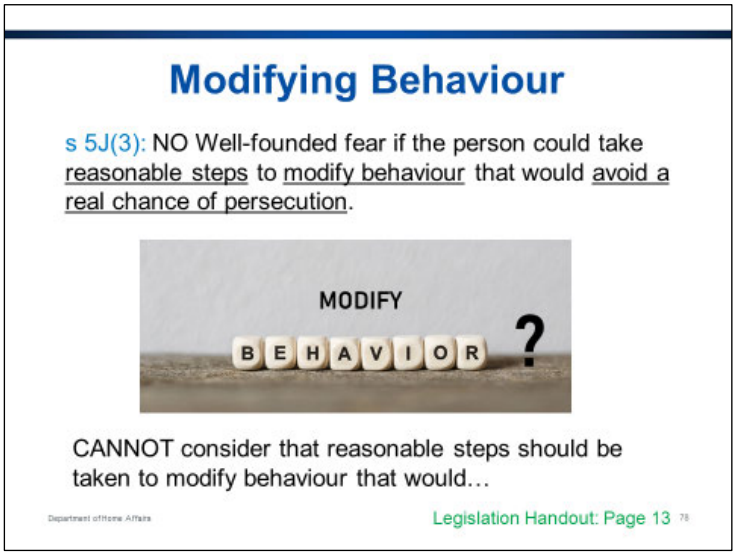
For a decision maker to find that there are no effective protection measures available as the State effectively turns a "blind eye" to personally motivated actions, the persecution must have an 'official' quality; that is, the persecution is officially tolerated or uncontrolled by the authorities. However, if the lack of protection is not due to an unwillingness of the State to act but is a result of under-staffing or lack of resources then there would be no evidence of State in-action based on race, religion, nationality, membership of a PSG or political opinion.

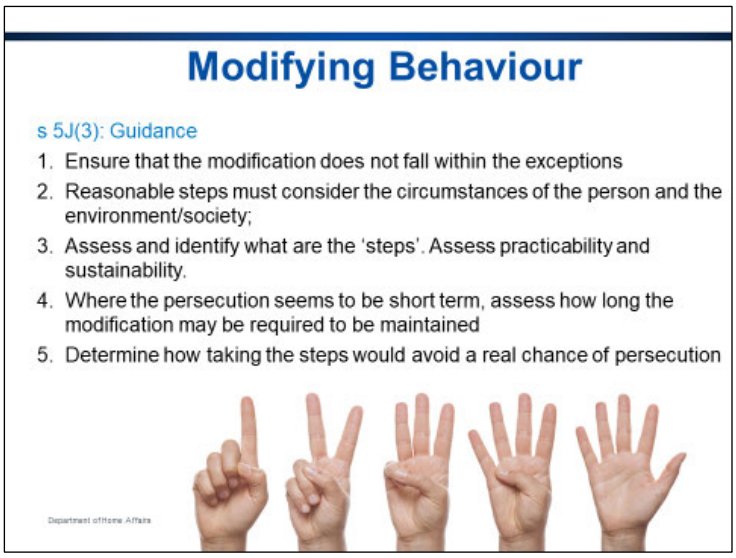
As an example, in *Minister for Immigration and Multicultral Affairs v Khawar* [2002] HCA 14, the applicant claimed that domestic violence perpetrated by her husband was tolerated and condoned by the State. She argued that this was an aspect of systematic discrimination against women, involving selective enforcement of the law, which amounted to a failure of the State to discharge its responsibilities to protect women. The Court held that if this lack of protection could be established, persecution would be established. At [31], Gleeson CJ said:

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the State or agents of the State, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the [s 5J(1)(a)] grounds may be satisfied by the motivation of either the criminals or the State.

Reasonable steps to modify behaviour

Overview





Section 5J(3) of the Act provides that a person does not have a well-founded fear of persecution if they can take reasonable steps to modify their behaviour so as to avoid a real chance of persecution.

The key elements in s 5J(3) are:

- identification of behaviour;
- ascertaining steps to be taken and whether the steps are reasonable;
- effect on the real chance of persecution; and
- circumstances where modification of behaviour is not to be considered.

A person will not satisfy s 5J(3) where any of the exceptions in 5J(3)(a),(b) or (c) apply. This means that a person is not expected to modify their behaviour if it would:

(a) conflict with a characteristic that is fundamental to the person's identity or conscience or

(b) conceal an innate or immutable characteristic of the person, or

(c) without limiting paragraph (a) or (b), require the person to do any of the following:

(i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;

(ii) conceal his or her true race, ethnicity, nationality or country of origin;

(iii) alter his or her political beliefs or conceal his or her true political beliefs;

(iv) conceal a physical, psychological or intellectual disability;

(v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;

(vi) Alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender, identity or intersex status.

The Explanatory Memorandum states:

'The reference in new paragraph 5J(3)(a) to "conscience" is intended to encompass aspects such as religion, political opinion and moral beliefs. A modification in behaviour which is contrary to any aspect of 'conscience' will not necessarily indicate that the person could not take reasonable steps to avoid a real chance of persecution. Only a modification of behaviour that is fundamental to the person's conscience will be relevant for the purposes of new paragraph 5J(3)(a).

For example, a person who faces persecution only for evangelising in public about his or her religion might be found not to have a ***well-founded fear of persecution*** because he or she could avoid the persecution by not continuing to evangelise. However, despite new s 5J(3), the same person would be assessed as having a ***well-founded fear of persecution*** if evangelism was a fundamental part of the person's religion and therefore fundamental to their conscience.

The reference in new paragraph 5J(3)(b) to an "innate" characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics could include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5J(3)(b) to an "immutable" characteristic is intended to encompass a shared common background that cannot be changed. This could be an attribute which the person has acquired at some stage of his or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking. For example, a person who faces persecution only for their history as a prostitute could not avoid that persecution by ceasing prostitution work in the future. New s 5J(3) would therefore not preclude a finding of a ***well-founded fear of persecution*** in respect of such a person.

Exceptions to behaviour modification

Relationship with S395/2002?

In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (*S395*), the High Court held that an assessment under the Refugees Convention does not extend to what a person could or should do if they were returned to their country of origin, but what they would do. New s 5J(3) is intended to clarify that any assessment of whether a person has a ***well-founded fear of persecution*** is to take into account not only what a person would do to avoid a real chance of persecution upon returning to a receiving country, but also what reasonable steps they could objectively take to avoid the persecution. As new s 5J(3) imports a consideration of "reasonable steps" and is qualified by new paragraphs 5J(3)(a) and 5J(3)(b), the Government considers that new s 5J(3) is not inconsistent with the principles enunciated by the majority in the High Court's finding in *S395*.'

s. 47E(d)

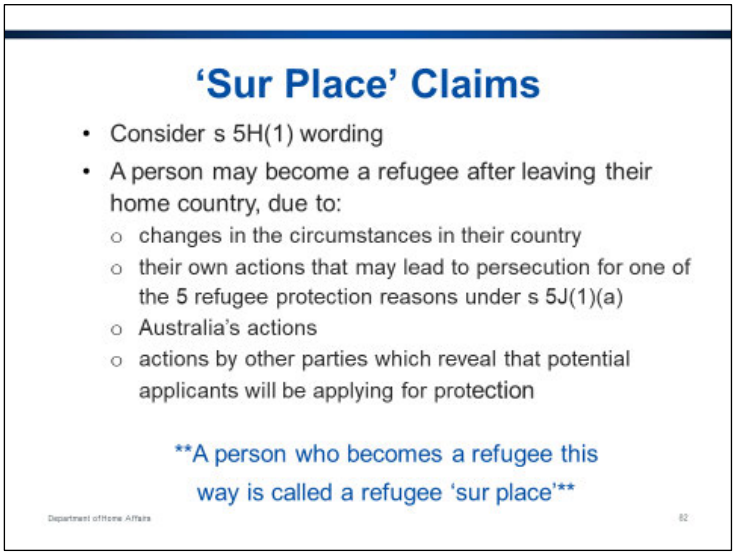
Activity 4 – Exceptions to well-founded fear

Aim:	The aim of this activity is to consider how to deal with cases where there are potential issues involving exceptions to well-founded fear.
Method:	Read the below scenarios. Discuss the scenarios in your table group. Record your response to each question in the space provided.

s. 47E(d)

(b)

Sur place refugee claims and s 5J(6) bad faith actions



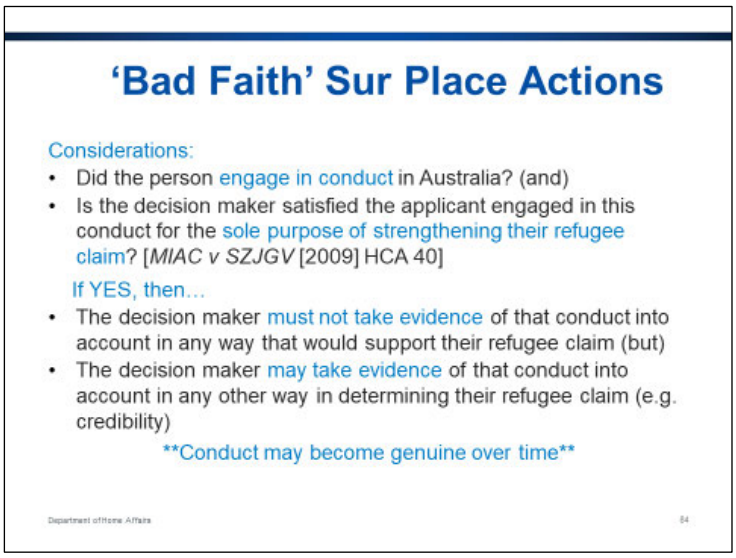
A person may become a refugee after leaving their home country, due to:

- changes in the circumstances in their country - e.g. PRC Tiananmen Square protests 1989;
- their own actions that may lead to persecution for a s 5J(1)(a) reason – e.g. protesting at an embassy;
- Australia's actions - e.g. s. 47E(d) [redacted]
- actions by other parties which reveal that potential applicants will be applying for protection - e.g. media footage.

A person who becomes a refugee this way is called a refugee "sur place".

Sur place claims are consistent with the claim to be a refugee under s 5H of the Act, since the person is outside their country and claiming that owing to a well-founded fear of persecution they are unable or unwilling to return to that country. There is nothing in the definition of refugee that requires a person to have left their country owing to a fear of persecution and remaining outside of it because of that same fear. Therefore, the claims are addressed the same as persons claiming to have experienced persecution within their country.

Bad faith sur place actions



Whilst sur place claims are consistent with the claim to be a refugee under s 5H, there are cases where applicants for refugee status intentionally engage in conduct to strengthen their refugee claims. In such cases, decision makers should consider if s 5J(6) of the Act applies to that case.

Section 5J(6) states that conduct:

- by the applicant
- engaged in Australia; and
- which the Minister is satisfied was for the purpose of strengthening refugee claims

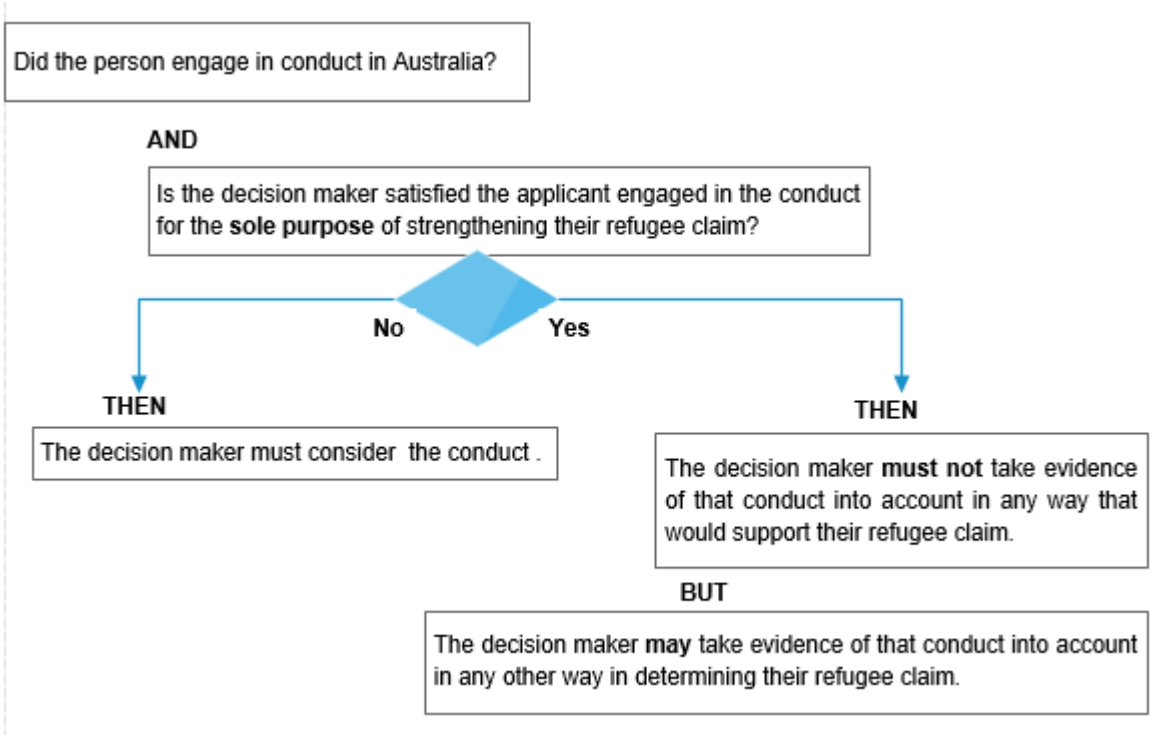
must be disregarded in assessing the claims.

As s 5J(6) was intended to reflect the repealed s 91R(3) by incorporating almost identical wording, the department's position is that the case law surrounding s 91R(3) is also applicable to s 5J(6).

s. 47E(d)

How significant is the purpose of the action to be? The courts have determined that the **sole purpose** of the conduct has to be for strengthening the claim to be a refugee (*Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40).

Summary of s 5J(6) of the Act:



Conduct

Decision makers should keep in mind that the effect of s 5J(6) of the Act is only to exclude the relevant conduct from the evaluation of whether a well-founded fear exists. As Federal Magistrate Driver expressed (in relation to s 91R(3)) in *SZIBK v Minister for Immigration and Anor,*[8] s 5J(6) relates to established conduct, not asserted conduct that is disbelieved. If a claim is rejected or accepted on a basis other than consideration of s 5J(6)), decision makers need not address whether or not conduct falls within s 5J(6). Remembering that s 5J(6) only refers to conduct engaged in while the person is in Australia.

However, conduct that was engaged in with the initial purpose of strengthening a claim may become genuine over time, such that s 5J(6) will not apply.[9] The term 'engaged in' can be construed as meaning 'carried on' rather than 'commenced'. For example, a person may commence engaging in religious practice in Australia to support their protection claim, but over time may become a genuine follower of the religion

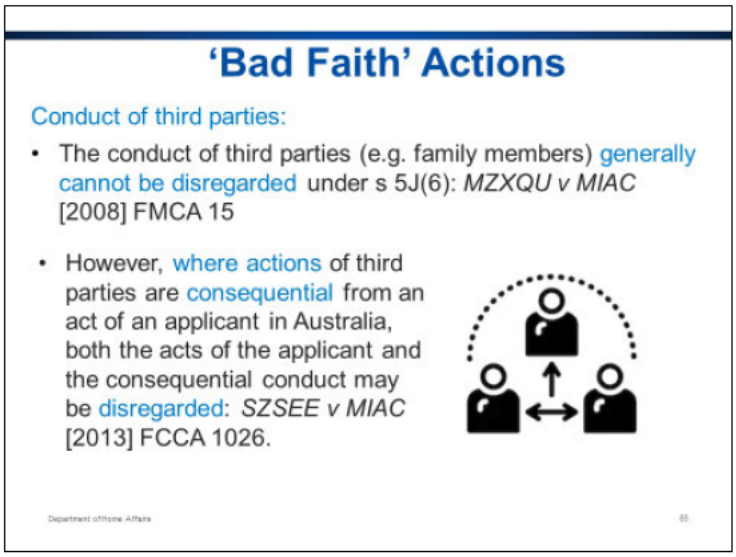
[8] [2006] FMCA 1167 at [9]. Note that an appeal to the Federal Court of Australia in this case was dismissed.

[9] See *SZGYT v Minister for Immigration and Citizenship* [2009] FCA 705

and carry on the conduct for a different reason. Conduct in this context is not limited to that occurring after the applicant makes a PV application.

Note: The court has closely scrutinised findings that certain conduct was engaged in to strengthen a claim for protection if the conduct occurred prior to the applicant applying for a PV. For example, in *SZRSE v Minister for Immigration and Citizenship* [2013] FCA 213 the Federal Court questioned the Tribunal's reasoning in finding that the applicant contrived church attendances to support a claim for a PV years later. It was ultimately held that the finding was within jurisdiction and was not irrational.

Section 5J(6) - Conduct by third parties



It should be noted that, for conduct in Australia to be relevant for the purposes of s 5J(6), that conduct must be engaged in by the applicant themselves and not a third person such as a family member. In *SZNCT & SZNCU v Minister for Immigration & Anor* [2009] FMCA 233 it was held that the RRT had erred in considering the conduct of the applicants' father in relation to s 91R(3). At [87] Federal Magistrate Nicholls said:

'…in light of the plain language of s.91R(3) it is the conduct of the applicant in Australia that engages that section, not the conduct of a third party.'

MZXQU v Minister for Immigration and Citizenship [2008] FMCA 15 - Conduct of third parties cannot be disregarded

Applicant was a 46 year old Burmese Muslim and Rohingya. He claimed that he faced persecution in Burma for reasons of his race, religion and his own and his family's known opposition to the government.

Applicant accepted that one of his purposes in engaging in the relevant conduct was to strengthen his claim to be a refugee which resulted in s 91R(3) being engaged [section 5J(6) is the new equivalent of s 91R(3)]. However, he argued that s 91R(3) authorised the RRT to disregard his conduct, but not authorise the RRT to disregard his wife's conduct.

RRT dealt with the applicant's sur place claim as follows:

The applicant claims to have communicated with his wife since arriving in Australia in July 2006, using email and other communication media that he admitted knowing were subject

to monitoring by the Burmese authorities. He has claimed that as a result of those contacts, his wife has been questioned by the authorities, who now know he is in Australia seeking a Protection Visa. It is unclear what basis he has for these beliefs about the Burmese authorities' alleged knowledge of his whereabouts and activities. However, the applicant made it abundantly clear to the Tribunal that he and his wife communicated en clair despite knowing that their communications could be monitored, and that their comments could disclose the applicant's whereabouts and intentions.

In view of the Tribunal's finding that the applicant did not engage in political or other protest activities while in Burma and that he was not subjected to persecution for any Convention reason (now referred to as s 5J(1)(a) reasons) in Burma, the Tribunal is satisfied for the purposes of subsection 91R(3) of the Act that the conduct the applicant has engaged in since his arrival in Australia has been engaged in solely for the purpose of strengthening his claim to be a refugee. Accordingly, the Tribunal disregards such conduct in accordance with s 91R(3) of the Migration Act 1958.

However, the applicant's actual claims in this regard were somewhat different. The applicant said in a statutory declaration made on 30 October 2006 that:

[3] When my wife went to the government Post Office in order to register documents to send to me in Australia, the letter was opened and she was interviewed about why she was sending these documents to me. The authorities took the letter and its contents to another room, where my wife believes they may have copied them. She became very afraid because of the questions they asked her.

[4] Recently my wife sent to me by email the document that gave me notice of suspension from work in December 1988 with the Myanmar Broadcasting and Television Service and she also sent the same document to an address in Malaysia, where I was for a few days before I came to Australia. In Myanmar all emails are monitored by the government, so by now the authorities will realise that I am in Australia and am making an application for protection. She did this at my request, but it has made both me and her worried about the family's safety because it has revealed to the government where I am.

FMC Held: Section 91R(3)(b) only expressly authorises the Tribunal to disregard the conduct in Australia of the person claiming refugee status. That provision does not authorise the Tribunal to disregard the conduct of any other person and, more particularly, the conduct of another person who is not in Australia.

The conduct of the applicant's wife in Burma stood alone.

The RRT in this case was not entitled to disregard the conduct of the applicant's wife in Burma in sending a particular letter and email to the applicant. By doing so, the RRT mistakenly failed to consider an aspect of the applicant's claims, namely, that he was at risk because the authorities in Burma were aware that he had made a claim for protection in Australia. This is a jurisdictional error that requires RRT's decision to be set aside.

In contrast, in *SZSEE v Minister for Immigration and Citizenship* [2013] FCCA 1026 the court considered that where actions of third parties is consequential from an act of an applicant in Australia, both the acts of the applicant and the consequential conduct may be disregarded.

Note: Section 5J(6) only applies to the criterion in s 36(2)(a) of the Act – that the person is a refugee. The consequences of any conduct which has been disregarded because of s 5J(6) also needs to be considered under s 36(2)(aa) – that is whether it results in a real risk of significant harm.

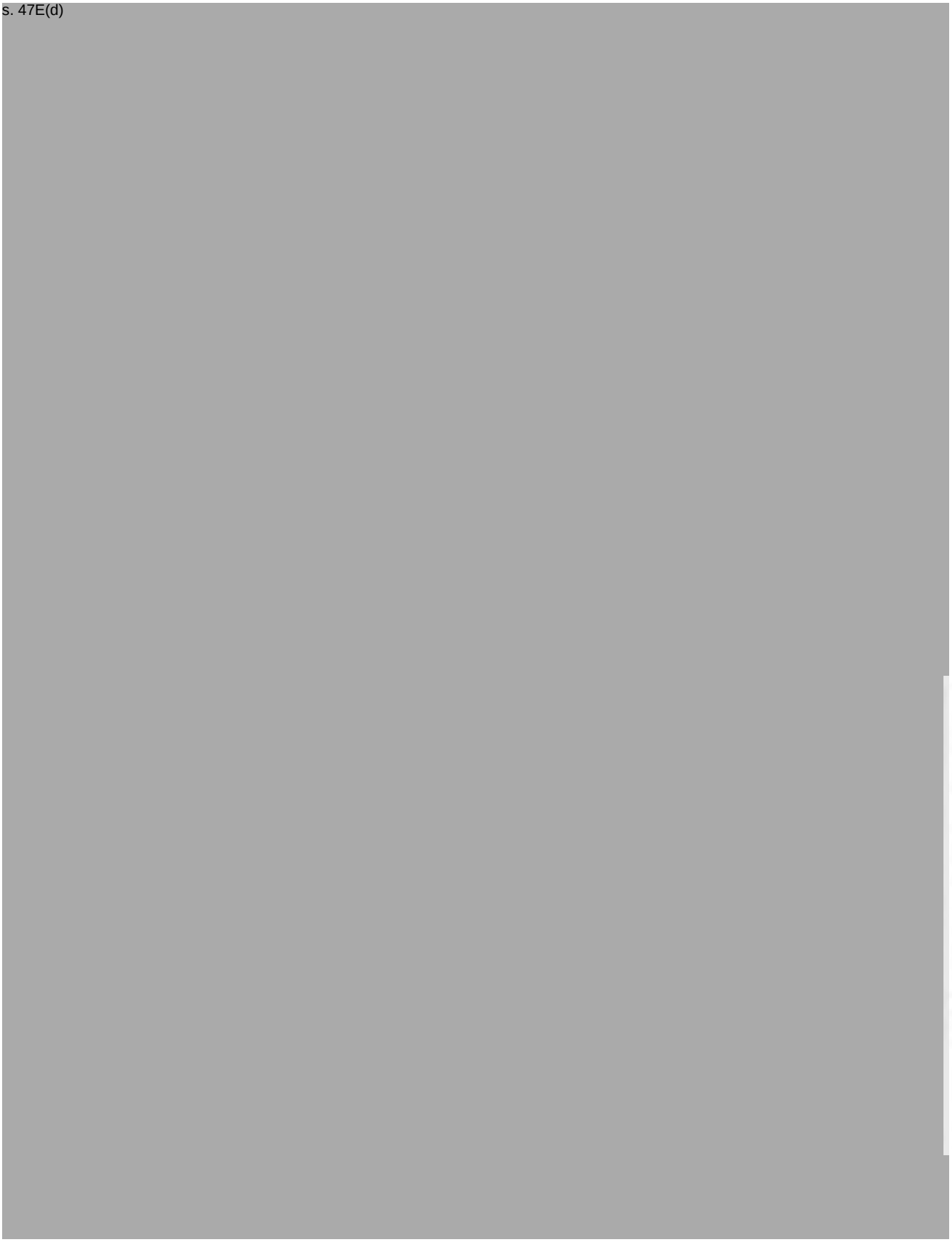
Activity 5 – Well- founded fear under section 5J

Aim:	The aim of this activity is to consider whether an applicant has a well-founded fear of persecution under the requirements under s 5J. It aims to consolidate your understanding of the topics covered in the module so far.
Method:	Read the scenarios and discuss the questions within your table group. Record your answers in the space provided. Refer to relevant legislation.

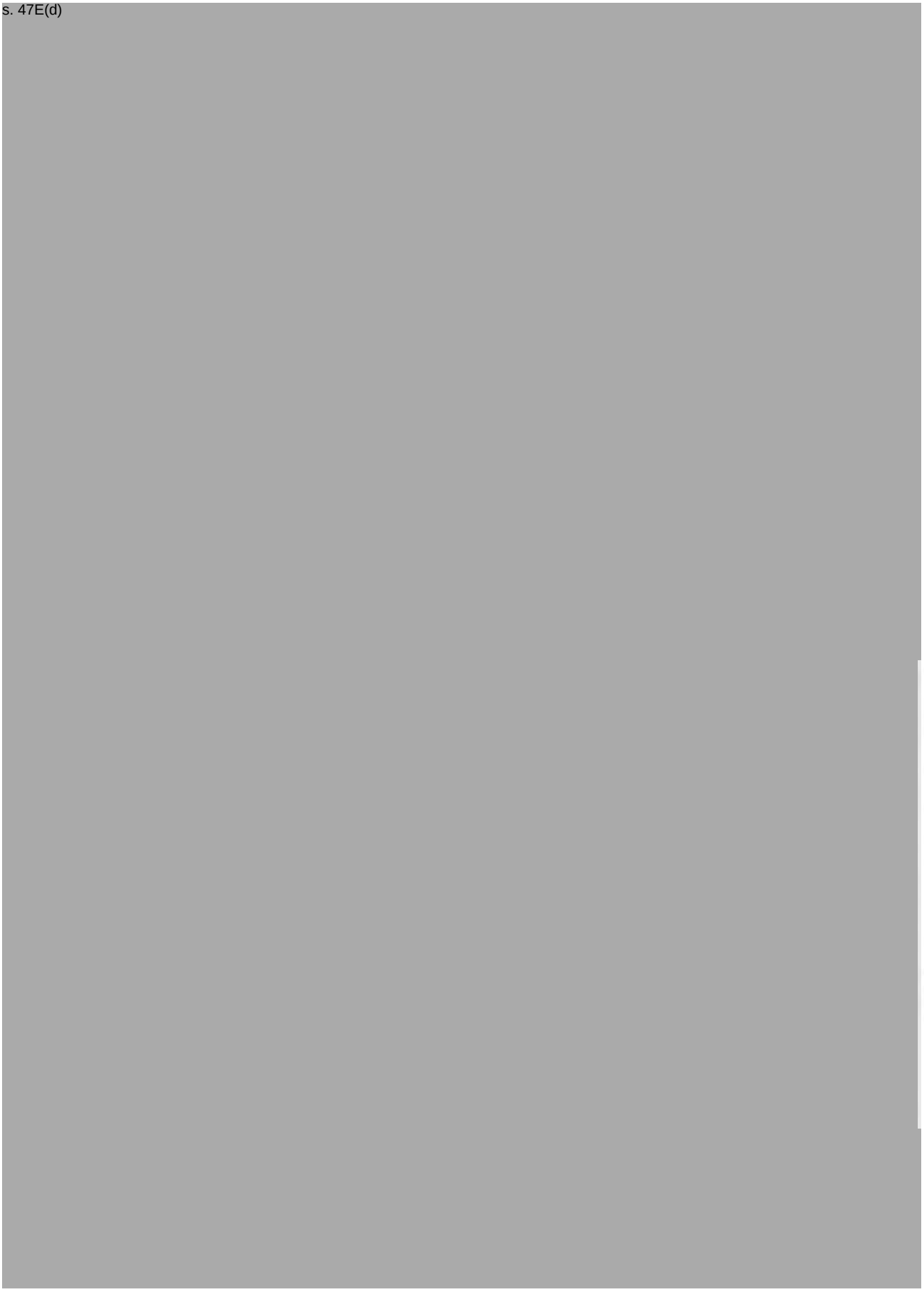
s. 47E(d)

[redacted]

s. 47E(d)



s. 47E(d)



Step 7
Complementary
Protection Assessment

Step 7: Complementary Protection Assessment

Complementary protection' refers to the legal mechanism for providing protection to a person if they do not fall within the definition of a refugee but their circumstances nonetheless trigger Australia's obligations not to return (non-refoulement obligations) under other human rights conventions to which Australia is a party. This is additional, or complementary, to the protection given by Australia to refugees.

Non-refoulement obligations

A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where he or she will be at risk of a specific type of harm. Australia accepts that it has non-refoulement

obligations in addition to those under Article 33 of the Refugees Convention under the following international human rights treaties:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment **(CAT) – Article 3** provides 'no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture [defined in Article 1]'
- International Covenant on Civil and Political Rights **(ICCPR)** – Non-refoulement obligations are implied in respect of the fundamental rights contained in **Article 6** ('every human being has a right to life') and **Article 7** ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'). Non-refoulement obligations also arise under the **Second Optional Protocol** in relation to persons who will have the death penalty carried out on them.

Australia became a party to the ICCPR in 1980, to its Second Optional Protocol in 1990 and to the CAT in 1989.

The Act, as amended by the *Migration Amendment (Complementary Protection) Act 2011*, enables consideration of all claims that may engage Australia's non-refoulement obligations, rather than those solely related to refugee status, to be assessed under a single visa application process. The Act reflects Australia's international obligations by providing criteria which assist decision makers to establish if non-refoulement obligations are engaged.

CP Claims - Examples

Example CP Claims

Potential (**not necessarily successful**) CP claims may include:

- Where claims have no nexus to refugee protection reasons under s 5J(1)(a) to the harm feared, including where a group does not constitute a particular social group
- Where the claimed harm does not meet the threshold for 'serious harm' and therefore does not constitute 'persecution' under the Act (although unlikely to meet 'significant harm' under CP)

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Example CP Claims cont'd

- Where the claimed harm is a fear of prosecution rather than persecution, that is, the fear of harm arises from a law of general application, e.g. conscientious objector claims
- Where the fear of harm involves, for example, personal vendettas, criminality, gangs, land seizures, neighbourhood/family disputes, blood feuds, honour killings, domestic violence, forced marriage, forced abortion/sterilisation, corporal punishment, imprisonment, socio-economic claims, disciplinary action, cultural practices or medical claims.

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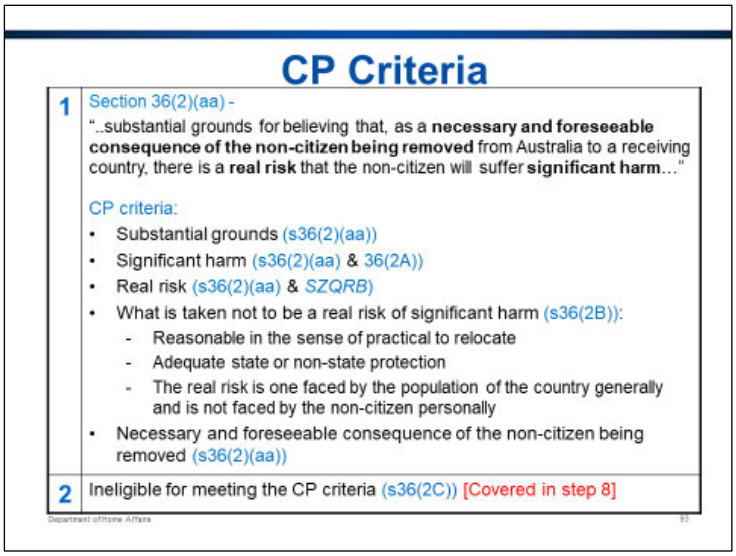
CP Criteria



Section 36(2)(aa) of the Act sets out the criterion for the grant of a protection visa on complementary protection grounds. The criterion is that the decision maker is satisfied that the applicant is a non-citizen in Australia in respect of whom Australia has protection obligations because:

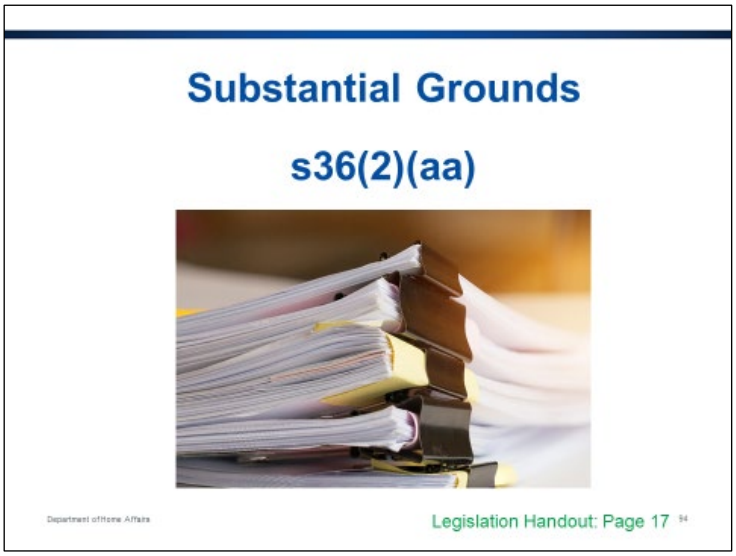
there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

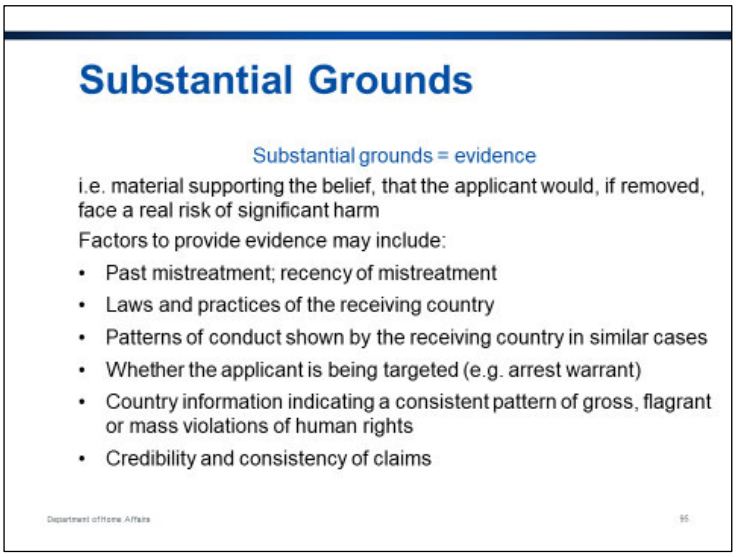
To establish whether the applicant meets this criterion, it is necessary to consider the following:

- Which is the receiving country? (s5(1))
- Would the feared harm constitute 'significant harm'? (s36(2A))
- Are there substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to a receiving country, there is a real risk the non-citizen will suffer the harm? (s36(2)(aa))
- Would it be reasonable for the non-citizen to relocate to an area where there would not be a real risk? (s36(2B)(a))
- Could the non-citizen obtain protection from an authority of the country such that there would not be a real risk of harm? (s36(2B)(b))
- Is the risk faced by the population of the country generally, rather than faced by the non-citizen personally? (s36(2B)(c))
- If the criterion is found to be met, would any of the ineligibility provisions in s36(2C) apply?

There is no legal requirement to consider these issues in any particular order, and there is no need to consider all of the issues once it becomes apparent that the applicant has not met a necessary criterion (for example, if the decision maker finds that the claimed harm does not amount to 'significant harm').

Substantial grounds





Under s36(2)(aa) of the Act, the risk threshold for assessing whether an applicant engages Australia's protection obligations on complementary protection grounds is whether there are:

substantial grounds for believing that, as a necessary and foreseeable consequence of their removal, there is a real risk that a non-citizen will suffer significant harm if returned to the receiving country.

This risk threshold intends to both capture and allow assessment of all potential circumstances and situations which may engage Australia's non-refoulement obligations under the ICCPR and the CAT. The risk threshold in s36(2)(aa) draws on both the 'substantial grounds for believing' test under Article 3 of CAT and the 'real risk of harm as a necessary and foreseeable consequence of removal' test that has been developed in relation to the implied non-refoulement obligation arising under the ICCPR.

The United Nations Committee against Torture (UNCAT) has repeatedly interpreted 'substantial grounds' as requiring a 'foreseeable, real and personal risk'. The UNCAT has stated that the risk must go beyond mere theory or suspicion, but does not need to meet a further test of being highly probable.

The United Nations Human Rights Committee (UNHRC) has stated that a non-refoulement obligation will be engaged under the ICCPR where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of that treaty. The UNHRC has also stated

the test as requiring 'substantial grounds for believing that, as a necessary and foreseeable consequence of…removal…there is a real risk that the person would be subjected to treatment prohibited in Articles 6 and 7.' The UNHRC has consistently emphasised the need for the risk to be 'real and personal' to the individual in order to engage a non-refoulement obligation under the ICCPR.

For the complementary protection criterion to be met, a decision maker must form a belief that removal of the applicant to the receiving country will expose the applicant to a real risk of significant harm. The term 'substantial grounds for believing' refers to the information or evidence required to support a belief that an applicant would face a real risk of significant harm and forms part of the overall objective approach to be used in assessing the concept of 'real risk'.

Factors relevant to determining whether there are substantial grounds for believing an applicant would be at a real risk (as a necessary and foreseeable consequence of removal) of suffering significant harm may include, for example:

- whether there is any evidence of past significant harm or past activity which may give rise to such harm, including activity in Australia or third countries;
- whether the receiving country has indicated any intention to target the individual (for example, issuing arrest warrants);
- the laws and practices of the receiving country; and
- the pattern of conduct shown by the receiving country in similar cases.

Significant Harm

When considering whether an applicant meets the complementary protection criterion, decision makers should first consider whether the applicant has claimed that they will suffer one of the five types of significant harm listed in the legislation.

'Significant harm' is defined in s5(1) of the Act to mean harm of a kind mentioned in s36(2A) of the Act. Section 36(2A) of the Act provides that a non-citizen will suffer 'significant harm' if:

- they will be arbitrarily deprived of their life;
- the death penalty will be carried out on them;
- they will be subjected to torture;
- they will be subjected to cruel or inhuman treatment or punishment; or
- they will be subjected to degrading treatment or punishment.

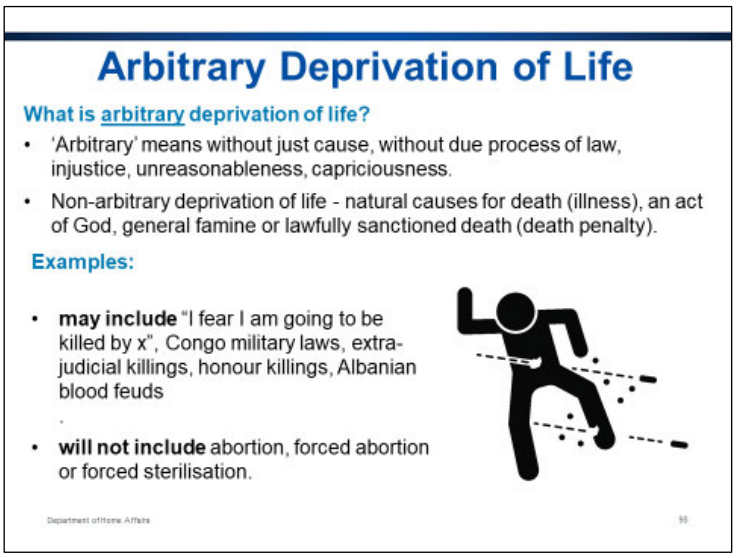
This is an exhaustive list of relevant harm. The terms 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are defined in s5(1) of the Act.

These types of significant harm are those in relation to which a non-refoulement obligation may be owed to a non-citizen in Australia and are based on the General Comments and views of the UNHRC and the UNCAT.

This list of significant harm must be read with the test in s36(2)(aa) of the Act, which sets out the risk threshold that must be satisfied to give rise to a protection obligation. In particular:

- there must be substantial grounds for believing that as a necessary and foreseeable consequence of the applicant's removal, there is a real risk of significant harm; and
- the real risk of significant harm must be personal to the applicant (as opposed to situations where the population in general may be at risk, see s36(2B)(c)).

Arbitary Deprivation of Life

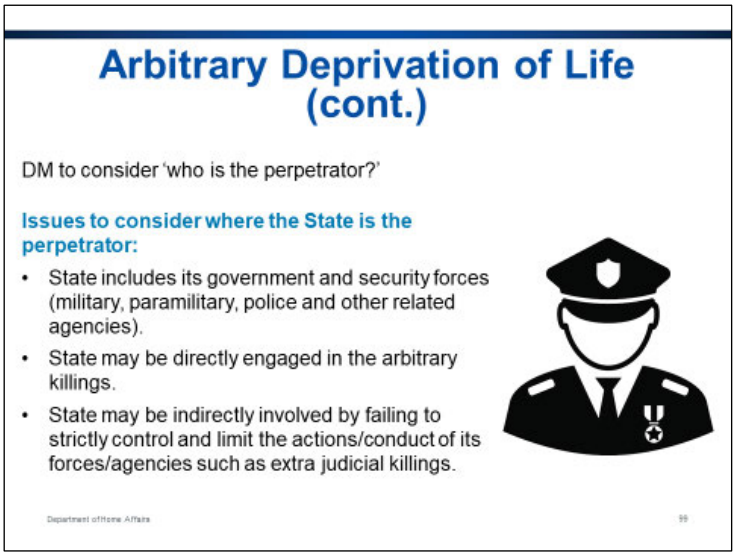


Arbitrary deprivation of life is not defined in the Act. The term 'arbitrary deprivation of life' contains elements of unlawfulness and injustice, as well as capriciousness, lack of predictability, unreasonableness, or a lack of proportionality. The concept of 'arbitrary' is broader than 'unlawful' and a killing that is lawful may still be arbitrary. Deprivation of life has also been understood as arbitrary where there is no due process of law.

Intention can be a relevant indicator of arbitrary deprivation of life, although it is not a necessary element.

Arbitrary deprivation of life may result where a non-citizen is returned to a country in which they are not adequately protected against arbitrary killings. This may be the result of a law that allows arbitrary killing, or where there is a lack of law or law enforcement to prevent and punish such killings.

Killing by the State



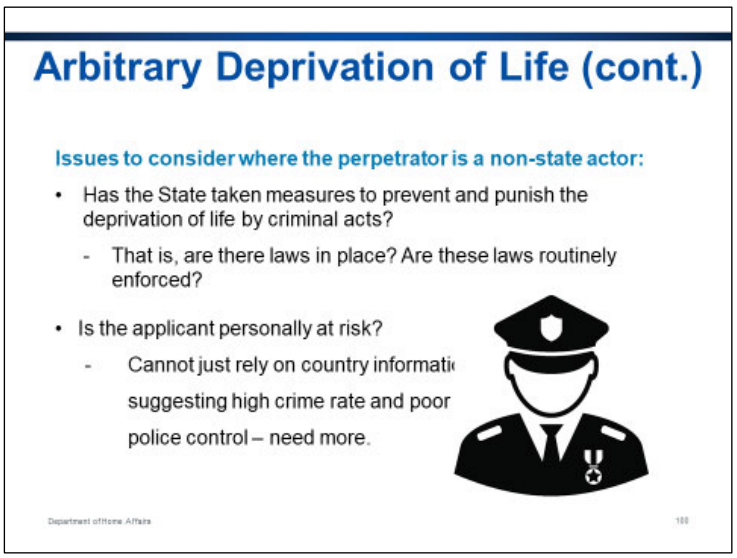
Situations of arbitrary deprivation of life can arise where the receiving State's own security forces including military, paramilitary and police forces engage in arbitrary killings, particularly where the State does not 'strictly control and limit' the circumstances in which a person may be deprived of their life by such authorities.

Extra-judicial killings (meaning without the permission of a court) involving excessive and unreasonable uses of force will constitute arbitrary deprivation of life. In contrast, the necessary use of force (that is, reasonable and proportionate in the circumstances) in connection with self defence, emergency, arrest or prevention of escape will not constitute arbitrary deprivation of life.

In the Suarez de Guerrero case, the UNHRC found that Colombia violated the right not to be arbitrarily deprived of life by failing to prevent their security forces from arbitrary killing. Colombia had passed a statutory decree in 1978 which justified killings "committed…by the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs." The Committee found a violation of the right not to be arbitrarily deprived of life after police murdered seven people and were subsequently found innocent by courts on the basis of the 1978 statutory decree. In particular, the Committee considered that the killings were intentional, without warning and disproportionate to the requirements of law enforcement.

However, in order to establish a non-refoulement obligation in relation to a risk of arbitrary deprivation of life by state actors, it would be necessary for an individual to demonstrate that there are substantial grounds for believing that they are personally at risk of being killed in an excessive and unreasonable use of force by State officers.

Non-state actors



The UNHRC has emphasised the importance for States to take measures to prevent and punish the deprivation of life by criminal acts. If no such laws exist, or there is evidence suggesting such laws are routinely not enforced, it may be arguable that a person will be arbitrarily deprived of life (if there is reason to believe that the person in their particular circumstances would be killed).

If there is a threat to an individual's right to life from a non-state actor, the decision maker must take into consideration whether the applicant is able to obtain protection from an authority in the relevant country, such that there is not a real risk that the applicant will suffer the harm - see Adequacy of protection by an authority.

It will not be sufficient for a person to point to a high crime rate and relatively poor police control in the receiving country to establish that there is a real risk that they will be arbitrarily deprived of life by a non-state actor (see also s36(2B)(c) of the Act). In order to establish that there is a real risk of being arbitrarily deprived of life by a non-state actor, decision makers should be satisfied that there are extremely widespread conditions of violence and systematic breakdown of law enforcement, coupled with a particular risk to the individual in question.

Abortion

The right to be protected from arbitrary deprivation of life does not affect laws relating to abortion. Australia has interpreted the right to life under Article 6 of the ICCPR as applying from birth.

Where cases involving claims of fear of forced abortion or sterilisation arise, it is necessary to consider them against the definitions of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment (see below).

Medical claims

If a non-citizen's life expectancy would be threatened by being removed due to a pre-existing medical condition (both terminal and non-terminal in nature), this would not amount to an arbitrary deprivation of life. Deprivation of life due to natural causes is not arbitrary.

Arbitrary Deprivation of Life Case Example

Case Example

Suarez

- In 1978 in Colombia, a government official was kidnapped
- Police ordered a raid of the house where they believed the official was being held prisoner
- The house was empty when the police arrived
- Police decided to wait in the house for the suspected kidnappers
- Police shot 7 people dead when they entered the house

Group Discussion:

- What might you ask based on these facts?
- What would make this 'arbitrary'?

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What might you ask based on these facts?

What would make this arbitrary?

Case Example (Cont.)

Additional facts:

- None of the victims had fired a shot and they were all killed at point-blank range
- Witness evidence: victims were given no opportunity to surrender
- Colombia had passed a statutory decree in 1978 which justified killings "committed…by the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs."
- Police were investigated and found innocent by the courts on the basis of this law.

Group Discussion:

- Is this sufficient to constitute arbitrary deprivation of life?

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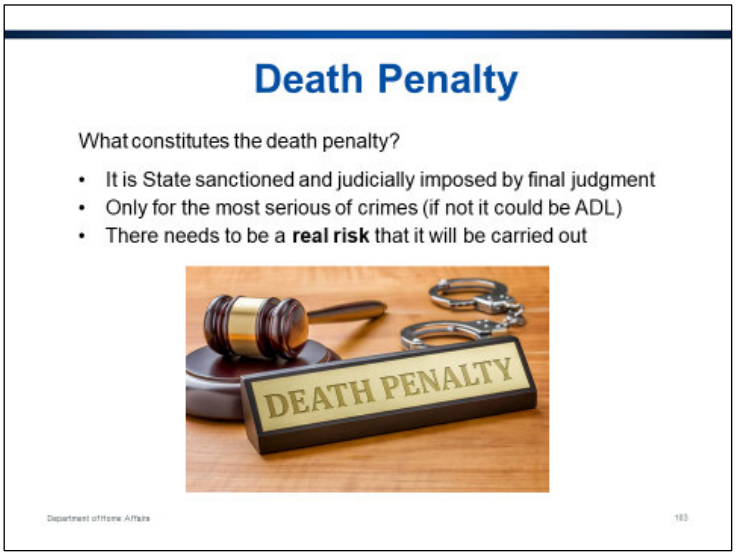
Is this sufficient to constitute arbitrary deprivation of life?

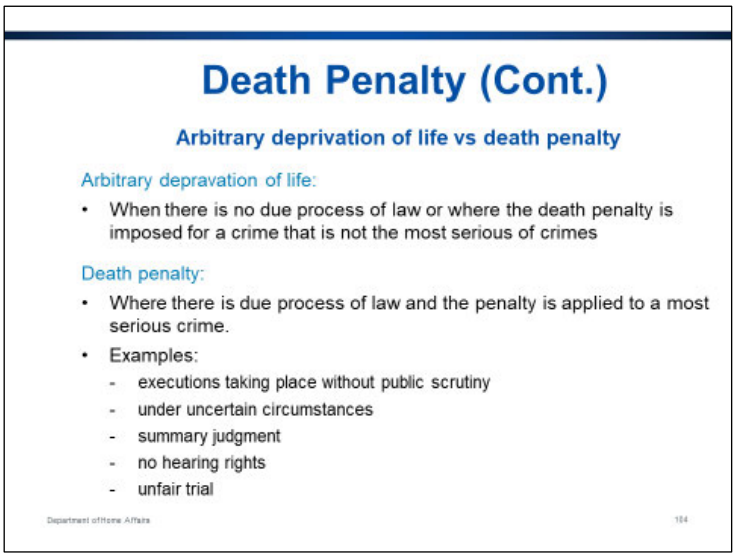
Death Penalty



Return to a situation where there is a real risk of the death penalty being carried out (even where imposed consistently with Article 6) engages Australia's non-refoulement obligations.

Article 6(2) of the ICCPR provides:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.



The effect of this Article is to limit the way countries that have not abolished the death penalty may carry out executions. The death penalty may be imposed only for the most serious crimes and in accordance with law in force at the time. Furthermore, it can only be carried out after the final decision of a competent court. If any of these conditions are not complied with, it is more appropriate to characterise the execution as an 'arbitrary deprivation of life', even if it is lawfully imposed.

Although the concept of 'most serious crimes' is not settled, it is clear that the death penalty cannot be properly imposed for property crimes, economic crimes, political crimes or crimes not involving the use of force. For example, a claim involving stoning to death for adultery should be characterised as an arbitrary deprivation of life, and not the death penalty, because adultery cannot be considered a 'most serious crime'.

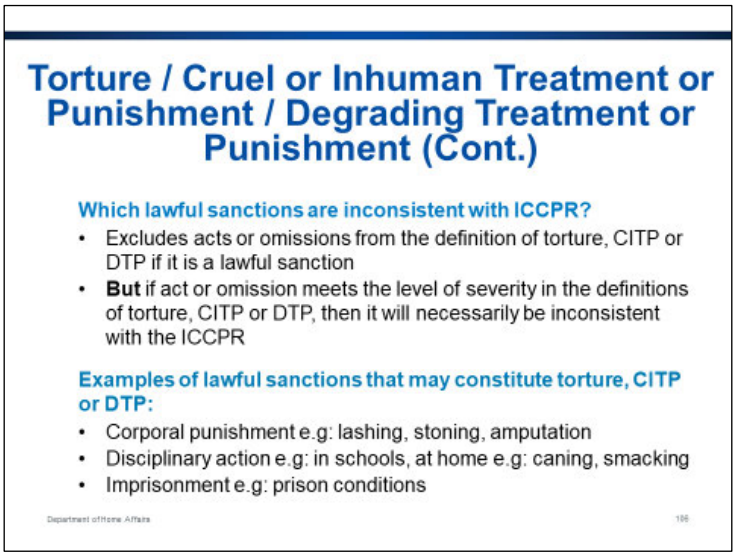
In order for there to be a real risk of the death penalty, it is not sufficient that the imposition of the death penalty be in theory a possibility: it is necessary for there to be a real risk that the death penalty will actually be carried out. This is because a non-refoulement obligation would not arise in situations, for example, where:

- The death penalty may be imposed if the person were convicted of a criminal offence but there is no real likelihood of their being tried (such as where no warrant for their arrest exists and/or there is information to the effect that the crime or the person is not of interest to the authorities) or
- The person may be convicted and a death sentence may be imposed but there is information to indicate that actual executions are rare or non-existent.

In such situations, there is no real risk of the application of death penalty, because there is no real risk that the death penalty will be carried out. The situations mentioned above are examples only and are not intended to be exhaustive.

The type of crime for which a person has been (or will be) sentenced to the death penalty is not relevant in determining whether they will suffer significant harm under s36(2A)(b) of the Act. However, this may be relevant in determining whether they are ineligible for a protection visa on the basis of s36(2C) or should be refused grant of a visa under s501.

Torture / Cruel or Inhuman Treatment or Punishment / Degrading Treatment or Punishment



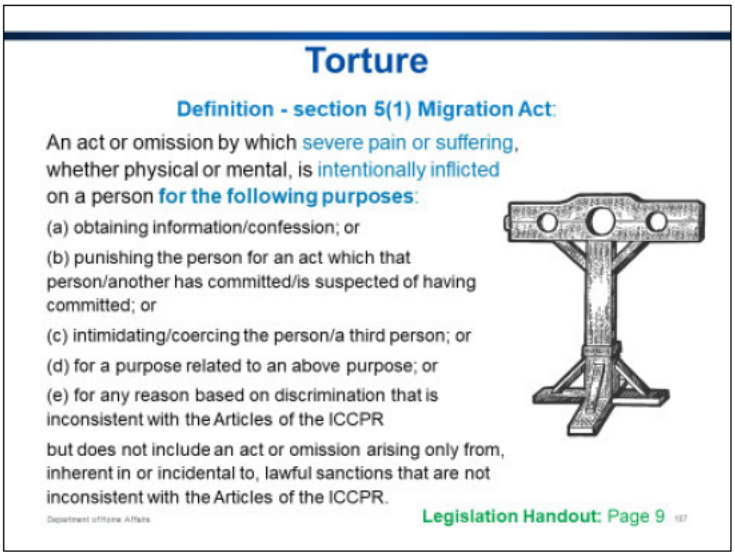
The terms 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are defined in s5(1) of the Act. The definitions derive from, and require decision makers to turn their minds to, international jurisprudence.

In practice, the categories of significant harm may overlap. It is possible that a claimed harm could meet more than one of these categories of significant harm.

The following table is designed to assist decision makers to compare and contrast each of the definitions. Decision makers should not use this table as a substitute for the definitions and should always refer to the definitions themselves in order to make a finding about whether a claimed harm amounts to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

Type of harm	An act or omission…	Inflicted for a specific purpose?	Does not include an act or omission…
Torture	By which **severe pain or suffering** (whether physical or mental) is intentionally inflicted on a person	Yes – For one of five defined purposes (for example, obtaining information, punishment, intimidation or coercion etc)	Arising only from, inherent in or incidental to, **lawful sanctions** that are not inconsistent with the ICCPR
Cruel or inhuman treatment or punishment	By which **severe pain or suffering** (whether physical or mental) is intentionally inflicted on a person *or* By which **pain or suffering** (whether physical or mental) is intentionally inflicted on a person so long as, in all the circumstances, it could *reasonably be regarded as cruel or inhuman in nature*	No	That is not inconsistent with Article 7 of the ICCPR *or* Arising only from, inherent in or incidental to, **lawful sanctions** that are not inconsistent with the ICCPR
Degrading treatment or punishment	That causes, and is intended to cause, **extreme humiliation** which is **unreasonable**	No	That is not inconsistent with Article 7 of the ICCPR *or* That causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR

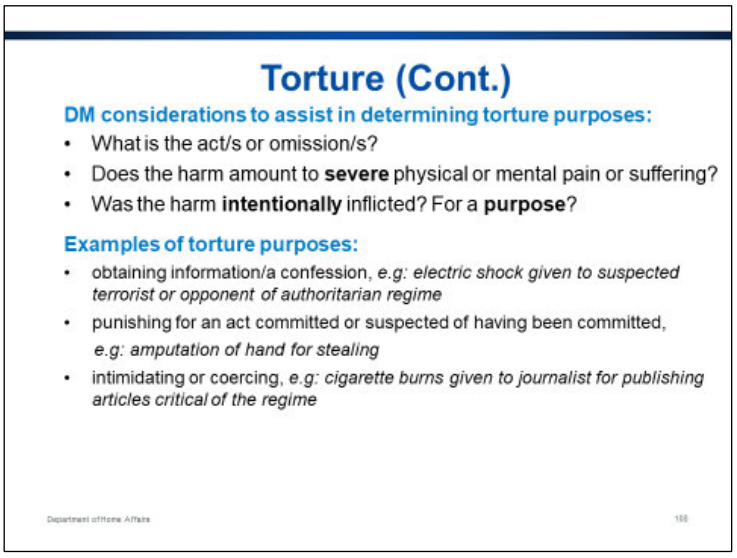
Torture



Torture is defined in s5(1) of the Act as:

- an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person;
- for the purpose of obtaining from the person or from a third person information or a confession;
- for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- for the purpose of intimidating or coercing the person or a third person;
- for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- for any reason based on discrimination that is inconsistent with the Articles of the Covenant [the ICCPR]

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant [the ICCPR].



Act or Omisson

Both an action and a failure to act could amount to torture.

Although expressed in the singular, the terms ‘act’ or ‘omission’ should also be interpreted to include multiple acts or omissions. If a series of acts or omissions is inflicted on a person that, each taken alone would not meet the definition of torture but together would, the definition should be taken to be satisfied.

Severe pain or suffering

For an act or omission to constitute torture, it must intentionally inflict severe pain or suffering (whether physical or mental) on a person.

The severity threshold for torture is very high. Determining whether physical or mental pain or suffering is sufficiently severe to constitute torture would involve careful consideration of all the circumstances, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.

Assessing the severity of pain or suffering includes a subjective element and so it is appropriate to consider the subjective feeling of the victim. Treatment that may not constitute torture when inflicted on some people, may reach the necessary level of severity if inflicted on a particularly vulnerable person, such as an elderly person or a child. For example, the exploitation of phobias or particular cultural taboos could conceivably amount to torture for one person where it may not for another person.

Whether or not the pain or suffering causes permanent damage to the victim's health may also be a relevant factor in determining whether the pain or suffering is sufficiently severe to amount to torture. It is not necessary for permanent damage to a person's health to result from ill-treatment in order for that treatment to constitute torture. However, if permanent damage does result, this will weigh strongly in favour of the pain or suffering satisfying the 'severity' threshold..

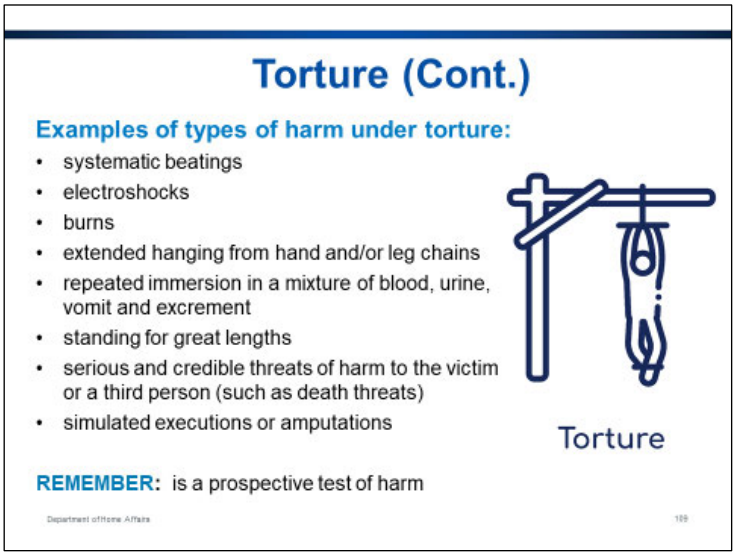
Inflicted for a purpose

According to the definition in s5(1), torture must be inflicted on a person:

- for the purpose of obtaining from the person or from a third person information or a confession;
- for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- for the purpose of intimidating or coercing the person or a third person;
- for a purpose related to a purpose mentioned in paragraph (a), (b) or (c) (see below); or
- for any reason based on discrimination that is inconsistent with the Articles of the Covenant [the ICCPR] (see below).

If severe pain or suffering is inflicted on a person but is not inflicted for one of the above purposes, that ill-treatment may fall within the definition of cruel or inhuman treatment or punishment.

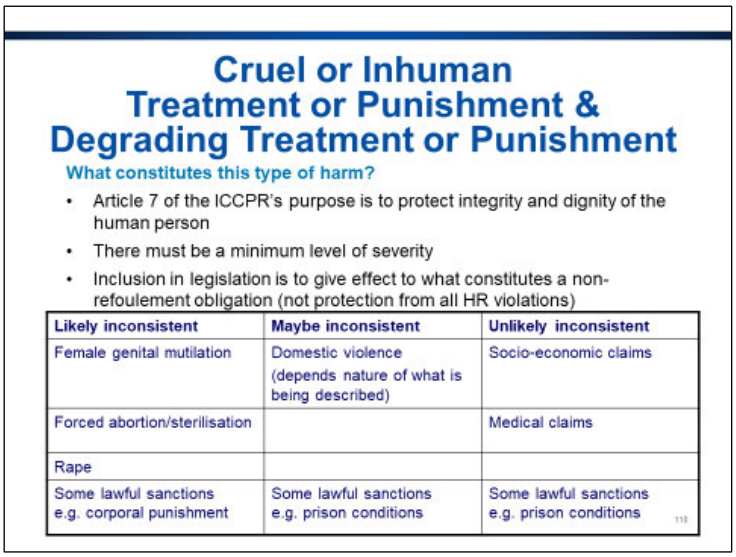
Examples of torture

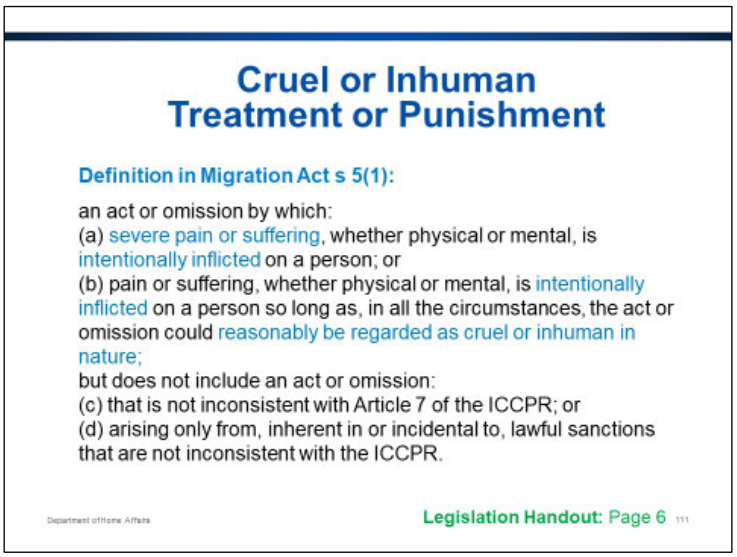


Neither the ICCPR nor the CAT provides a prescriptive list of examples of treatment that constitute torture. Most individual complaints in which the UNHRC has identified a breach of the prohibition of torture under Article 7 of the ICCPR relate to the former military dictatorship in Uruguay. According to the facts found by the UNHRC, the victims had been subjected to a variety of brutal interrogation techniques, usually during an initial period of incommunicado detention. These included systematic beatings; electroshocks to fingers, eyelids, nose and genitals when tied naked to a metal bedframe; burns with cigarettes; extended hanging from hand and/or leg chains; repeated immersion in a mixture of blood, urine, vomit and excrement; standing naked and handcuffed for great lengths; and simulated executions or amputations.

The UNHRC also found security forces in Zaire (Congo) had subjected victims to torture in the form of beatings, electric shocks, mock executions, deprivation of food and water, or thumb presses. Incommunicado detention in a secret location for more than three years was found to constitute torture.

Cruel or Inhuman Treatment or Punishment & Degrading Treatment or Punishment





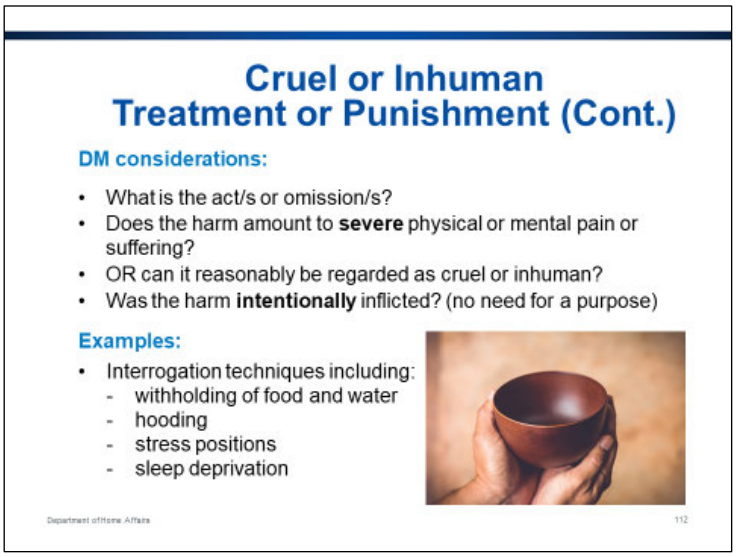
Cruel or inhuman treatment or punishment is defined in s5(1) of the Act as an act or omission by which:

- severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature,

but does not include an act or omission:

- that is not inconsistent with Article 7 of the Covenant [the ICCPR]; or
- arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant [the ICCPR].

Act or Omisson



The definition above provides that cruel or inhuman treatment or punishment may be brought about by an act or omission. This means that both an action and a failure to act could amount to cruel or inhuman treatment or punishment.

Although expressed in the singular, the terms 'act' or 'omission' should also be interpreted to include multiple acts or omissions. If a series of acts or omissions is inflicted on a person that, each taken alone would not meet the definition of cruel or inhuman treatment or punishment but together would, the definition should be taken to be satisfied.

Cruel or inhuman treatment or punishment can be inflicted by any person, regardless of whether or not the person is a public official or person acting in an official capacity. If the treatment or punishment would be committed by non-state actors, it will be necessary to consider the capacity of the State to provide adequate protection from that harm (see s36(2B)(b)).

Severe pain or suffering

An act or omission that intentionally inflicts severe pain or suffering, but is not inflicted for one of the purposes listed in the definition of torture, will amount to cruel or inhuman treatment or punishment provided it is inconsistent with Article 7 of the ICCPR.

Pain or suffering and 'reasonably regarded as cruel or inhuman in nature'

Alternatively, cruel or inhuman treatment or punishment may be an act or omission that intentionally inflicts pain or suffering (but which does not meet the threshold of severity to amount to torture) so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.

If, taking into account all relevant considerations, pain or suffering is intentionally inflicted by an act or omission that can be regarded as cruel or inhuman in nature, then that ill-treatment would constitute cruel or inhuman treatment or punishment, provided it is inconsistent with Article 7 of the ICCPR.

Decision makers should interpret this part of the definition by reference to the international jurisprudence on the meaning of cruel or inhuman treatment or punishment in the context of Article 7 of the ICCPR. For further guidance on this, see Is the act or omission inconsistent with Article 7 of the ICCPR.

The assessment of whether particular conduct or conditions amounts to cruel or inhuman treatment or punishment is subjective, in that it depends on the characteristics of the victim (such as sex, age, state of health). For example, the exploitation of phobias or particular cultural taboos could conceivably amount to cruel or inhuman treatment or punishment for one person where it may not for another person.

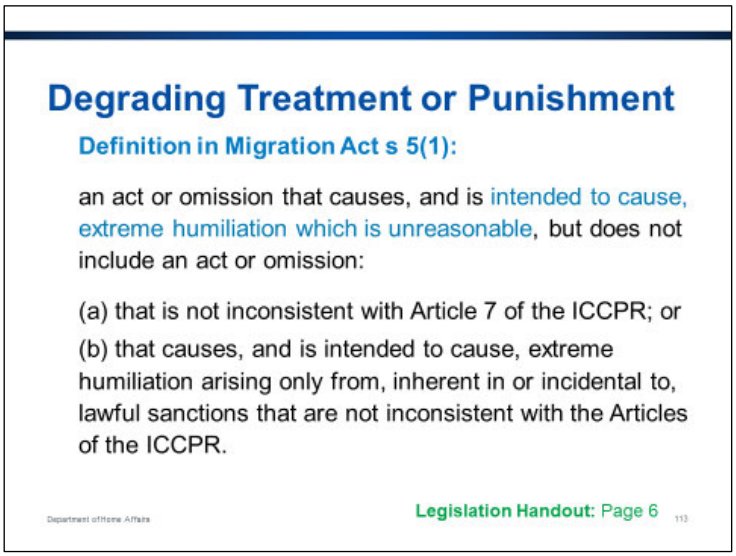
Even if decision makers are satisfied that an act or omission, in all the circumstances, could reasonably be regarded as cruel or inhuman in nature, they would also need to be satisfied that the act or omission would be inconsistent with Article 7 of the ICCPR in order to conclude that it meets the definition of cruel or inhuman treatment or punishment.

Inflicted for a purpose

To meet the definition of cruel or inhuman treatment or punishment, an act or omission must be intended to inflict either severe pain or suffering or some level of pain or suffering, depending on which limb of the definition the decision maker considers appropriate. An act or omission that is not intended to cause pain or suffering but inadvertently did so would not fall within the definition.

In certain circumstances it may be appropriate to infer an intention to inflict pain or suffering if it is evident that pain or suffering was or may be knowingly inflicted.

Degrading Treatment or Punishment



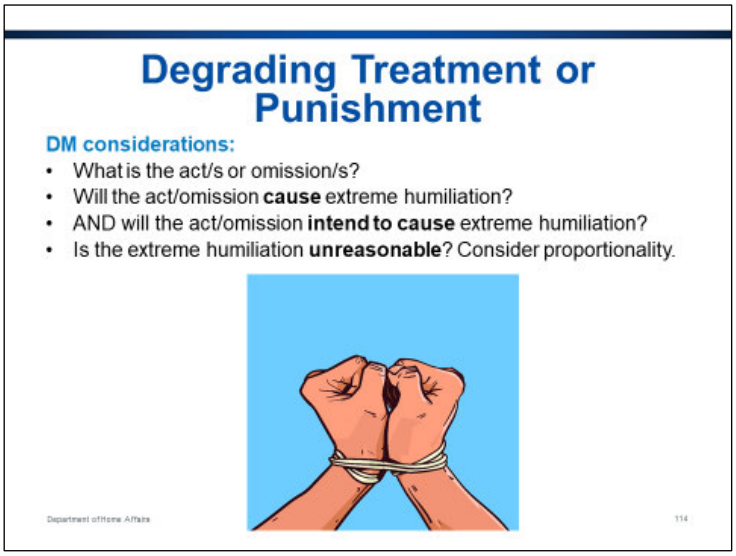
Degrading treatment or punishment is defined in s5(1) of the Act as:

an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- that is not inconsistent with Article 7 of the Covenant [the ICCPR]; or
- that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant [the ICCPR].

According to the definition in s5(1), for an act or omission to be 'degrading treatment or punishment', it must cause, and intend to cause, extreme humiliation, which is unreasonable. This definition is based on the jurisprudence of the UNHRC.

Act or Omisson



An action and a failure to act could amount to degrading treatment or punishment.

Although expressed in the singular, the terms 'act' or 'omission' should also be interpreted to include multiple acts or omissions. Therefore, if a series of acts is inflicted on a person that, each taken alone would not meet the definition of degrading treatment or punishment but together would, the definition should be taken to be satisfied.

Degrading treatment or punishment can be inflicted by any person, regardless of whether or not the person is a public official or person acting in an official capacity. If the treatment or punishment would be committed by non-state actors, it will be necessary to consider the capacity of the State to provide adequate protection from that harm (see s36(2B)(b)).

Will cause extreme humiliation

To meet the definition of degrading treatment or punishment, an act or omission must cause extreme humiliation. It is intended that the meaning of the term 'extreme humiliation' will be informed by international jurisprudence considering when treatment would constitute degrading treatment or punishment in breach of Article 7 of the ICCPR.

Treatment is degrading if it is such as to arouse in the person subjected to it feelings of fear, anguish and inferiority capable of humiliating and debasing the person and possibly breaking their physical or moral resistance. Treatment may also be said to be degrading if it grossly humiliates a person in front of others or drives the person to act against their will or conscience.

Whether the treatment or punishment is performed in public or not may be a relevant factor in determining whether it causes extreme humiliation, although the failure to publicise particular treatment or punishment will not prevent it from being characterised as degrading.

For example, the UNHRC has held that certain practices exercised for the purpose of humiliating prisoners and making them feel insecure constituted degrading treatment. These included repeated solitary confinement, subjection to cold and persistent relocation to a different cell.

A measure that does not involve physical ill-treatment but lowers a person in rank, position, reputation or character may also constitute degrading treatment but again provided it is of a minimum level of severity, thereby interfering with human dignity. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.

Intended to cause

To meet the definition of degrading treatment or punishment, an act or omission must be intended to cause extreme humiliation. An act or omission that is not intended to cause extreme humiliation but inadvertently did so would not fall within the definition.

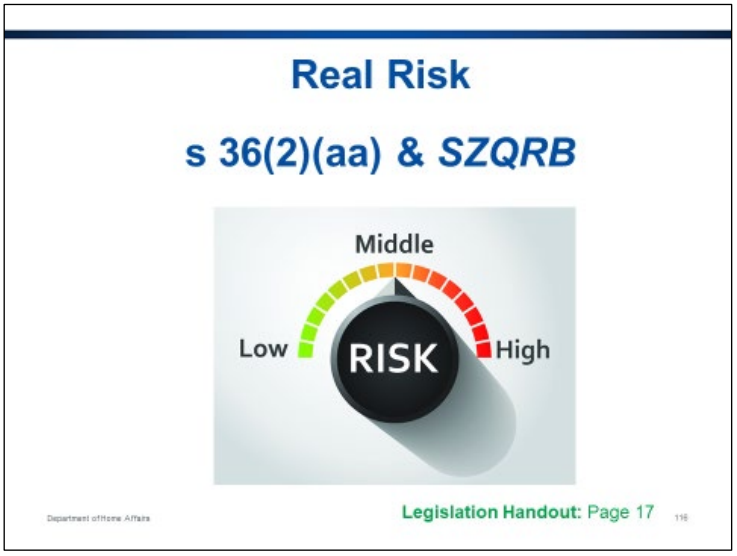
In certain circumstances it may be appropriate to infer an intention to inflict extreme humiliation where it is evident that humiliation was or may be knowingly inflicted.

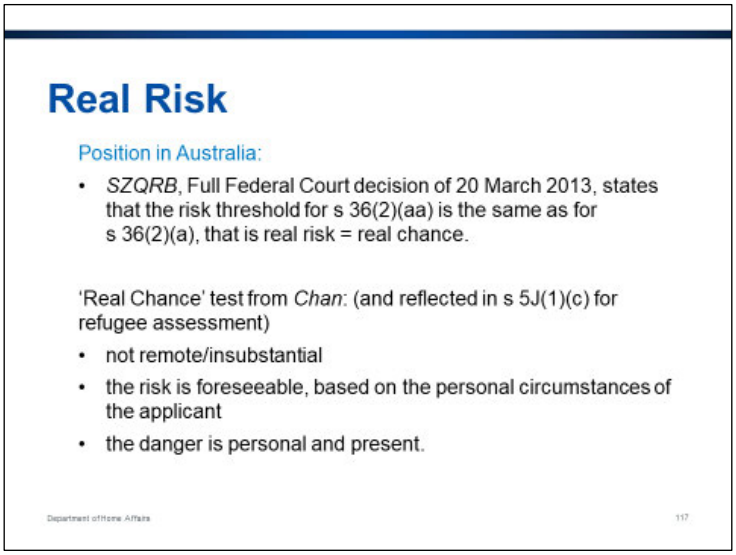
Unreasonable

In determining whether the treatment is unreasonable, the decision maker should apply the principle of proportionality in light of the specific circumstances of the case. Although the use of force may be justified or necessary in connection with an arrest or breaking up a violent demonstration, even the use of mild force (such as slapping) may constitute degrading treatment when this contradicts the principle of proportionality in light of the specific circumstances of the case.

Significant Harm Recap / Overview

Real Risk





One of the key elements in identifying whether an applicant warrants Australia's complementary protection is that the applicant will be personally at risk from suffering one of the forms of significant harm outlined in s 36(2A) of the Act.

A decision maker should consider whether there is evidence showing the risk to be foreseeable in the personal circumstances of the individual and that the level of danger is personal and present for the non-citizen.

The existence in the relevant State of a consistent pattern of gross, flagrant or mass violation of human rights is a relevant consideration. However, the existence of a consistent pattern of human rights violations does not of itself constitute sufficient grounds for determining that there is a real risk of significant harm upon return to that country. Additional grounds must be adduced to show that the individual is personally at risk.

Conversely, the absence of a pattern of gross human rights violations does not necessarily preclude an applicant from being at a real risk of suffering significant harm if returned.

Real risk' is determined objectively

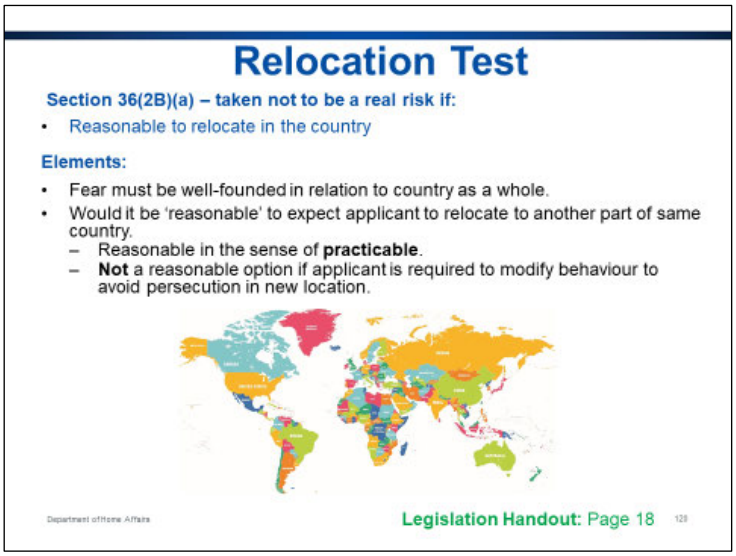
An assessment of whether there is a 'real risk' of significant harm to an applicant if removed to a receiving country, is an objective assessment based on the consideration of evidence (including claims), facts and country information. There is no need to consider whether the applicant has a subjective fear, unlike when considering an applicant's subjective fear of persecution under the Refugees Convention.

For example, the European Court of Human Rights found that Sweden had legitimately returned a claimant to Chile, even though he was suffering from post-traumatic stress disorder as a consequence of having been tortured there. Due to a change in government, there was no longer any objective basis for the claimant's fear of torture.

Notwithstanding that there is no need to make an independent finding as to the subjective fear of the applicant, it is necessary for the risk of harm to be personal to them. If evidence indicates that an applicant does not subjectively fear suffering significant harm - for example, they have repeatedly travelled to the country in question - this may demonstrate that the applicant is not personally at risk of such treatment.

What is not a real risk?

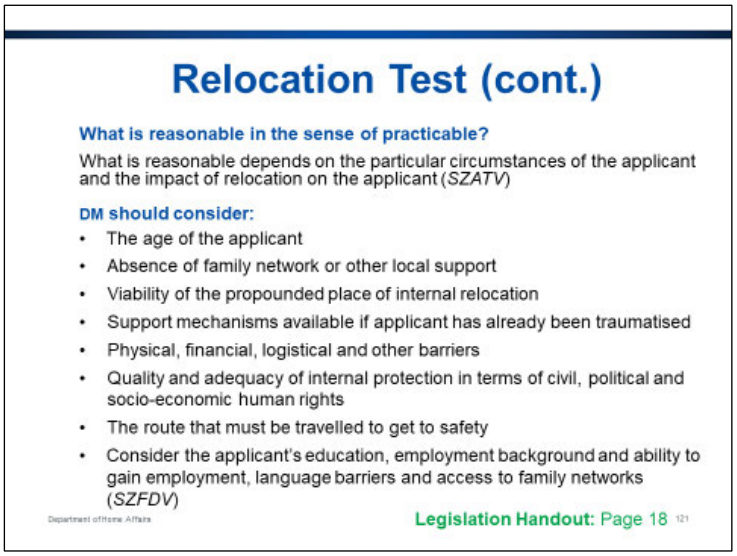
Relocation Test



Section 36(2B)(a) of the Act provides that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister or ministerial delegate is satisfied that it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm. For example, in determining that Australia's non refoulement obligations were not breached by the proposed removal of a person to Somalia, the UNCAT took into account (amongst other things) the fact that the person was able to return to a part of that country other than Mogadishu, where the feared harm was claimed to exist.

When interpreting s36(2B)(a), decision makers may draw guidance from the case law which had developed on the internal relocation principle as developed in the context of the Refugees Convention as s36(2B)(a) was intended to reflect that case law. This approach was endorsed in *MZYXS v MIAC* [2013] FCA.

The test for refugee assessments under s 5J(1)(c) is whether a person has a real chance of persecution relating to all areas of a receiving country. As part of this assessment, decision-makers are to consider whether access relocation area lawfully and safely. This test is significantly different to the test used for complementary protection assessments and the case law which developed in the Refugee Convention context prior to the introduction of s 5J(1)(c). Regardless of what finding the decision maker has made in relation to s 5J(1)(c), they must consider this issue for complementary protection afresh and by reference to the wording of s 36(2B)(a).



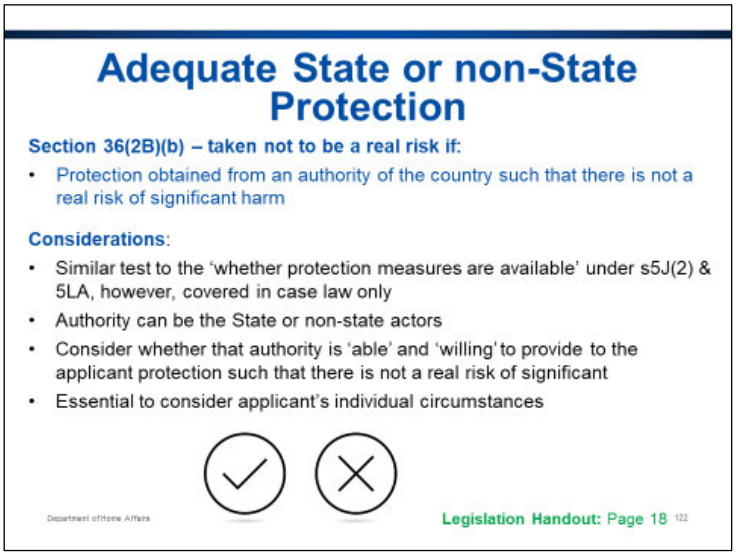
What is reasonable depends on the particular circumstances of the applicant's case. When approaching the issue of relocation, decision makers should address it in a practical and common-sense way.

When assessing what is reasonable, the joint judgment (Gummow, Hayne and Crennan JJ) in the High Court case of *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, held it means 'reasonable in the sense of practicable', but will also depend on the particular circumstances of the applicant and the impact of relocation on the applicant.

In *Randhawa v Minister of Immigration, Local Government and Ethnic Affairs* [1993] FCA 592, the Full Court of the Federal Court discussed the reasonableness test. The issue before the court was whether the applicant could reasonably be expected to relocate from the Punjab region to another region in India in which protection was available. Although the decision maker accepted the applicant could experience adverse treatment if he were returned to the Punjab, she went on to assess whether the applicant's fear was in relation to the whole of India, not simply the Punjab region. On the basis of independent country information, the decision maker found that the applicant's fear was only in relation to the Punjab region and the applicant could reasonably be expected to relocate to other parts of India where he would not face harm. This approach was upheld by the Federal Court and the Full Court of the Federal Court. The Full Court held that, in the context of refugee law, the practical realities of relocation must be carefully considered. The range of realities that may need to be considered extends beyond physical or financial barriers to the quality and adequacy of internal protection in terms of civil, political and socio-economic human rights. The court in *Randhawa* approved the following commentary in Hathaway J, The Law of Refugee Status (1991), on restriction on relocation:

> "It should be restricted in its application for persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, [protection should be granted]."

Adequacy of protection by an authority



Section 36(2B)(b) of the Act provides that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm. An authority can be the State, including its government and related forces or it can be a rebel or military force in power.

In considering complementary protection, decision makers must make an assessment of whether the level of protection offered by the receiving country reduces the risk of the significant harm to the non-citizen to something less than a real one.

When considering whether an applicant could obtain protection, decision makers should be aware that s36(2B)(b) requires protection to be obtained 'such that there is not a real risk that the non-citizen will suffer significant harm'. The fact that a receiving state has generally functioning laws and standard protections in place that are available to the general community is one element that may be taken into account in determining whether a person faces a real and personal risk of significant harm. Nevertheless, an individual may still face a real risk of significant harm even where a receiving state has a functional system of state protection in place.

In some cases, the decision maker will need to be satisfied that a receiving state would take specific measures to protect a person, if removed, for removal to be consistent with Australia's non-refoulement obligations under the ICCPR. As a matter of practice, to determine whether specific measures of protection provided by a receiving state are sufficient, decision makers should identify:

- the specific type of significant harm that the person in question would be at risk of if removed to the receiving state;
- the specific factors which create the real risk; and
- the measures that would be required to remove the real risk.

If the State does not provide protection, it may be necessary to see whether protection may be provided by another source. For example, in *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953, Sundberg J saw no difference between cases where adequate protection was provided by:

- government forces alone;
- a combination of government forces and friendly forces;
- forces from a neighbouring country or ally;

- mercenaries (alone or paid to assist government forces); or
- UN forces invited to assist government forces.

Depending on the type of significant harm that a person faces, it may be that the provision of specific measures of protection in a receiving state will be sufficient to remove the real risk of significant harm. However, there will be circumstances where the protection offered in a receiving state will not be sufficient in the individual's case to remove the real risk of significant harm. Even where there are general measures of state protection in place that would otherwise be considered 'reasonable' for the population at large, if there remains a 'real risk' of significant harm to the individual in question then Australia's non-refoulement obligations will be engaged.

Faced by the applicant personally

According to s36(2B)(c) of the Act, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the risk is not faced by the non-citizen personally but is (merely) faced by the population of the country generally. In other words, a person will not meet the criterion in s36(2)(aa) if they do not face a personal risk of suffering significant harm. This should be interpreted as meaning the particular individual must face a real risk in light of the individual's specific circumstances, although it is not necessary to show that an individual has been or would be 'singled out' or targeted.

General country information that, for instance, arbitrary killing or torture is prevalent in a particular country would be insufficient to engage a non-refoulement obligation for all people who may be returned to that particular country. Rather, what is required is an assessment of the level of risk to the individual, taking account of all relevant considerations.

Real Risk Case Example

Case Example

Kaba

Consider the following in the context of real risk:

(i.e. what is a real risk and what is not a real risk)

- Mother and daughter applicants, daughter is 15 y/o
- Guinea nationals claiming protection in Canada
- Claimed daughter will be subjected to female genital mutilation (FGM)
- Father arranged for FGM when daughter was 6 y/o but was prevented by the mother at that time
- Father continued to push for FGM so that daughter would be a 'true Muslim', father's family agrees, only mother opposed

Questions you might ask based on these facts?

- What is a real risk?
- What is **not** a real risk?

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What is a real risk?

What is not a real risk?

Case Example (cont.)

Accepted facts:

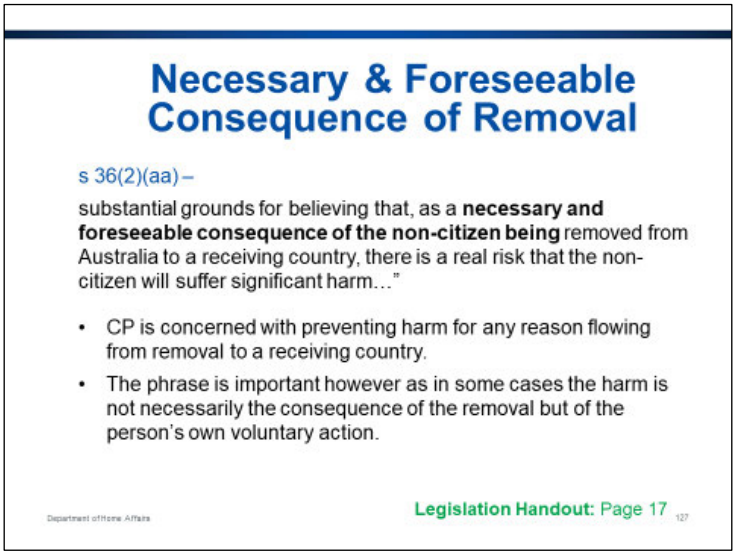
- FGM is a common and widespread practice
- FGM usually occurs in girls under 10
- Risk of FGM decreases with age
- UNICEF reports incidence of FGM having been carried out among women in Guinea aged 15-49 is 96%
- FGM is illegal but goes unpunished

Sufficiently personal?

Department of Home Affairs 125

Based on the accepted facts, is it sufficiently personal?

Necessary and foreseeable conseuqences of removal



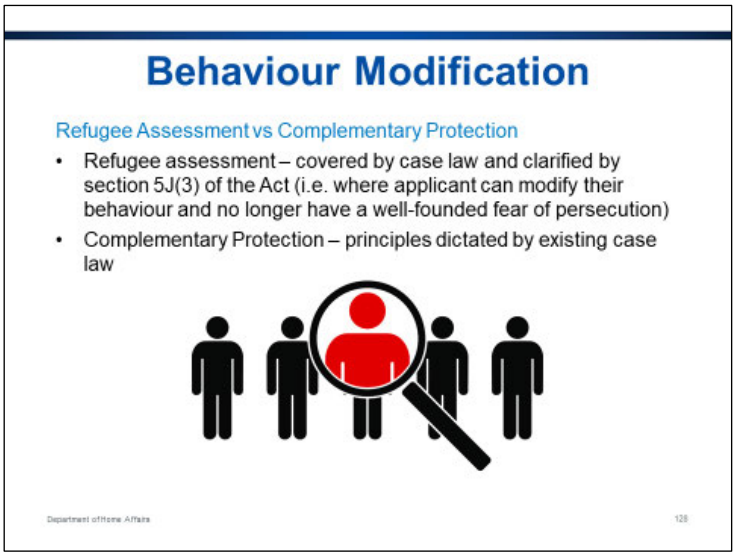
As in the context of making assessments under the Refugees Convention, the complementary protection assessment may be based on past events but is forward looking: the issue to be determined is whether events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, show that the applicant would be subjected to significant harm, if returned. In particular, the phrase 'necessary and foreseeable consequence' requires decision makers to be satisfied of a real as opposed to speculative causal link between the applicant's removal from Australia and the likelihood or possibility of their facing a 'real risk' of being subjected to significant harm.

Whether or not the applicant suffered significant harm in the past is a relevant consideration. However, the fact that an applicant has not suffered significant harm in the past does not preclude there being a real risk of suffering significant harm if returned. Conversely, past harm does not give rise to a presumption of future harm. If past events are raised as the basis of prospective mistreatment, it will be relevant whether significant time has elapsed since these events and whether there has been any change in country conditions that would alter their prejudicial nature.

There will not be a real risk of suffering significant harm if the harm has already taken place and, due to the nature of the harm, there is no prospect of it reoccurring. For example, applicants who have been forced to

undergo sterilisation will not be at a real risk of forced sterilisation in the future because, due to the nature of that particular type of harm, it can only occur once.

Decision makers also need to be aware that s 91R(3) of the Act, which relates to bad faith sur place claims, does not apply to complementary protection. That is, any conduct that has been disregarded under this provision in relation to the Refugees Convention needs to be considered under the complementary protection criteria to determine whether it would give rise to a real risk of significant harm.

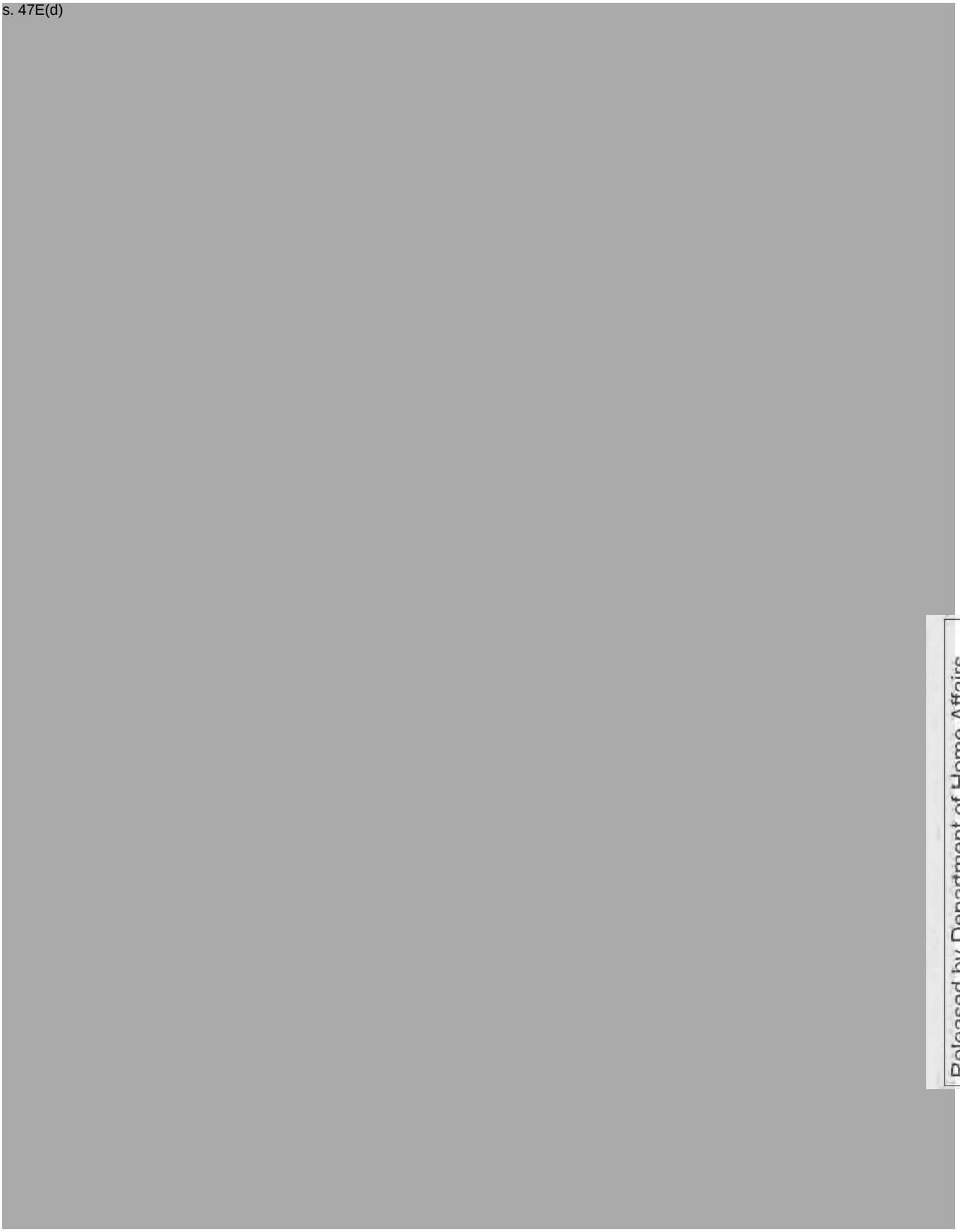


Activity 6 – Complementary protection scenario

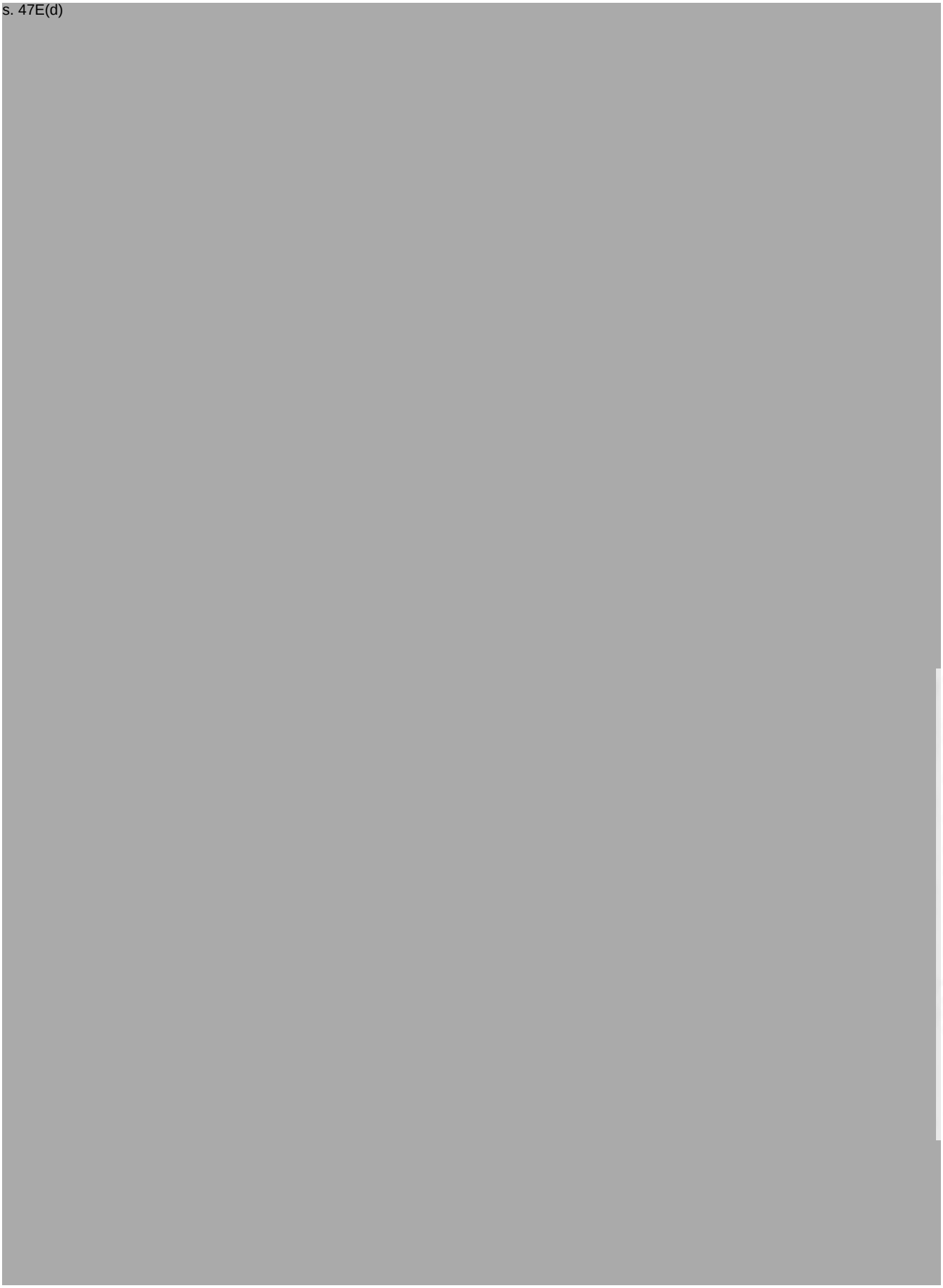
Aim:	The aim of this activity is to consider whether an applicant meets the complementary protection (CP) criteria under s 36(2)(aa). It aims to test your understanding of complementary protection.
Method:	Read the scenario and discuss the questions within your table group. Record your answers in the space provided. Refer to relevant legislation.

s. 47E(d)

s. 47E(d)

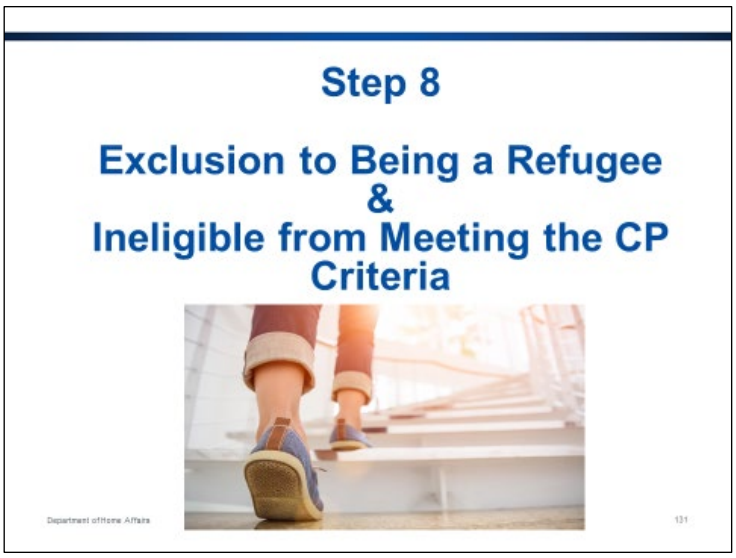


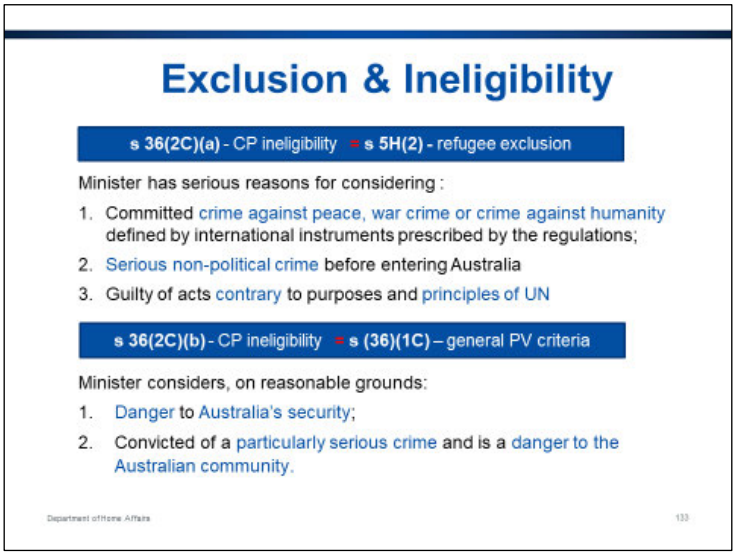
s. 47E(d)



Step 8
Exclusions to Being a Refugee/Ineligible for CP

Step 8: Exclusion to Being a Refugee and Ineligibility from Meeting the CP Criteria





Mirror Provisions – s 5H(2) and s 36(2C)(a)

Subsections 5H(2) and 36(2C)(a) of the Act are intended to be mirror provisions, with s5H(2) relating to the refugee assessment and s 36(2C)(a) relating to the CP assessment.

These subsections provide that a person is not a refugee, or is ineligible to be granted a protection visa on CP grounds, if there are serious reasons for considering the person has committed one of the following:

(a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations;.

(b) the person committed a serious non-political crime before entering Australia; or

(c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

As s 5H(2) (and subsequently s36(2)(a) as it's mirror provision) was intended to incorporate the meaning of Article 1F of the Refugees Convention, it is the department's position is that the case law surrounding Article 1F is also applicable to s 5H(2) and 36(2C)(a). Consequently, this section refers to case law that examines Article 1F, which remains applicable to the relevant s 5H(2) and 36(2C(a) provisions.

Exclusions to Being a Refugee – s 5H(2)

Section 5H(2) of the Act operates to nullify the meaning of who is a refugee under s 5H(1). While it may be expedient to consider whether s 5H(2) applies to a person before considering s 5H(1) and s 5J and the other sections of the Act as applicable, it is preferred that an assessment is made whether or not the person is a refugee under s 5H(1) first before considering s 5H(2).

The main reason is that while s 5H(2) operates to nullify s 5H(1), meaning that the applicant cannot be granted a PV, it's preferable to have a full picture of a person' s case, including what harm they face and for what reasons. The harm could also give rise to non-refoulement obligations under other treaties. In addition, different review rights flow from a decision depending on what aspect it is based on.

In short:

- assess s 5H(1) – and thereby s 5J and relevant sections; if the person is a refugee and you think s 5H(2) is engaged, then
- assess s 5H(2).

If you assess s 5H(1) and find the person not to be a refugee then refuse the visa, but if along the way you notice evidence that may fall within s 5H(2) make a clear file note on the issues you observe.

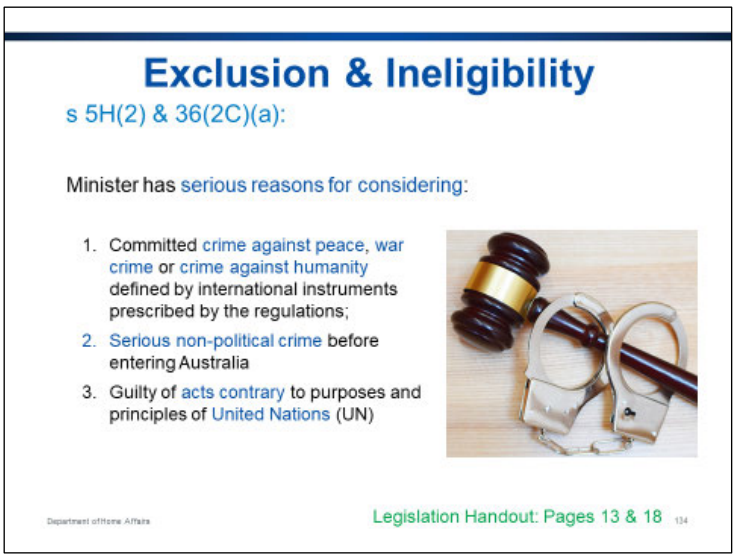
Ineligibility for a grant of a protection visa based on CP criteria – s 36(2C)(a)

Section 36(2C) of the Actsets out five situations in which a person may be ineligible for the grant of a protection visa. The purpose of s 36(2C) is to provide when a non-citizen is taken not to satisfy the protection visa criterion in s36(2)(aa). Depending on the circumstances of the case, s 501 and s 36(1B) may also be considered. Depending on the circumstances of the case, s 501 and s 36(1B) may also be considered.

Australia's non-refoulement obligations under the ICCPR and the CAT are absolute and cannot be derogated from. Therefore, even if a non-citizen is considered ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove the non-citizen to a country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen's removal to that country, there is a real risk that the non-citizen will suffer significant harm.

In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a non-refoulement obligation, such a person will not be removed from Australia while the real risk of suffering significant harm continues, but will be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia's non-refoulement obligations; and the individual circumstances of their case.

Considerations applicable to all elements of s5H(2) and 36(2C)(a)



Temporal and territorial scope to s 5H(2) and 36(2C)(a)

It should be noted that out of the three 'international crimes' mentioned above, only s 5H(2)(b)/s 36(2C)(a)(ii) provides that the crime in question must have been committed before entering Australia.

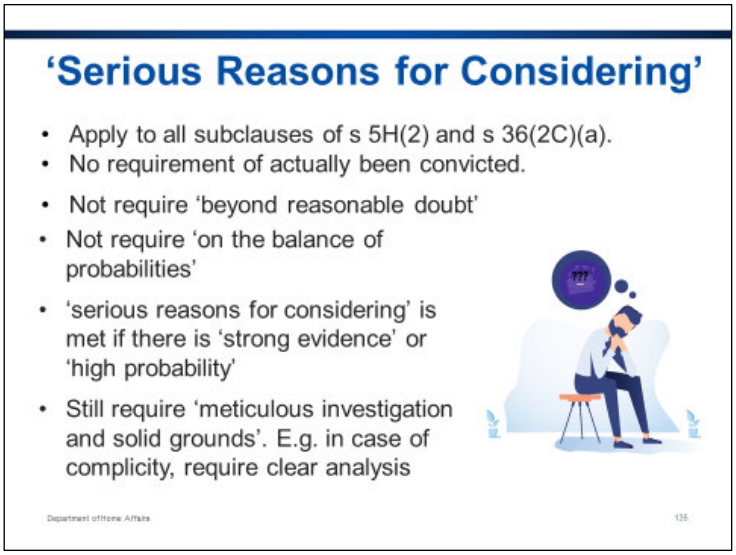
The other subparagraphs contain no temporal or territorial reference and so are applicable at any time, whether the act in question took place in the country of refuge, country of origin or in a third country.

Practical approach

Decision makers need to consider the following, taking into account all evidence provided:

- whether there are 'serious reasons for considering' a person has committed an act falling under s 5H(2)/36(2C)(a);
- what the person's involvement in the crime was – level of action, complicity, when the actions occurred;
- whether the person had the requisite mental knowledge and intention regarding the crime (if knowledge and intention are elements of the crime); and
- whether any defences that apply to exclude to criminal responsibility.

Serious reasons for considering



The Act establishes the threshold for finding whether the person has committed an 'international crime' under s 5H(2)/s 36(2C)(a) is whether the Minister is satisfied that there are 'serious reasons for considering' that the person committed one or more of the acts.

'Serious reasons for considering' is less than 'balance of probabilities' and not 'beyond reasonable doubt' meaning that there is no requirement for the person to have charges or convictions against them to give rise to the consideration. This means that evidence of a charge or conviction is not always sufficient on its own.

s. 47E(d)

The term "serious reasons for considering" is not defined however, based on case law –

"Serious reasons for considering" is NOT a requirement for the decision maker to be satisfied beyond a reasonable doubt or on the balance of probabilities (*Arquita v Minister for Immigration and Multicultural Affairs* [2000] FCA 1989).

"Serious reasons for considering" IS:

- need to have "strong" evidence of the commission of the relevant crime or act (*Dhayakpa v MIEA* (1995) 62 FCA 556).
- A finding on the facts that there is a "high probability" that the applicant has committed the relevant crimes or acts.

Kirby J in *SHCB v Minister for Immigration and Multicultural Affairs* [2004] HCATrans 294, stated "…. It is not serious reasons for considering that crimes were committed or that others have committed it…but that the applicant has committed the crime."

Consider all the evidence

Whether there are serious reasons for considering that the crime has been committed will depend upon an assessment of all the evidence and other material before the decision maker.

s. 47E(d)

s. 47E(d)

Information that may be strong and could, therefore, lead to 'serious reasons for considering' includes:

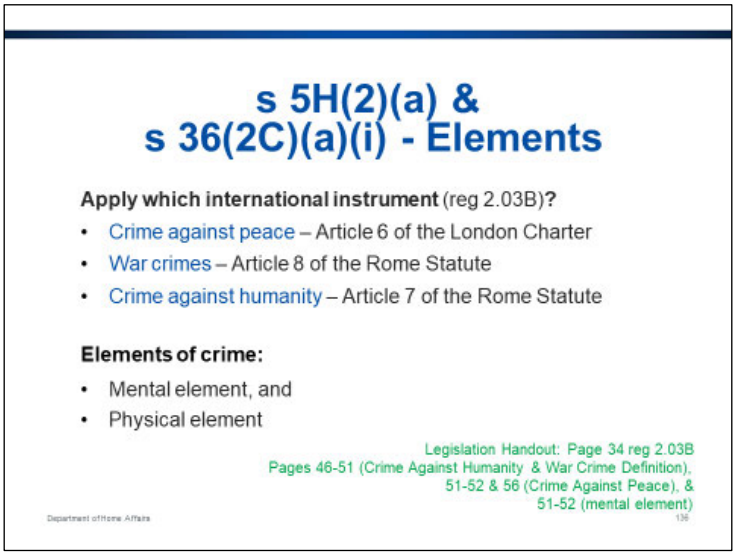
s. 47E(d)

Applicant's own confession

An applicant's own confession will **normally suffice** to establish *reasons* for considering that they have committed a relevant crime, however, some further evidence should be obtained to show there are 'serious' reasons since the applicant may later resile from this comment or be assessed as being under some duress at the time of making the statement.

Where the applicant's credibility is in question by the decision maker, it would be difficult to reject other claims on the basis of credibility to then assert that s 5H(2)/s 36(2C)(a) applies to an applicant merely on their own testimony. There should be some other evidence of 'an extrinsic and objective nature' to assist make the finding (See *Gian Shokar and Minister for Immigration and Multicultral Affairs* [1998] AATA 144).

Considering s 5H(2)(a)/36(2C)(a)(i) - Prescribed International Instruments



Subsections 5H(2)(a)/s 36(2C)(a)(ii) of the Act state that a person is not a refugee if there are serious reasons for considering the person has committed crimes against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations.

Regulation 2.03B specifies that the Rome Statute, the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, the *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, the *Geneva Convention relative to the Treatment of Prisoners of War* and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* and their protocols (the Geneva Conventions) and the London Charter are the prescribed international instruments that PV officers should use to define crimes against peace, a war crime or a crime against humanity. These instruments as prescribed by regulation 2.03B are the only instruments decision makers refer to for defining the crimes under s 5H(2)(a)/ s 36(2C)(a)(i) of the Act.

Crimes against peace

Crimes against peace (also known as the crime of aggression) only apply to international conflicts. The are defined in Article 8 *bis* of the Rome Statute and Article 6 of the London Charter. The Rome Statute, in most cases, should be given greater weight as a definitional source, as it is the most recent embodiment of international criminal law.

Article 8 *bis* of the Rome Statute refers to crimes against peace as the crime of aggression and defines these as the:

planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

[An] "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

A crime against peace can only be committed in the context of an international armed conflict.

There is only one Australian cases that examines crimes against peace as an exclusion from the definition of refugee. In *SRL v Minister for Immigration and Multicultural Affairs* [2000] AATA 128, the Tribunal found that the applicant's activities in relation to the Sri Lankan Janatha Vimukthi Peramuna Party amounted to crimes against peace or crimes against humanity ([108]). There have also been limited international cases where crimes against peace have been considered but there is currently no international consensus on what constitutes such a crime.

War crimes

Defined in Article 6 of the London Charter, Article 8 of the Rome Statute and the Geneva Conventions. The Rome Statute should be given greater weight as a definitional source, as it is the most recent embodiment of international criminal law. However, if the applicant's circumstances relate to a crime committed in a particular conflict, that instrument should be referred to if it is one of the prescribed international instruments under regulation 2.03B. Regulation 2.03B prescribes only two international instruments that are conflict specific:

- Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute); and
- Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States (Rwanda Statute).

Generally speaking, war crimes are crimes committed in violation of the laws and customs of war as set out in Article 8 of the Rome Statute, Article 6 of the London Charter or the Geneva Conventions, which may include acts such as wilful killing and torture or inhuman treatment, including biological experiments. More examples can be found in the Refugee Law Guidelines.

The Rome Statute also covers war crimes committed **in a civil war** (that is, *internal* armed conflict). Decision makers need to pay careful attention to the relevant war crime types in the Rome Statute to ensure that they are identifying the correct crime type, depending on whether the crime took place in an internal armed conflict or an international armed confclit.

A war crime requires a connection with armed hostilities. However, a crime against humanity does not require this connection.

When considering war crimes under the Rome Statute, decision makers should use the International Criminal Court's (ICC) Elements of Crimes document as a guide to assessing whether these crimes have been committed. This document is available online.

Crimes against humanity

Defined in Article 7(1) of the Rome Statute. Crimes against humanity differ from war crimes in that they can be committed in times of peace as well as in times of war. Under the Rome Statute, crime against humanity requires several elements. This are outlined below.

A specific 'act'

For the crime against humanity definition to be satisfied, an applicant must have committed an 'act' specified in Article 7(1)(a) to (k) of the Rome Statute. Such acts include acts of murder, enslavement, torture apartheid. More examples can be found in the Refugee Law Guidelines.

Article 7(2) of the Rome Statute gives further guidance on the interpretation of the definition of acts set out in Article 7(1). Further, decision makers should use the ICC Elements of Crimes document as a guide to assessing whether these crimes have been committed. This document is available online.

'Widespread or systematic attack'

These inhumane acts must be part of a widespread or systematic attack aimed at a civilian population. A single inhumane act, for example, torture during an interrogation, can be a crime against humanity if committed as part of a systematic attack (*N96/1441 and Minister for Immigration and Multicultural Affairs* [1998] AATA 619).

However, isolated acts unconnected with a widespread and/or systematic attack against a civilian population will not come within the definition of crimes against humanity.

'Against any civilian population'

According to the AAT, a broad interpretation should be given to the meaning of civilian. The AAT has interpreted "civilian" to mean "non-military", which includes police officers and former members of the military (*N96/1441 and Minister for Immigration and Multicultural Affairs* [1998] AATA 619; *W98/45 and Minister for Immigration and Multicultral Affairs* [1998] AATA 948).

'With knowledge of the attack'

Similar to the general test, the perpetrator does not necessarily have to have knowledge of all characteristics of the attack, but that there was the intention to further the attack.

To distinguish between 'crimes against humanity' and 'war crimes' the decision maker must look at whether the appellant had **'knowledge' that the attack was widespread or systematic** (*SRYYY v Minister for Immigration and Multicultral and Indigenous Affairs* [2005] FCAFC 42 at 33).

Mental element in committing a crime under the Rome Statute

For an applicant to have committed a crime under the Rome Statute (i.e. 'crimes against peace', a 'war crime' or 'crimes against humanity'), the applicant must have committed the crime with intent and knowledge. This is called the mental element.

Article 30 states that "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

Articles 30(2) and (3) of the Rome Statute set out what is required to meet the requirements of "intent" and "knowledge."

Rome Statute of the International Criminal Court

Article 30 - Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Complicity (Accessorial Liability) – Arts 25(3)(c) and (d) of Rome Statute

If an applicant was somehow complicit in the commission of the relevant crime(s), then the applicant may also be subject to exclusion from protection.

Under the Rome Statute, a person is criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission (Art 25(3)(c)); or
- in any other way, contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose, including providing the means for its commission (Art 25(3)(d)).

W97/164 and Minister for Immigration and Multicultural Affairs [1998] AATA 618

Applicant had participated in the shooting of fleeing activists whilst a member of the Burmese navy, but claimed he had not personally shot anyone.

AAT: held that the applicant would be held responsible for the killings if he shared the common objective that the activists be shot and killed. However, the AAT accepted that the applicant had deliberately shot into the air to avoid hurting anyone, and so did not share the objective that the activists be shot and killed.

The test for accomplice cases was developed in *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA:

- Need awareness of the act of participation and a conscious decision to participate by aiding, abetting or otherwise assisting.
- Includes planning, instigating, ordering or committing.
- Need intent - mere knowledge is not sufficient.
- Presence alone is not sufficient.
- Membership is usually insufficient.

- Rank may be a factor.

SHCB v MIMIA [2003] FCA 229

Applicant was a major in KHAD (Afghanistan Secret Police). KHAD was an internal security agency established by the Communist Government which was in power in Afghanistan from 1978 to 1992.

AAT rejected the applicant's application because of his membership with KHAD from 1981 until the end of the Communist Regime. In his evidence, the applicant did not deny that KHAD, or at least a division of it called the 5th Riasat, had been involved in various atrocities.

AAT found that KHAD was responsible for "war crimes and "crimes against humanity". Mere membership of KHAD is not sufficient to ascribe the applicant with these crimes. The AAT acknowledged this: *"In order to bear criminal responsibility for an act under the Rome Statute, a person need not have directly committed that act him or herself. He or she must, however, have **aided**, **abetted** or **otherwise assisted** in its commission or attempted commission or have **contributed** to its commission or attempted commission by persons acting with a **common purpose**. The person must act intentionally and must have knowledge of the intention of the group to commit the crime."*

This is a correct statement of the test for the "complicity" of a member of an organisation involved in systematic crimes. In determining whether the applicant was relevantly complicit in the acts of KHAD, the AAT drew attention to the following:

- The applicant was a middle-ranking officer of KHAD who had been promoted during the course of his service with the organisation;
- KHAD was feared in the community;
- The applicant would have been well aware of the activities of KHAD even if he himself was not personally engaged in those acts;
- The applicant would be aware that reports by him to his superiors could lead to others within the organisation committing war crimes or crimes against humanity against those named in the reports.

The AAT found that many such acts were committed by the KHAD while the appellant was an officer, in circumstances where he knew such acts were being committed. He passed on information in the two specific incidents, knowing that atrocity, torture, cruelty or violence to the person was a likely consequence. It is not necessary, for a finding that the appellant committed a war crime or a crime against humanity, that there be a finding with respect to a specific incident, if there are findings of many such incidents and a finding that the appellant took steps as an officer of KHAD knowing that such acts would be the consequence of his steps. It was open to the AAT, on the material before it, to conclude that the appellant aided, abetted or otherwise assisted the commission or attempted commission of such acts. The AAT made findings that KHAD was involved in crimes against humanity and war crimes at a time when the appellant, in the course of his duties as a reasonably high ranking officer, passed on information that was likely to lead to the commission of such acts.

FC states that whether or not the applicant may have been harmed if he had **disobeyed** orders is **not to the point**. The question is, **did he have a common purpose** with the organisation? The AAT found that he did.

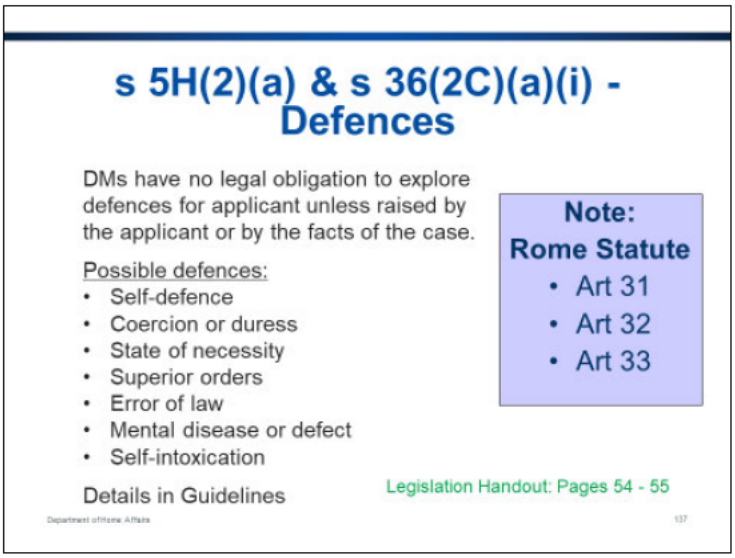
In summary, the AAT was satisfied that KHAD was involved in the commission of crimes against humanity or war crimes or both. The applicant was found to be sufficiently involved in these activities, as in the course of his duties as a reasonably high ranking officer, passed on information that was likely to lead to the commission of such acts. The matters

relating to his level in the organisation and his providing information to the organisation are matters relevant to showing that he participated in the common purpose of the organisation.

NB: This matter was appealed and dismissed by the Full Court of the Federal Court and an application for special leave dismissed by the High Court.

Further examples of complicity can be found in the Refugee Law Guidelines.

Applicant's defences



Part of the definition of a crime includes the defences. The instrument relied upon to define the crime should also be used to consider what defences, if any, may be applicable. A decision maker does not need to consider defences if the applicant has not raised any, or if none arise on the facts of the applicant's case (*SZITR v MIMIA* [2006] FCA 1759). If the facts indicate the availability of a defence then it must be considered (*MIMA v SRYYY* [2005] FCAFC 42).

Article 31 of the Rome Statute provides a number of "grounds for excluding criminal responsibility in relation to crimes under that Statute (i.e. 'crimes against peace', 'war crimes', 'crimes against humanity'). The defences recognised under Article 31 are:

- Mental disease or defect;
- Intoxication;
- Self-defence or in the defence of another; and
- Duress.

Articles 32 and 33 of the Rome Statute provide for the defences of mistake fact and superior orders respectively. These defences, primarily in the context of the Rome Statute, are explored in greater detail below.

When examining whether a defence may be available to a person, the Full Court of the Federal Court in *SRYYY* made it clear that the same principles applied to deciding which definitions of crimes against peace, humanity or war crimes should be applied.

Decision maker's obligation to explore defences?

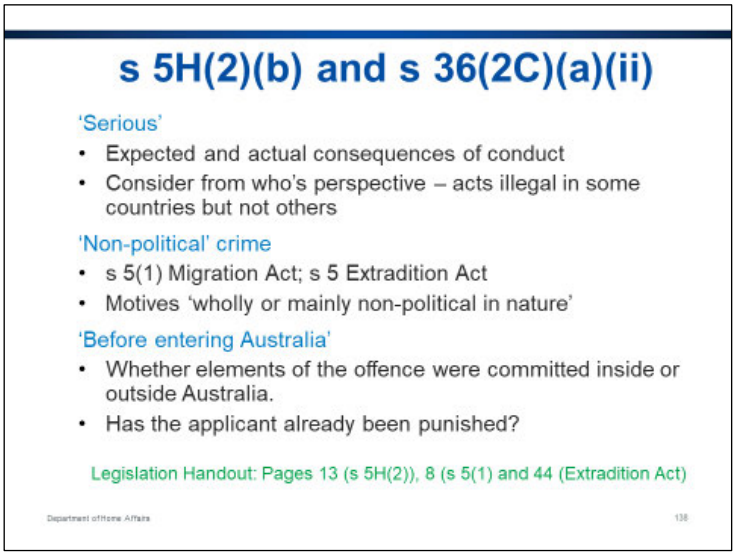
Where an applicant does not raise a defence and it is clear that a particular defence is not available for the commission of certain crimes, then there is no obligation on the decision maker to explore any possible exception which may make such a defence otherwise available (*SZITR v MIMIA* [2006] FCA 1759).

In *SZITR*, the applicant claimed that the AAT should have examined whether the defence of superior orders was available under customary international law.

Under Article 33 of the Rome Statute, the defence of superior orders is not available for crimes against humanity**.** The applicant's counsel before the AAT did not make a submission that the defence may be otherwise available. Court held:

"one could reasonably expect the Tribunal to have believed … that it was not necessary to consider a defence of superior orders if it was satisfied that there were serious reasons for believing the applicant had committed a crime against humanity."

Consideration of s 5H(2)(b)/36(2C)(a)(ii)



Paragraph 5H(2)(b)/36(2C)(a)(ii) of the Act requires that the Minister is satisfied that there are serious reasons for considering the applicant has committed a serious non-political crime outside Australia before being admitted as a refugee in Australia.

Key words include:

- 'Serious'
- 'Non-political crime'
- 'Outside' the country of refuge, meaning Australia in our context.

'Serious'

What does it mean? And, 'serious' from whose perspective, Australia's or other countries'?

'Serious' crimes may encompass crimes such as murder, kidnapping, drug trafficking and other violent crimes.

Ovcharuk v MIMA (1998) 158 ALR 289

FC: held that what amounts to a serious crime may be answered by reference to notions of serious criminality accepted within the receiving State. The relevant circumstances to be considered include the **expected** and **actual consequences** of the criminal conduct.

However, the Court also noted that to exclude a person who has engaged in conduct which is a crime in the receiving State, but which was legal in the country of origin could be against the spirit of the Convention (this is now considered under the Act as per the *RALC* Act). Examples include where the applicant has engaged in sexual relations with persons under a specified age, the use or supply of particular drugs and certain forms of economic activity which may be illegal in some places but not others.

'Non-political' crime

A 'non-political crime' is defined in s 5(1) of the Act as:

> *(a) Subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and*
> *(b) Includes an offence that, under paragraph (a), (b), or (c) of the definition of **political offence** in section 5 of the Extradition Act 1988, is not a political offence in relation to a country for the purposes of that Act.*

The crimes referred to in paragraph (b) include crimes prohibited by international treaties, such as piracy, hostage taking, torture, and crimes against protected persons (including diplomats). However, this list is not exhaustive.

When assessing whether a crime is non-political, decision makes should first consider whether the crime allegedly committed is one of the offences in paragraphs (a), (b) or (c) of the definition of *political offence* in s5 of the *Extradition Act 1988*. These offences are crimes that are not 'political' for the purposes of extradition. If the alleged crime is one that falls within the meanings in paragraphs (a), (b) or (c) of s 5 of the *Extradition Act*, then they are non-political crimes for the purposes of the Migration Act, regardless of the motivation for the crime.

If the crime is not within the definition of a political offence in the *Extradition Act*, then the decision maker should consider whether the motivation of the person for committing the crime was wholly or mainly non-political.

Subjective motive for committing a serious non-political crime

Subjective motives are identified through an applicant's statements and claims.

However, subjective motives are complex and often involve a mixture of political and non-political motives.

A crime involving a mix of motives is not necessarily inconsistent with the definition in s 5(1), provided the **main motivation was non-political** (*MIMA v Daljit Singh* [2002] HCA 7).

In this respect, decision makers need to be aware of the dangers of over-simplification when trying to characterise an applicant's motivation.

MIMA v Daljit Singh [2002] HCA 7 – took part in killing a police as an act of revenge

Applicant, a Sikh of Indian nationality, arrived in Australia in 1996 and applied for a PV.

Applicant was a member of Khalistan Liberation Force (KLF). One of KLF's political purposes was to **resist oppression** of the Sikhs.

Applicant said, the Indian police were arresting members of KLF, so he fled India.

Gleeson CJ stated that:

"Once it was accepted that the concept of a political crime was not limited to offences such as treason, sedition, and espionage, and could extend to what would otherwise be "common" crimes, including unlawful homicide, then it became necessary to find means of avoiding the

consequence that any crime could be political if one of the motives for which it was committed was directly or indirectly political."

Gleeson CJ concluded that for a crime to be considered 'political' it was necessary that: "there must be a **sufficiently close connection** between the **criminal act** and **some objective identifiable as political** to warrant its characterisation as a political act."

Objective circumstances for committing a serious non-political crime

The definition of 'non-political crime' deals with an applicant's subjective motivation. However, objective factors such as the nature and circumstances of the crime also need to be considered before the crime can be characterised as political in nature.

There should be a close and direct causal link between the nature and circumstances of the crime and its claimed political purpose. This involves looking at:

- Whether there is a political struggle in existence within the State where the crime was committed;
- Whether commission of the offence was an incident of the political struggle; and
- Whether the **nature of the crime** was **in proportion** to the **claimed political purpose**, for example, it may be reasonable to expect that a crime committed for a political purpose would be aimed at a military or Government target, rather than indiscriminate killing or injuring of civilians.

'Outside' the country of refuge

Ordinarily this will not be a problematic consideration, however, what if the crime has acts committed outside Australia and parts within Australia?

Based on case law, 'continuous' crimes – where elements of the offence are committed both inside and outside Australia – satisfy the requirement that the crime be committed outside the country of refuge: *Dhayakpa v MIEA* (1995) 62 FCR 556 and *Ovcharuk v MIMA* (1998) 88 FCR 173.

Crimes such as conspiracy to import drugs which partly occur within and partly outside Australia, can still be considered as being committed "outside the country of refuge" for the purposes of s 5H(2)(b)/36(2C)(a)(ii) based on the reasoning of cases like *Dhayakpa*.

Has the applicant already been punished for committing the crime?

Based on previous case law this is not a relevant consideration for s 5H(2)(b)/36(2C)(a)(ii) of the Act. The Federal Court in *Dhayakpa* and *Ovcharuk* thought that what is now s 5H(2)(b) of the Act extends to cover circumstances where the applicant has been punished for the crime, whether in Australia or elsewhere.

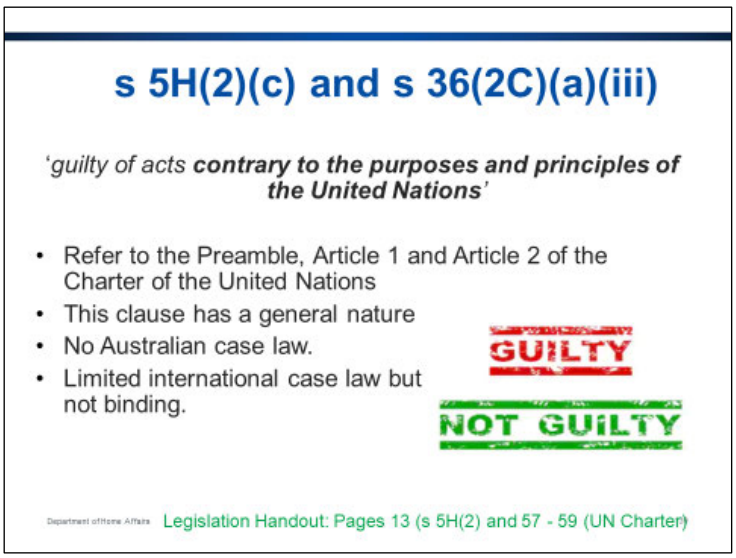
Do you have to consider the possible harm if the applicant is returned?

In *Dhayakpa* French J at pages at 563 and 564 observed:

"There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the State of origin."

This proposition was impliedly endorsed by the Full Court of the Federal Court in *Ovcharuk*. Also the Full Court in *NADB of 2001 v MIMA* (2002) 126 FCR 453 reaffirmed that if the person falls within in the terms of exclusion from being a refugee then there is no requirement any consideration of the degree of persecution which the applicant may face in the country of origin.

Consideration of s 5H(2)(c)/ 36(2C)(a)(iii)



The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

The meaning and scope of s 5H(2)(c)/ 36(2C)(a)(ii) is uncertain and it is seldom used.

It is generally considered that the terms of s 5H(2)(c)/ 36(2C)(a)(ii) is meant to cover acts against the principles and purposes of the UN but do not fall within s 5H(2)(a) or (b) / 36(2C)(a)(i) or (ii).

The ambit of s 5H(2)(c)/ 36(2C)(a)(iii) may extend to the following persons:

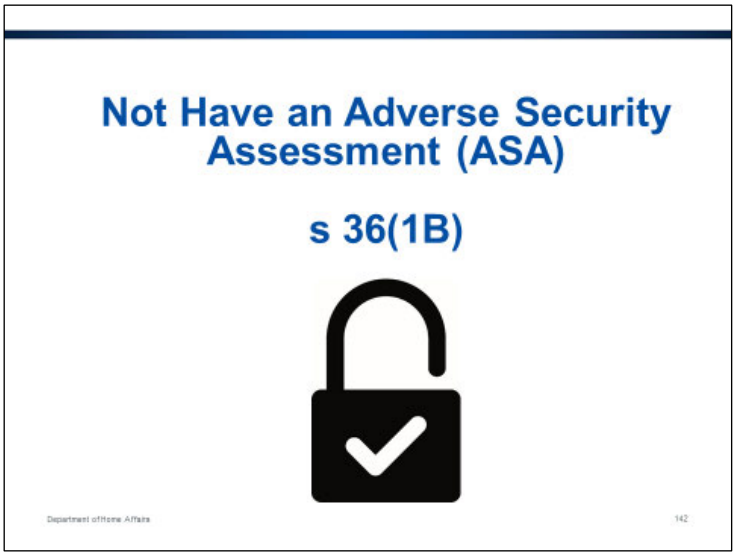
- Members or organisations or individuals who have denied or restricted the human rights of others;
- People who are engaged in the drug trade, who displace or obstruct democratic and representative governments, or who are opposed to certain liberation movements; and
- Terrorist groups seeking to overthrow democratic regimes.

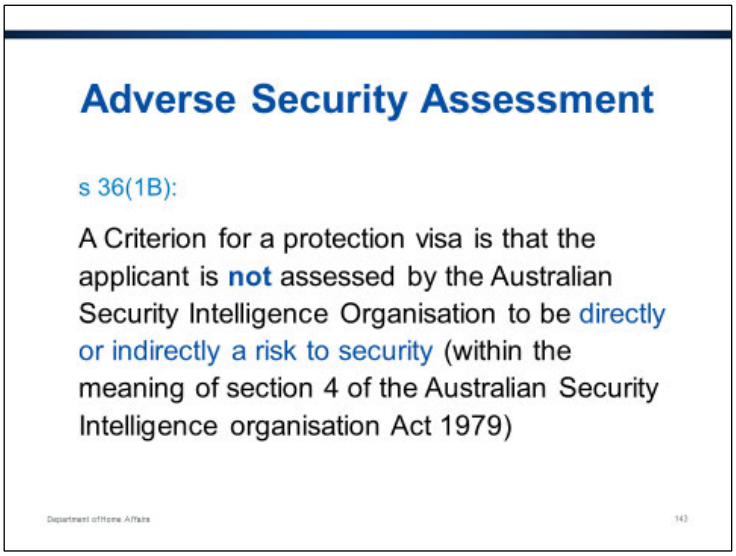
Step 9
Character and Security

Step 9: Character and Security Exclusions – s36(1A)(a)

This section covers Adverse ASIO Security Assessment & Danger to Australia's Security or the Australian Community 36(1B) & (1C).

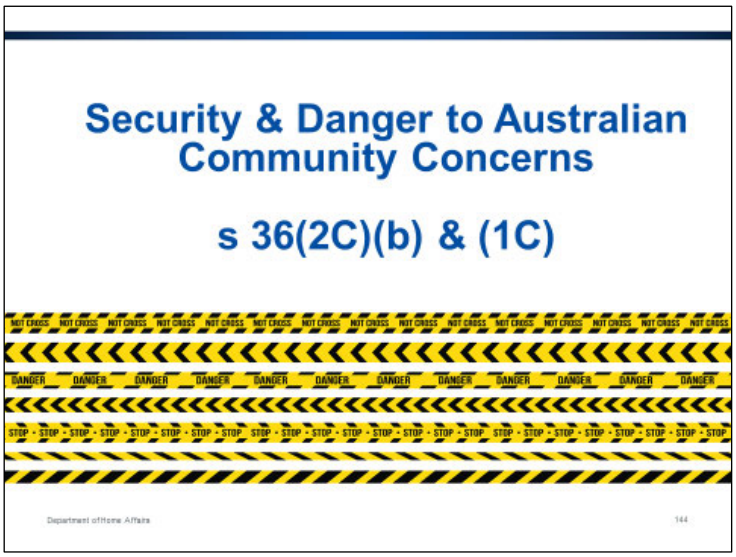
Not Assessed by ASIO to be Directly or Indirectly a Risk to Security – s36(1B)

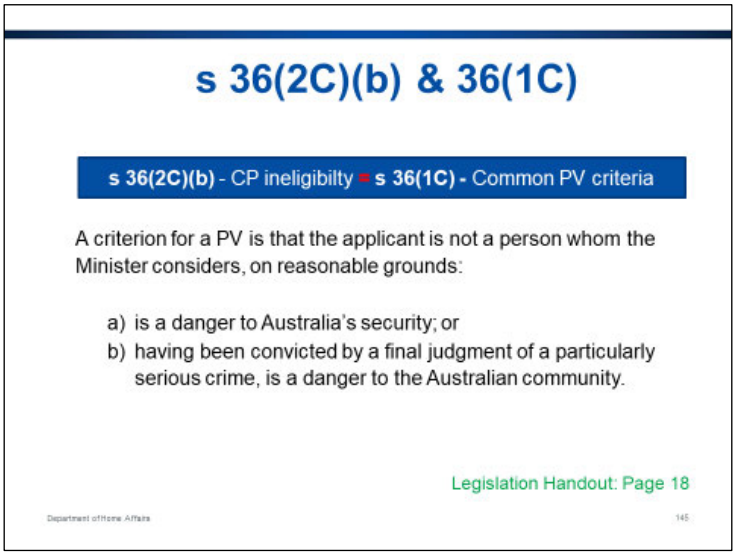




If an applicant is the subject of an adverse security assessment by the Australian Security Intelligence Organisation (ASIO) they will not satisfy the criterion in s 36(1B). If the criterion in s 36(1B) is not satisfied, the applicant's Protection visa application must be refused as s 36(1A)(a) requires a Protection visa applicant to satisfy s 36(1B) *and* s 36(1C). Decision makers should refer to the Security Checking Handbook for further information about adverse security assessments by ASIO.

Danger to Australia's Security or the Australian Community – s 36(2C)(b) and (1C)





Section 36(2C)(b) and 36(1C)

Under s36(2C)(b)/36(1C), an applicant will be ineligible for grant of a protection visa if the Minister (or delegate) considers, on reasonable grounds, that the applicant:

- Is a danger to Australia's security or
- Having been convicted by a final judgment of a particularly serious crime (including crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

There are two limbs to s 36(1C). The applicant is **not** a person the Minister considers, **on reasonable grounds** to be:

- A danger to Australia's security; or
- Having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

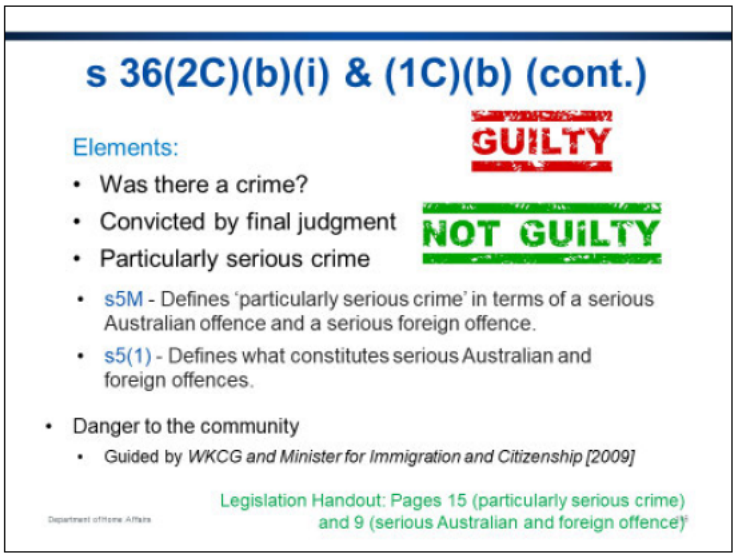
Section 36(1A) of the Act requires an applicant for a PV to satisfy s 36(1B), 36(1C) and one of the criteria in s 36(2). The insertion of s 36(1C) into the Act was based on Article 33(2) of the Refugees Convention to exclude a refugee from a PV if the applicant fell within the terms of that subsection (p 180 Explanatory Memorandum to the RALC Act).Under the Refugees Convention this is an exception to that Convention's non-refoulement obligation.

Danger to Australia's security

There is very limited Australian jurisprudence on this exception, and so there is very little guidance when considering potential dangers to the security of Australia. For further information, please see the Refugee Law Guidelines.

s. 47E(d)

Convicted of a particularly serious crime and danger to the community



In considering s 36(1C)(b), each of the following elements should be considered:

- Was there a crime?
- Is the crime considered to be particularly serious?
- Has there been conviction by a final judgement?
- Does the person remain a danger to the community of Australia?

Was there a crime?

Whether there was a crime can usually be established by referencing the applicant's claims and/or supporting evidence. However, this may also be established by other information such as country of origin information or information from a third party.

Convicted by final judgment

Conviction requires a finding by a court that the person is liable for the offence committed and final judgment may either be determined on the basis that the person has exhausted all judicial remedies to appeal a judgment or that no further appeals are forthcoming.

'Particularly serious crime'

In determining whether a crime an applicant has committed is particularly serious, decision makers must consider s 5M of the Act which provides that a particularly serious crime for the purposes of s 36(1C)(b) consists of commission of:

(a) a serious Australian offence or
(b) a serious foreign offence.

Both of these terms are defined in s 5(1) of the Act.

Under s5(1), a serious Australian offence means an offence against a law in force in Australia, where the offence:

- Involves violence against a person
- Is a serious drug offence
- Involves serious damage to property or
- Is an offence relating to immigration detention (s 197A or 197B of the Act)

and that offence is punishable by:

- Imprisonment for life
- Imprisonment for a fixed term of not less than 3 years or
- Imprisonment for a maximum term of not less than 3 years.

Consequently, in considering whether an offence committed by the applicant meets the s5(1) definition of *serious Australian offence*, decision makers should consider each of the following elements:

- Which Australian criminal law the offence breached
- Whether the offence involved one of the specified offence types (i.e. violence against a person, a serious drug offence, serious damage to property or an immigration detention offence under s 197A or 197B)
- Whether the offence is punishable for one of the specified sentence parameters (i.e. whether the Australian criminal law that the offence breached highlights that the offence is punishable by life imprisonment or imprisonment of greater than 3 years)

Danger to the community

Assessment of whether a refugee constitutes a danger to the community needs to be undertaken on a case-by-case basis. In *WKCG and Minister for Immigration and Citizenship [2009] AATA 512,* the AAT established what has become known as the *WKCG* test for assessing whether a person constitutes a danger to the community of Australia. Under this test, decision makers are guided to consider the following:

- The seriousness and nature of the crime committed, s. 47E(d)
- The length of the sentence imposed;
- The criminal record in totality, that is whether there has been a single relevant conviction, or a series of convictions – s. 47E(d)
- Any mitigating or aggravating circumstances;
- Whether rehabilitation has occurred and will continue – s. 47E(d)
- The risk of re-offending and recidivism;
- The likelihood of relapsing into crime; and
- Considering the above, whether the applicant *continues* to remain a danger to the Australian community.

For further information, please see the Refugees Law Guidelines.

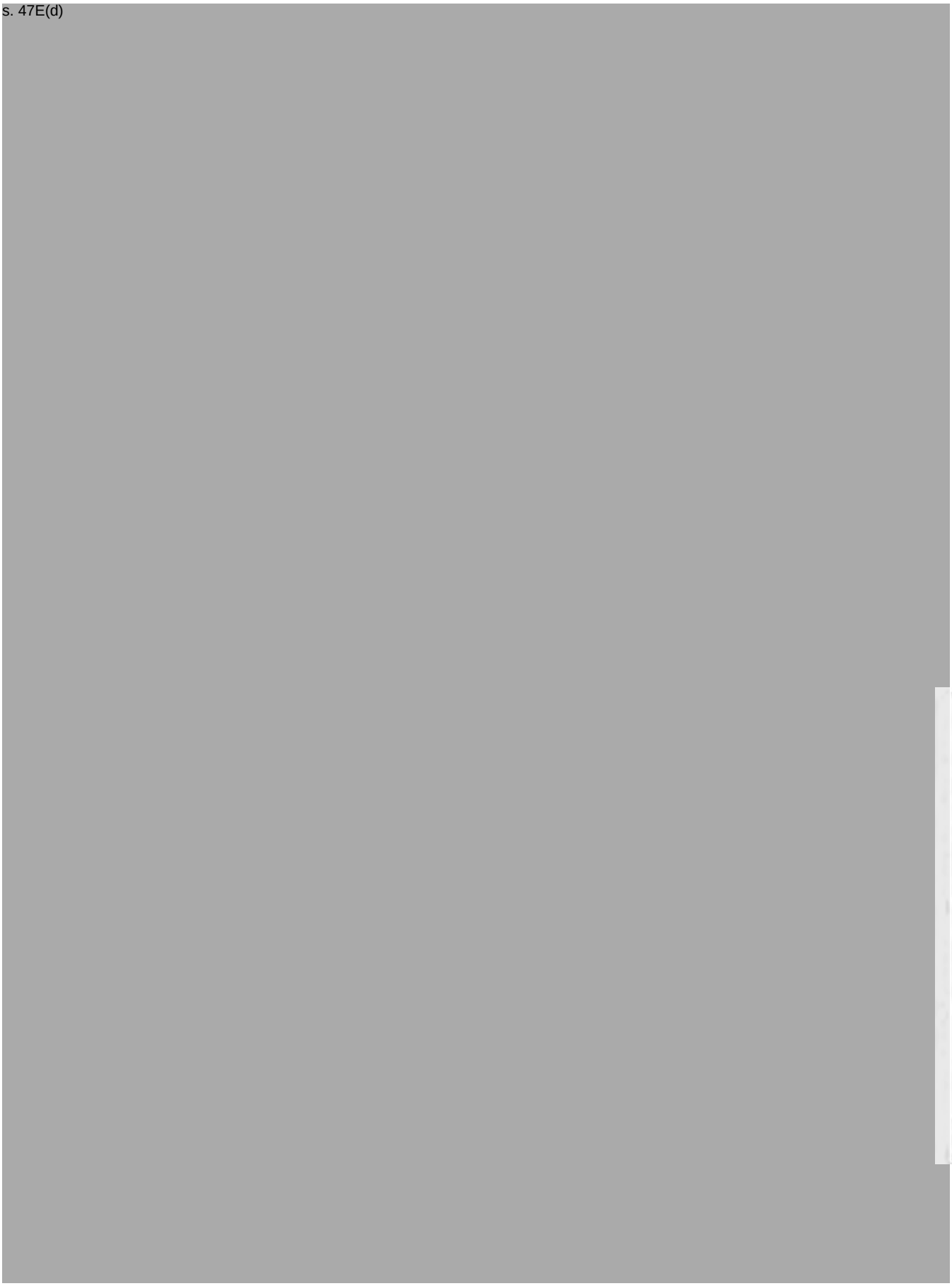
s. 47E(d)

Activity 7 – Exclusion, ineligibility, security and danger to the australian community provisions

Aim:	The aim of this activity is to consider whether the exclusion, ineligibility, security and danger to the Australian community provisions under s 5H(2), 36(2C), 36(1B) and 36(1C) are applicable to the applicant's circumstances.
Method:	Read the scenario and discuss the questions with your table group. Record your answers in the space provided.

s. 47E(d)

s. 47E(d)



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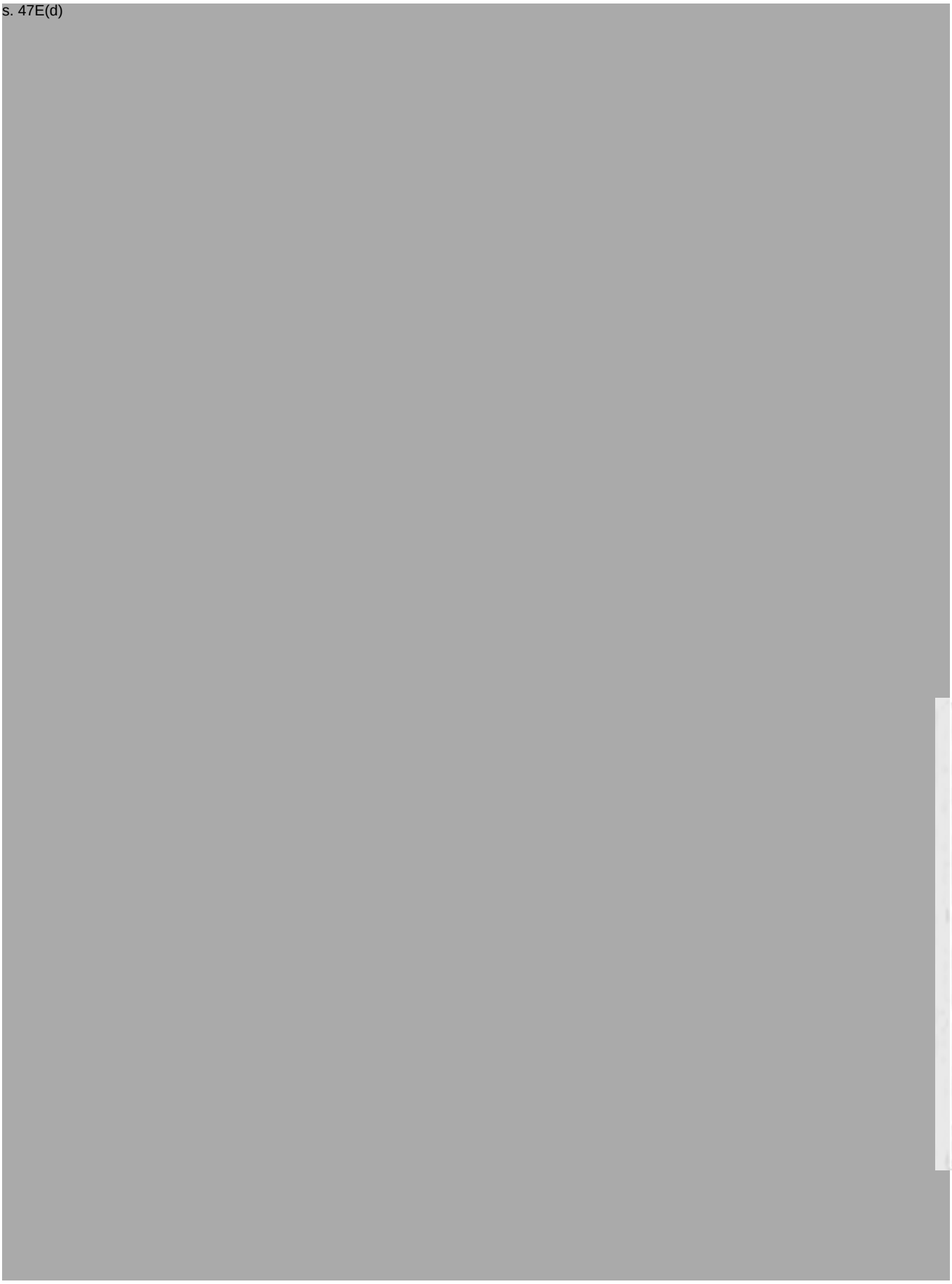


Step 10: Excluded Fast Track Applicants

The fast track assessment process is an expedited process for deciding PV applications of applicants who are unauthorised maritime arrivals as defined in s5AA of the Act. For guidance on this definition, refer to section 4.2 - Unauthorised arrivals. This process includes shorter timeframes for responding to requests for information and a more limited form of merits review of refusal decisions for eligible applicants that is provided by the IAA.

Who is a fast track applicant?

Under the definition in s5(1)(a), an applicant will be a fast track applicant if they are a UMA as defined in s5AA of the Act who:

- arrived in Australia on or after 13 August 2012 but before 1 January 2014
- has not been taken to a regional processing country (RPC) and
- made a valid application for a PV on or after 18 April 2015.

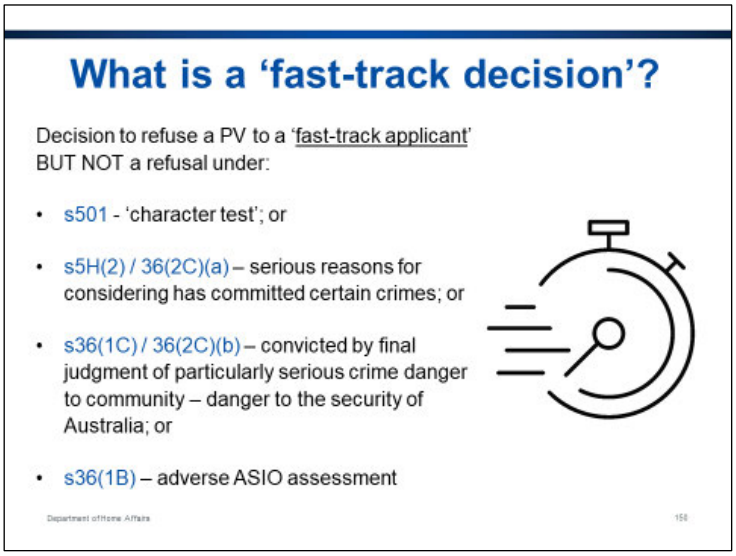
As these applicants are UMAs, they are subject to the bar in s46A(1) of the Act. Therefore, in order to meet the requirement of making a valid application, the applicant must have received written notice under s46A(2) that the Minister has lifted the s46A(1) application bar.

If an applicant does not satisfy the definition of fast track applicant in s5(1)(a), officers must consider whether they satisfy the definition in s5(1)(b) instead. The definition of fast track applicant in s5(1)(b) applies to:

'a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).'

Section 5(1AA)(b) gives the Minister the authority to issue a legislative instrument to extend the definition of fast track applicant to apply to specified persons or classes of persons. There are three legislative instruments under s5(1AA)(b) currently in effect.

What is a fast track decision?



Fast track decision means a decision to refuse to grant a protection visa to a fast track applicant, other than a decision to refuse to grant such a visa:

(a) because the Minister or a delegate of the Minister is not satisfied that the applicant passes the character test under section 501; or

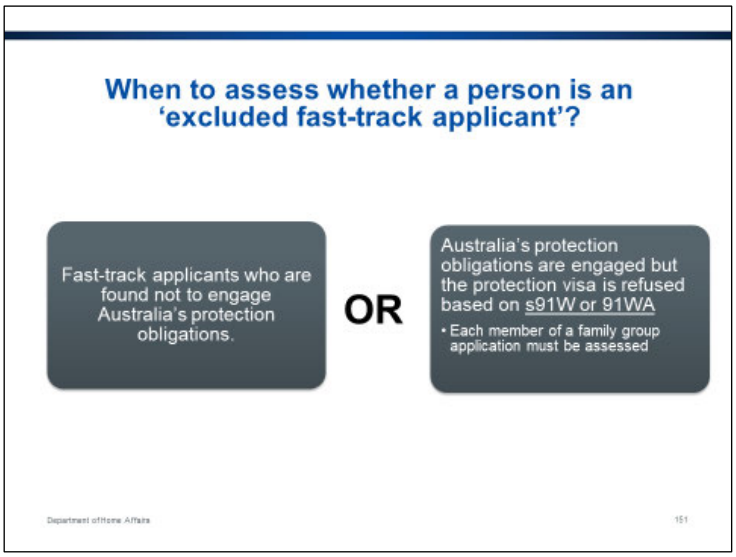
(b) relying on:

(i) subsection 5H(2); or

(ii) subsection 36(1B) or (1C); or

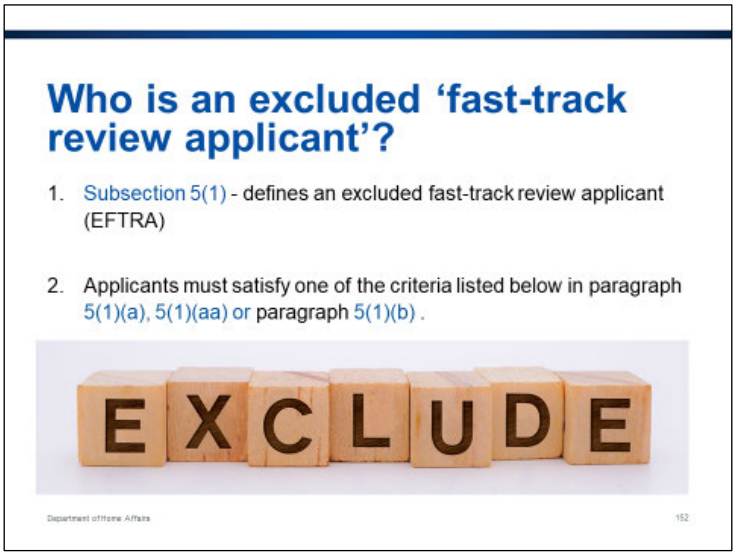
(iii) paragraph 36(2C)(a) or (b).

Excluded fast track applicant assessment



An assessment of whether the applicant is an excluded fast track review applicant should be undertaken for each fast track applicant being refused a PV. The assessment must be undertaken for each applicant on an individual basis and, if an application involves a family group, the decision maker must undertake an assessment for each applicant included in the application. s. 47E(d)

Who is an excluded fast track review applicant?



Excluded fast track review applicant means a fast track applicant:

(a) who, in the opinion of the Minister:

(i) is covered by section 91C or 91N; or

(ii) has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or

(iii) has made a claim for protection in a country other than Australia that was refused by that country; or

(iv) has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or

(vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

(aa) who makes a claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application, if, in the opinion of the Minister, the claim is manifestly unfounded because, without limiting what is a manifestly unfounded claim, the claim:

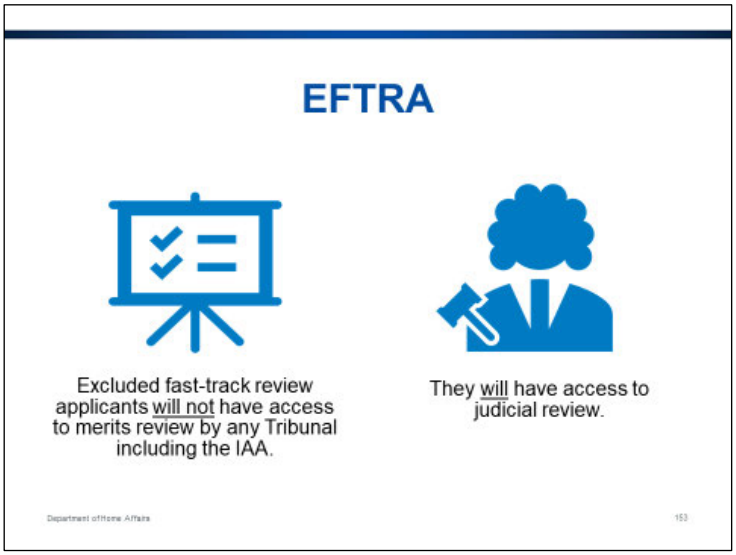
(i) has no plausible or credible basis; or

(ii) if the claim is based on conditions, events or circumstances in a particular country — is not able to be substantiated by any objective evidence; or

(iii) is made for the sole purpose of delaying or frustrating the fast track applicant's removal from Australia; or

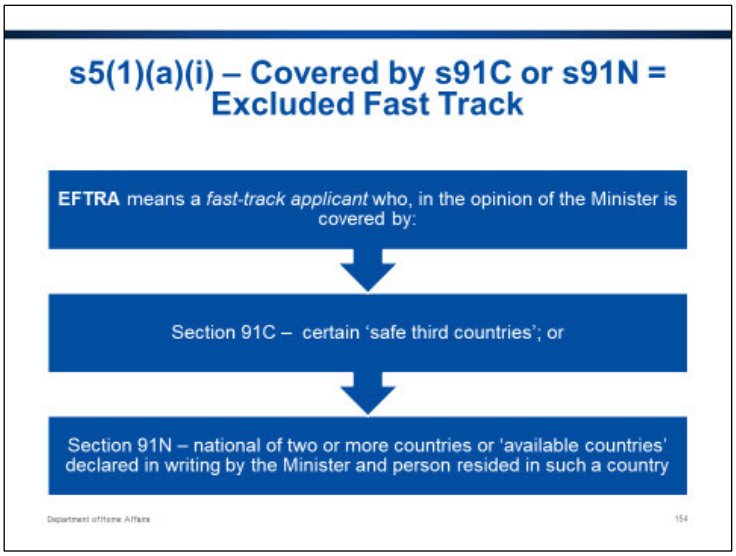
(b) who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(a).

Excluded fast track applicant review rights



If the applicant is an excluded fast track review applicant, they will not have access to merits review of the decision to refuse their PV application by the IAA or the AAT. However, they will have access to judicial review.

Section 91C or s 91N – Excluded Fast Track



The decision maker must determine whether the fast track applicant is affected by s91C or s91N of the Act. If an applicant is affected by either of these provisions, they will be an excluded fast track review applicant.

S91C

Section 91C applies to non-citizens who are covered by the Comprehensive Plan of Action (CPA) approved by the International Conference on Indo-Chinese Refugees in 1989. The CPA was introduced to deal with a specific caseload of asylum seekers from Vietnam and the Lao People's Democratic Republic following the Vietnam War. The CPA ended on 6 March 1989 and is no longer applicable.

Section 91C also applies to persons in relation to whom there is a safe third country as defined in s91D. Currently, there are no safe third country agreements in operation. Therefore, there are no applicants who are covered by this aspect of s91C.

Persons covered by s91C are barred from applying for a PV by s91E of the Act. However, the Minister may exercise the power in s91F to determine that the person is no longer barred by s91E from making a valid application for a PV. Any person covered by s91C who has the application bar in s91E lifted will nevertheless be an excluded fast track review applicant if their PV application is refused.

S91N

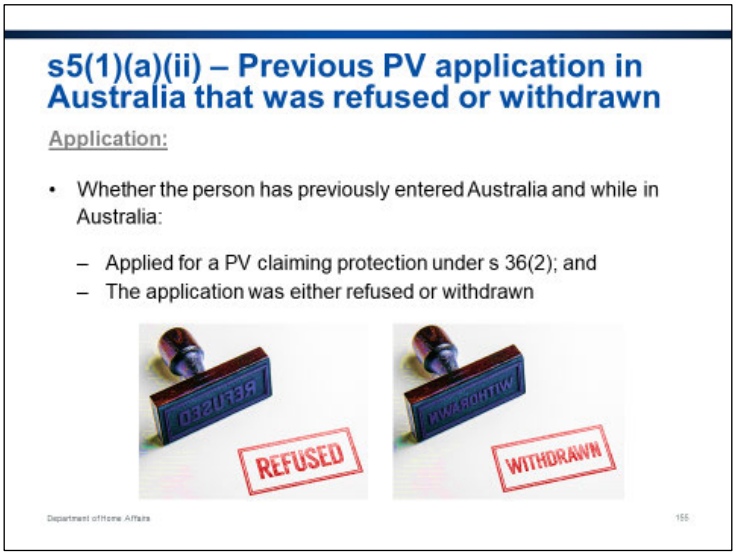
Section 91N covers non-citizens who are nationals of two or more countries and those who have a right to re-enter and reside in an available country. The assessment of s91N is not to be confused with the assessment of third country protection under s36(3) of the Act.

Persons who are nationals of two or more countries and who have the application bar in s91P of the Act lifted will nevertheless be an excluded fast track review applicant if their PV application is refused.

If:

- An applicant may be covered by s91N of the Act but
- This was not considered at the time of application (for example, if the applicant was not aware that they are a dual national),

Previous PV application



To determine whether a fast track applicant comes under this provision, the decision maker must be satisfied that:

- The applicant has previously entered and then departed Australia
- During their previous visit, they lodged an application for a PV which was either withdrawn or refused
- The applicant has re-entered Australia as an UMA and has made a second application for a PV.

If all of these circumstances are applicable and they are refused a PV under the fast track assessment process, the applicant will be an excluded fast track review applicant. This will be the case regardless of the time that may have elapsed since the first PV application or of any differences between the claims in their first and second applications.

Refused Claim in Third Country

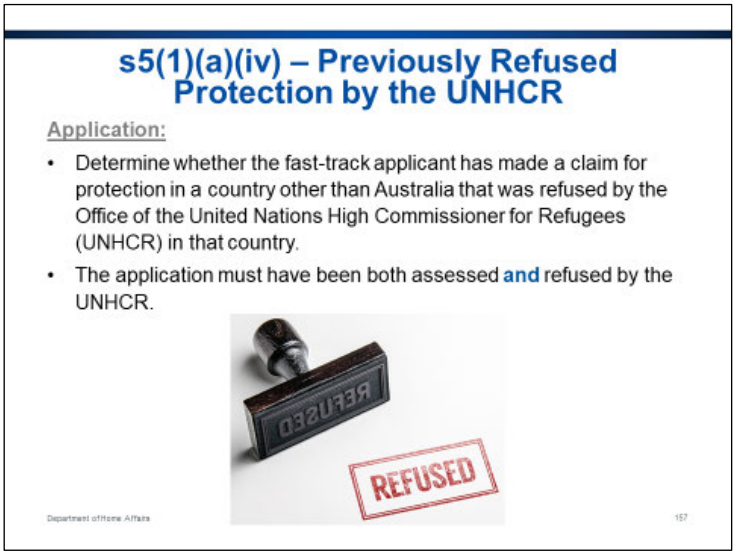
The Department's policy is that applicants will come under this clause of the excluded fast track review applicant definition only if they have had an application for asylum or protection assessed and refused in a third country that is a party to the 1951 Convention relating to the Status of Refugees (Refugee Convention) and/or its 1967 Protocol.

If the applicant has raised claims relating to the complementary protection criterion, it may also be relevant to consider whether the third country is, depending on the nature of the harm, a party to:

- The International Covenant on Civil and Political Rights (ICCPR)
- ICCPR's Second Optional Protocol Aiming at the Abolition of the Death Penalty
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

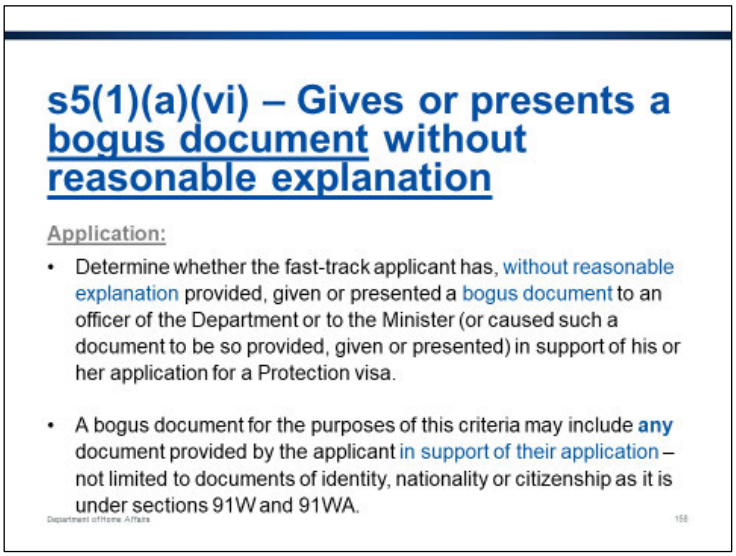
s. 47E(d)

Refused UNHCR Claim



A fast track applicant will come under this provision if they have previously applied to the Office of the UNHCR for protection in a third country and if that application was both assessed and refused by the UNHCR. If they come under this provision and are refused a PV under the fast track assessment process, the applicant will be an excluded fast track review applicant. This will be the case regardless of the time that may have passed since the UNHCR's decision or of any changes in their circumstances or protection claims.

Presents Bogus document with reasonable explanation



A fast track applicant will come under this provision if:

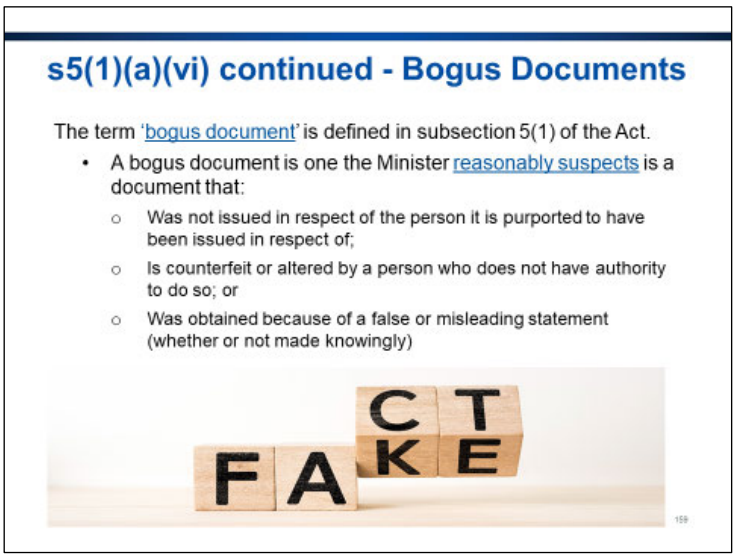
- They have presented a bogus document to an officer of the Department or to the Minister in support of their PV application or they have caused such a document to be presented
- After being questioned about presenting the document, they do not have a reasonable explanation for having done so.

The decision maker may consider any document provided in support of the applicant's PV application in making the assessment of whether they are an excluded fast track review applicant, although they can only consider documents provided in support of that application. If the applicant provided the documents before lodging their PV application, or provided them other than in relation to that application, these documents cannot be considered in the assessment.

Unlike s91W and s91WA of the Act, the provisions in s5(a)(vi) do not just apply to documents of identity, nationality or citizenship. Rather, any document provided in support of the fast track applicant's PV application may be considered.

Therefore, the decision maker should seek to establish whether any documents of identity, nationality or citizenship, or any documents presented in support of the person's protection claims such as documents purportedly prepared by representatives of religious groups, family members or employers, are authentic.

Bogus Document



Section 5(1) of the Act defines a bogus document as being a document which the decision maker reasonably suspects:

- Was not genuinely issued to the applicant
- Is counterfeit or has been altered by a person who does not have authority to do so
- Was obtained as a result of a false or misleading statement (whether or not made knowingly).

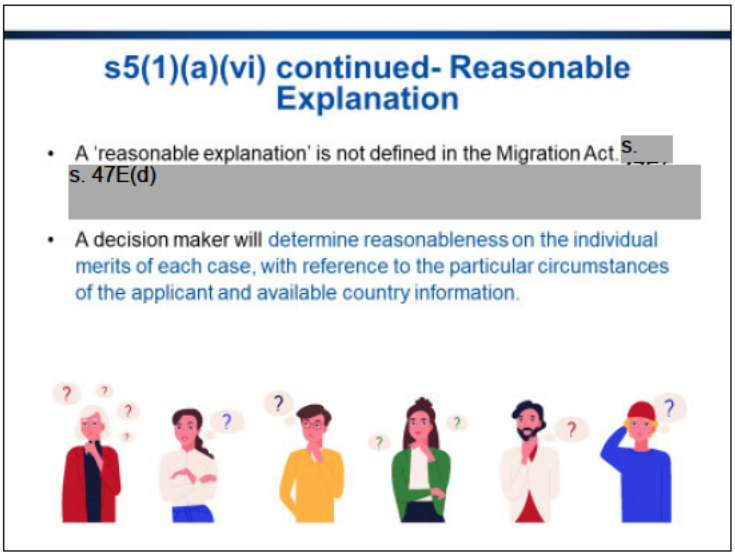
Decision makers should refer to all available information, including country of origin information, in making a determination as to whether a document is bogus.

The decision maker must determine whether a document meets the definition of a bogus document and should form a reasonable suspicion taking into account:

- Whether an applicant's biography and/or biometrics allows a decision maker to form a reasonable suspicion that the document was not issued in respect of the applicant (s5(1)(a))
- Whether a departmental document examiner confirms that the document has been fraudulently made or is a forgery or is otherwise tampered with (s5(1)(b))

◦whether an applicant's biography or biometrics allows a decision maker to form a reasonable suspicion that while the document is genuine, it was obtained by the applicant using false or misleading information (s5(1)(c)).

Reasonable Explantion



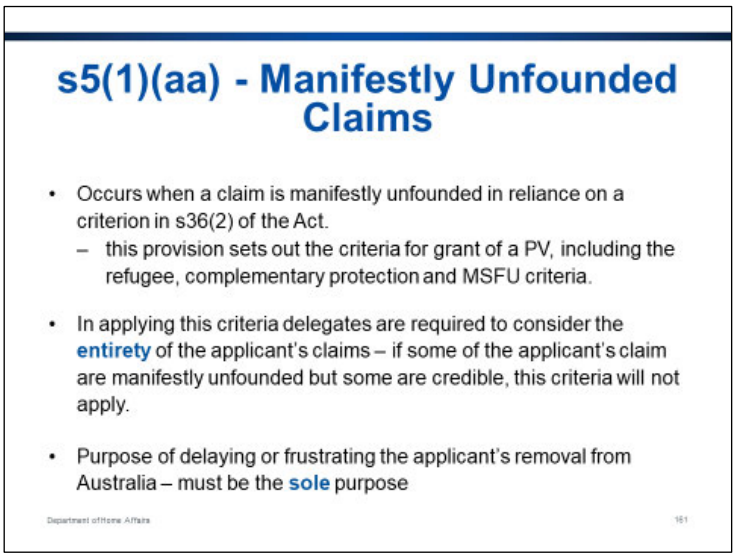
If a document provided by the applicant in support of their PV application is not genuine, the decision maker must also assess whether they have a reasonable explanation for providing a bogus document. One situation in which an applicant may have a reasonable explanation for providing bogus documents is difficulty obtaining genuine documents due to circumstances in their receiving country which were beyond their control such as s. 47E(d)

In addition, vulnerable applicants such as stateless persons or unaccompanied minors may have difficulty obtaining genuine documents. Therefore, applicants in these circumstances may also have a reasonable explanation for providing a bogus document.

However, each document must be assessed on its individual merits with regards to all of the circumstances. If the explanation is based on the circumstances in the applicant's receiving country, the decision maker should consider whether the explanation is generally consistent with available country information.

If the applicant fails to respond to the invitation to comment within the prescribed timeframe, or provides an explanation that the decision maker considers not to be reasonable, the decision maker may determine that the applicant comes under s5(a)(vi). The decision maker must provide sound reasoning for this finding in the record of assessment.

Manifestly unfounded claims

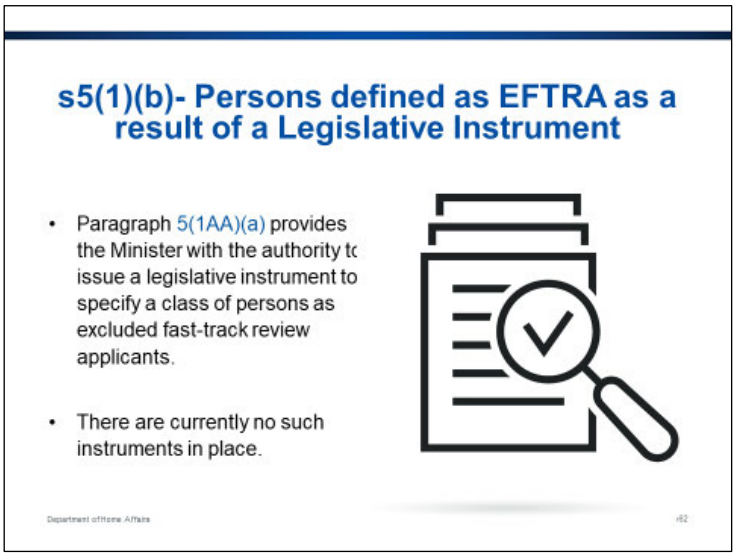


A fast track applicant whose PV application is refused will come under s5(1)(aa) if they have made a claim for protection relying on a criterion in s36(2) that is manifestly unfounded.

When assessing a claim under s5(1)(aa)(i), the decision maker must consider the overall plausibility and credibility of their claims. If the applicant has made claims that have some plausible or credible basis, or that are able to be substantiated in part but not in full, they will not come under the definition of excluded fast track review applicant.

s. 47E(d)

Legislative instrument defines person as excluded fast track

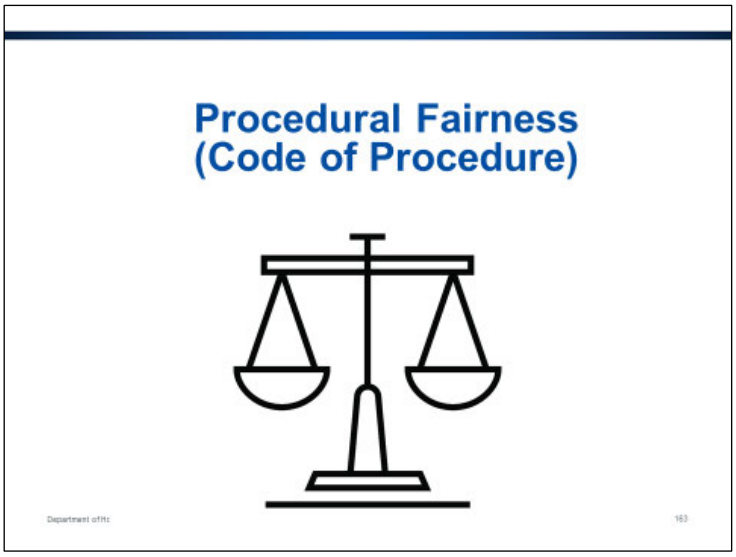


Section 5(1AA)(a) of the Act gives the Minister the authority to issue an instrument to extend the definition of excluded fast track review applicant to specific persons or classes of persons. Under s5(1)(b), the applicant will be an excluded fast track applicant if they are the subject of an instrument issued by the Minister under s5(1AA)(a) or they are included in a class of persons that is the subject of such an instrument. There are currently no such instruments in effect.

Considerations at Every Step

Through the PV assessment process decision makers need to consider credibility and follow the code of procedure.

Procedural Fairness

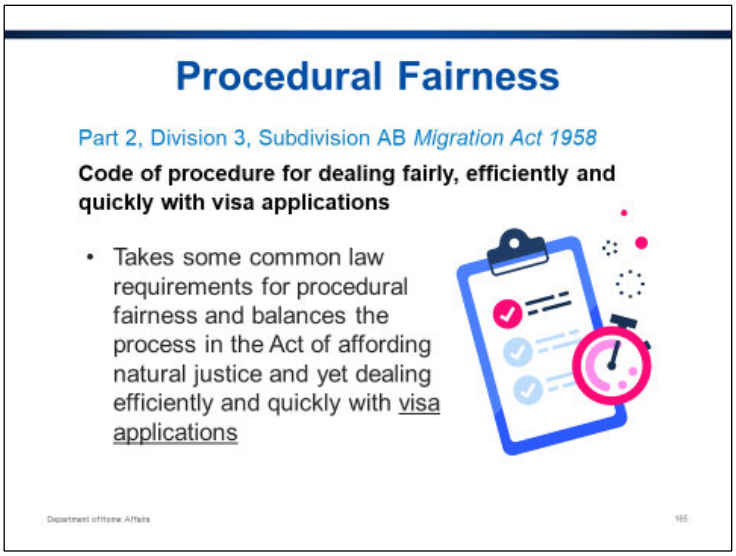


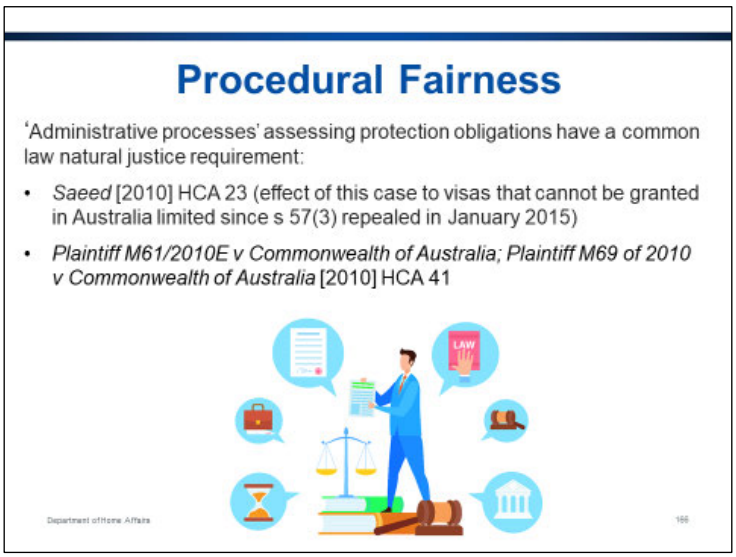
Before making decisions on visa applications decision makers must give visa applicants an opportunity to comment on certain kinds of issues and information. This is called “the obligation to give procedural fairness” (also referred to as the “natural justice hearing rule”).

Procedural fairness is about giving people a “fair go” when making decisions about them. It is about giving a person who will be affected by a decision an opportunity to put their case and to meet the case put against them.

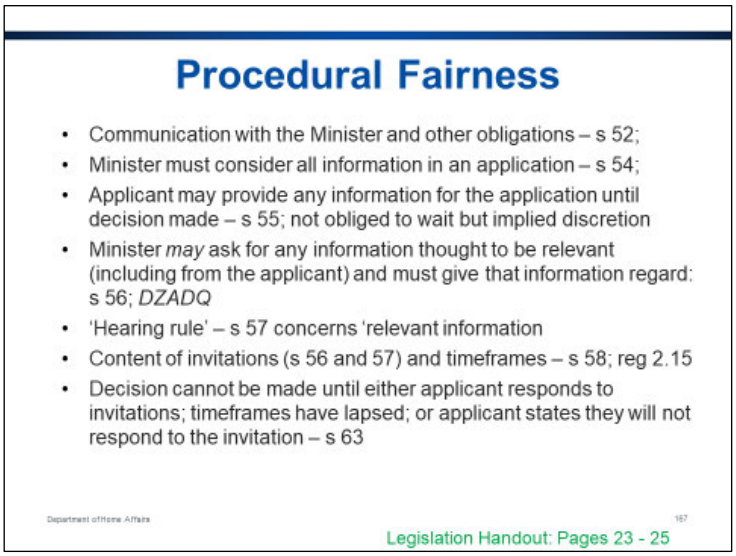
The obligations to give procedural fairness to visa applicants are set out in Subdivision AB of the Act.

When and how is procedural fairness given to an applicant?





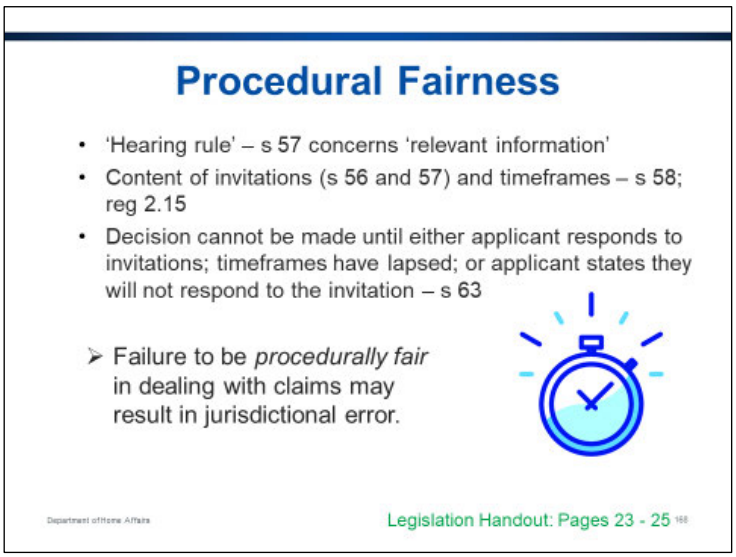
Subdivision AB of the Act codifies the principles of procedural fairness to be applied in the primary decision making process. It sets out the Code of Procedure (ss 51A-64) for primary decision makers for dealing with all visa applications. To be clear, the Code of Procedure, since it governs all visa applications, covers all protection visa applications (including those made by 'fast track' or 'excluded fast track review' applicants. However, the timeframes for response may be different for certain visa applicants. The RRT has a similar code (conduct of review) under Division 4 of the Act (ss 422B – 429A).



For primary decision makers, s 51A states that this Subdivision is "an exhaustive statement of the requirements of the natural justice hearing rule." This means, if you process a PV application, you need to comply with this Subdivision.

Under s 54, decision makers must have regard to all information in an application. Under s 55, an applicant may give a decision maker any additional relevant information, and the decision maker must have regard to that information, up until a decision is made.

Under s 56 of the Act, officers may seek further information from the applicant that they consider relevant and if such information is received, must have regard to that information in making a decision whether to grant or refuse a visa (s 56(1)). Officers may seek such additional information orally or in writing (s 56(2)). Once requested, decision makers must give the information regard (DZADQ v MIBP [2014] FCA).



Under s 57 of the Act, 'certain information must be given to applicant'. This information is 'relevant information' (also commonly referred to as 'adverse' information) other than non-disclosable information that:

- Would be the reason, or a part of the reason, for refusing to grant a visa for deciding that the applicant is an excluded fast track review applicant (s 57(1)(a)); and

- Is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member (s 57(1)(b)); and
- Was not given by the applicant for the purpose of the application (s 57(1)(c)).

s. 47E(d) .

Under s 57(1)(b) a decision maker is not obliged to put relevant information that is not specifically about the applicant (e.g. country information) to the applicant. However, in line with the principles of good decision making, decision makers are encouraged to seek all information needed to be satisfied in making the decision to grant or refuse a visa under s 65 of the Act. Further information may be sought from the applicant under s 56.

Please note, where inconsistent information is provided by the applicant, this is not considered adverse information or 'relevant information' for the purposes of s 57 because of s 57(1)(c). That is, information that has been provided by the applicant does not necessarily need to be put back to them. s. 47E(d) .

Decision makers can utilise s 91V to request an applicant to verify information (discussed below in relation to credibility). Information that is relevant and has been dealt with in the s 57 process is not subject to a continual or never-ending loop of procedural fairness. A decision maker can indicate that a decision will be made on an application on a particular date so long as that date takes into account the procedural fairness prescribed timeframes.

If the requirements under s 57(1) are met, you are required to give the applicant particulars of the relevant information under s 57(2)(a) and "ensure, as far as reasonably practicable, that the applicant understands why it is relevant to the consideration of the application" under s 57(2)(b). The applicant is then invited to comment on that information under s 57(2)(c).

Section 58 sets out the time periods that apply for an invitation under s 56 or 57 which are the timeframes stipulated in reg 2.15.

('Fast track' applicants are considered in a separate module – note that different time periods will apply to them)

If relevant information cannot be disclosed (because it is "non-disclosable information"), it may be appropriate to give it little or no weight. Where the information itself cannot be disclosed, as much of the substance of the information as possible (i.e. the 'gist', should be put to the person for comment).

Decision makers should consult the Notification Requirements PCCF document (LS-1818) on LEGEND for further guidance or contact the Refs Help Onshore mailbox (s. 47E(d)) should they require any assistance in this regard.

Group Discussion Question

Procedural Fairness

Group Discussion Exercise:

For a Protection visa application, is there an obligation to invite an applicant to comment on country of origin information?

Does your answer change for an 'excluded fast-track review applicant'?

What do you understand to be 'non-disclosable information'?

How would you deal with informant disclosures?

Do you have to invite comment on inconsistent information from another application or entry interview?

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Table Group Exercises

Procedural Fairness

Table group Exercise 1/3:

You have decided that a fast-track applicant meets the criteria for the grant of the visa. You also note the applicant was previously refused protection by the UNHCR in Indonesia. Are you required to put that information to the applicant for comment?

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Procedural Fairness

Table group Exercise 2/3:

You invite an applicant to give additional information in support of the application. The applicant does not respond in the prescribed timeframe and does not seek an extension.

A) What are you legally able to do in this situation?

B) What happens if the applicant gives the Minister the information before decision is made?

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Procedural Fairness

Table group Exercise 3/3:

The applicant is invited to an interview to further discuss the protection visa application. At interview you invite the applicant to comment on information in accordance with s 57 of the Act.

A) When does the Act say you are legally able to proceed to make the decision?

B) What is the timeframe for the applicant to respond?

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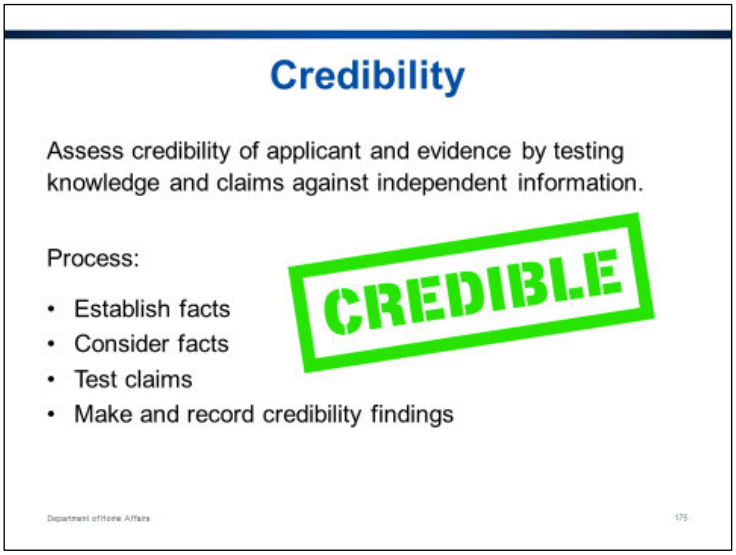
Credibility



Assessing applicant's credibility and evidence

An assessment of credibility is not undertaken at any one time in the protection assessment process, rather, it is considered at every stage of the assessment.

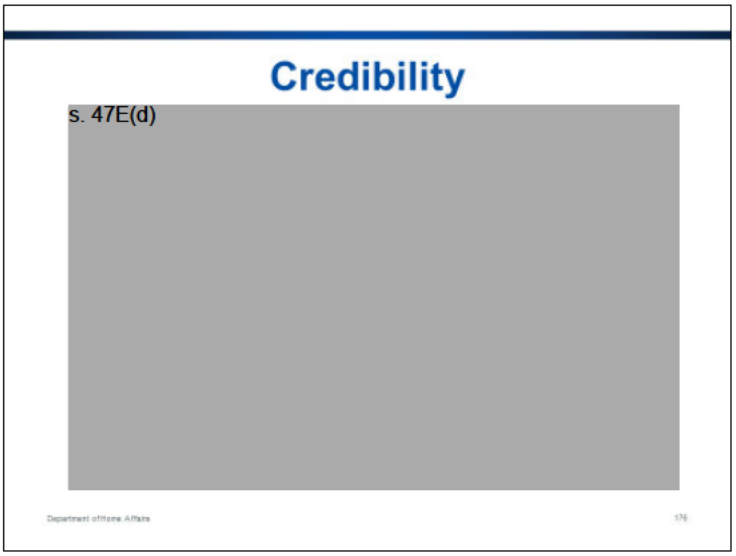
s. 47E(d)

Decision makers should follow these key steps in assessing credibility:

- Establish the facts – through the collection of information and supporting documentation from the applicant and independent country information

- Consider the facts – identify which facts are material to the claim and identify inconsistencies or aspects of the claim that need to be tested
- Test the claims – by testing the applicant's knowledge and inviting comment or additional information (affording procedural fairness)
- Make and record credibility findings – determine which claims are or are not credible and accepted/not accepted; determine whether the applicant is generally credible and may be afforded the benefit of the doubt or whether the applicant is not a witness of truth. These findings should be based on evidence including when and how you put relevant information to the applicant, what the applicant's response was and how you took this into account in making your finding.

Testing applicant's claims



s. 47E(d)

M17/2004 v MIMIA [2005] FCA 86
Three independent linguistic assessments of recordings of the applicant were undertaken. The first and third assessments confidently concluded that the applicant was from Pakistan, while the second concluded that he "unequivocally comes from Ghazui in Afghanistan." In this case, the RRT did not give any weight to these assessments and decided the application on other information before it.

s. 47E(d)

s. 47E(d)

s. 47E(d)

s. 47E(d)

s. 47E(d)

Drawing adverse inferences

Sections 91V of the Act are also relevant when dealing with credibility concerns during a PV assessment.
Verification of information (s 91V)

Section 91V of the Act allows officers to request a PV applicant to verify information, by making an oral statement that certain information in their application is true. s. 47E(d)

What if the applicant refuses or fails to comply with the request? What if the applicant complies with the request but you have reason to believe that the applicant was not sincere?

- In these circumstances, you may draw any reasonable inference unfavourable to the applicant's credibility, as long as a warning was made to the client beforehand.

Decision maker's reasoning and evidence

As a decision maker, you look at all evidence as a whole, and decide which evidence is relevant or material to the application. By law, you are required to take into account relevant considerations when making a decision on an application.

When you are looking at evidence, you should consider the:

1. Relevance
2. Reliability
3. Credibility
4. Currency
5. Sufficiency of the material before you, and as a result of this process,
6. How much weight should you give the evidence?

Decision makers need to make sure their reasoning is clear, concise and sustainable.

"The reasoning process and supporting evidence that forms the basis on which a finding that evidence is rejected should be disclosed and **clear findings** made in **direct and explicit terms**. It is not sufficient simply to make general passing comments on general impressions made by the evidence where the issue is important or significant." - *W148/00A v MIMA* [2001] FCA 679.

Need evidentiary basis

Credibility of claims is to be determined by the decision maker in light of all the evidence. An adverse credibility finding must have an evidentiary basis. If there are specific aspects of an applicant's account which you consider may be important to the decision and may be open to doubt, you must at least ask the applicant to expand on those aspects of the account and ask the applicant to explain why the account should be accepted (*SZBEL v MIMIA* [2006] HCA 63 at [47]).

Demeanour – cultural variations

Decision-making must make allowance for the different cultural settings of applicants and 'avoid applying assumptions about human behaviour which are contingent upon or informed by local culture': *Bakhtyar v MIMA* [2001] FCA 947. (See also *Kathiresan v MIMA* [1998] FCA 159; and *Sundararaj v MIMA* [1999] FCA 76.) Whilst demeanour (e.g. apparent evasiveness in response to questioning) may form part of an adverse credibility finding, decision makers should be cautious in placing too much importance on it. Under

departmental policy, minimal weight should be given to it and it should not be the sole basis for an adverse credibility finding. See also 'Other Considerations' subheading in this part for further information.

Using information on the Internet

Caution is to be used if considering Wikipedia as a source of information. Decision makers have discretion to obtain any information they think is relevant to the decision (s 56), which may encompassing using Wikipedia sources. However, decision makers should be prudent, considering the authors and editors of the information, the nature of the information, and what weight to give to it (See *MZXMM v MIAC* [2007] FMCA 975 and *MZYY v MIAC* [2013] FMCA 34). For guidance on selecting and evaluating country information for use in decision making please refer to the Use of Country of Origin Information PCCF document (VM-3245) available on LEGEND.

As a department, we use information on CISNET. If you find information elsewhere, you can request for it to be included on CISNET. Operational guidance on assessing applicants from certain countries is available on LEGEND from time to time.

Known facts

It is unlikely that a State would be expected to grant refugee status to a person whose account, although plausible and coherent, was inconsistent with known facts, e.g. country conditions as outlined on CISNET (*Chan Yee Kin v MIEA* [1989] HCA 62 (per McHugh)).

Contradictions and discrepancies

Officers should be aware that in some circumstances it may be prudent to provide a client with an opportunity to clarify or elaborate on what appear to be inconsistencies with the evidence:

Sellamuthu v MIMA [1999] FCA 247

FC noted that:

> *mere "vagueness or inconsistencies in recounting peripheral details", or an inability to give a "precisely accurate or consistent account of some past events" would not be enough for an adverse credibility finding.*

FC also noted that discrepancies, which are obviously insignificant and immaterial, are insufficient to undermine an applicant's credibility. Insignificant or peripheral discrepancies are not likely to be material factors.

MIMIA v SGLB [2004] HCA 32

Kirby J noted that there is no necessary correlation between inconsistency and credibility in such cases. Many factors may explain why applicants present with the appearance of poor credibility. These include:

- Mistrust of authority;
- Defects in perception and memory;
- Cultural differences;
- The effects of fear;
- The effects of physical and psychological trauma;
- Communication and translation deficiencies;
- Poor experience elsewhere with governmental officials; and
- A belief that the interests of the applicants or their children may be advanced by saying what they believe officials want to hear.

The Tribunal must be firmly told - if necessary by this Court - that the process is one for arriving at the best possible understanding of the facts in an inherently imperfect environment. It is not to punish or disadvantage vulnerable people because they have made false or inconsistent statements, or are believed to have done so.

Courts are prepared to scrutinise such decisions and decision makers should be careful **not to join a series of minor alleged inconsistencies and ambiguities** to reject the whole of the applicant's account.

In the case of *SZGUR v MIAC* (unreported, FMC 28/11/07) the RRT's decision was quashed as its selective use of corroborative evidence to undermine the applicant's credibility created an apprehension of bias in the form of a pre-judgment, that is, "a mind not open to persuasion."

Where a decision maker finds an applicant to be generally credible, then they should give the applicant the **benefit of the doubt** where they are unable to fully substantiate their claims.

Different accounts

Shi Chu Lin v MIMA [1999] FCA 192

The applicant's account to the RRT differed to the account prepared by an agent and contained in his original application.

FC held that the RRT had taken care to elicit the applicant's account as clearly as possible and that there were no errors in its approach or findings.

This case indicates that if posed with this problem, decision makers need to very carefully consider the basis for the differing accounts and should be aware that the differences might not have been the result of the applicant's actions.

Delay in applying for protection

Delay in seeking protection will not be conclusive of itself but it can support an adverse credibility finding as well as a finding that the applicant's fear is not well-founded (*Zhang v RRT* & Anor [1997] FCA 423; *Kavun v MIMA* [2000] FCA 370 and *Subramaniam v MIMA* (Carr J, 10/3/98)).

SZJYM v MIAC [2008] FMCA 652 (27 June 2008)

The applicant applied for a PV, approximately 6 years after arriving in Australia.

The RRT affirmed refusal decision, forming an adverse view of applicant's credibility because of the delay in making the application.

FMC: held that it is jurisdictional error to reject an applicant's credibility **solely** by reference to the applicant's delay in applying for a PV. The court granted an application to review the RRT's decision because RRT treated the applicant's delay as conclusive of claim fabrication.

Pannasara v MIMA [2000] FCA 1331

The applicant had departed his country of nationality 10 years before applying for protection in Australia (7 of those years spent in Australia). In assessing a delayed application for protection, the RRT took into account events that had occurred in the applicant's country in the intervening years; and the applicant's personal history during that period.

The RRT considered that:

- Delay did not fatally undermine the applicant's claims to have a strong fear of returning to his own country; and
- Delay was one factor in considering whether his claim for protection from persecution was well-founded.

FC endorsed the RRT's assessment of the delay in seeking protection.

Poor interpreting errors

Poor interpreting may deny a person an opportunity to put his case forward, and may affect the perceptions of the credibility of the evidence or applicant.

MZXPV v MIAC [2008] FMCA 1225 (1 September 2008)

The RRT affirmed the delegate's decision to refuse to grant a PV. The RRT found the applicant's evidence was unsatisfactory and considered the evidence regarding election campaign was vague and some claims were fabricated.

FMC: Reithmuller FM said:

- The applicant had raised concerns about the interpreter at an early stage.
- The case turned on credibility of applicant.
- When reading the answers that the interpreter provided, it is easy to obtain the impression that the applicant is without a clear version of events, constantly trying to create credible answers.
- If the correct interpretation of the answers is read, the impression is quite different. The poor interpreting created an apparent inconsistency.
- Inadequate interpretation at the RRT hearing resulted in a failure by the RRT to comply with s 425.

FMC set aside RRT decision and allowed review because the poor quality of interpreting denied the applicant proper opportunity to put case.

There is a difference between poor interpretation and words being actually 'intruded' into the applicant's claims by the interpreter:

W98/45 and MIMA [1998] AATA 948

Matthews J: "… and I have already mentioned the very significant difference between the two versions which appears at the end of the quoted passages, when the interpreter said to Ms Johansen 'I have watched for operations about 20 to 25 times for assassination', whereas those crucial final words 'for assassination' had not been used by the applicant."

"It is a matter of concern that these inaccuracies intruded into the English version of this interview. Interviews such as this are of vital importance to the individual seeking a visa. It is essential that they be translated faithfully and accurately and that any ambiguities be resolved by further questions, not by the interpreter intruding an account of what he or she thinks the individual meant to say."

Other considerations

- An applicant may be suffering from post-traumatic stress disorder or otherwise affected by recent travels (see *Selliah v MIMA* [1999] FCA 615). But do not take on the role of medical expert – that is not your job.
- There may be statements that are not susceptible of proof. But this should not lead to an uncritical acceptance of any and all the allegations made by applicants See *Randhawa v Minister of Immigration, Local Government and Ethnic Affairs* [1993] FCA 592.
- Refugees may be identified as not telling the truth on certain issues and still be refugees (*SZIEW v MIAC* [2008] FCA 522 (18 April 2008)).

SZIIF v MIAC [2008] FCA 913 (19 June 2008)

2 RRT decisions were previously set aside by consent. 3rd RRT member found inconsistencies in the statements provided to the 3 different tribunals.

FC: The unusual circumstances required particular caution when assessing inconsistency. The 3rd tribunal needed to ensure it did not overlook the combined effect of delay and disadvantage to the applicant in having to repeat a detailed account of past mistreatment when assessing the overall consistency of his account. The FC stated that the inconsistencies were not properly analysed, several misstated the applicant's earlier position and some involved summaries taken out of context.

Officers are reminded to utilise the 'Assessing Credibility' section within available in LEGEND.

Activity 8 – Credibility

s. 47E(d)

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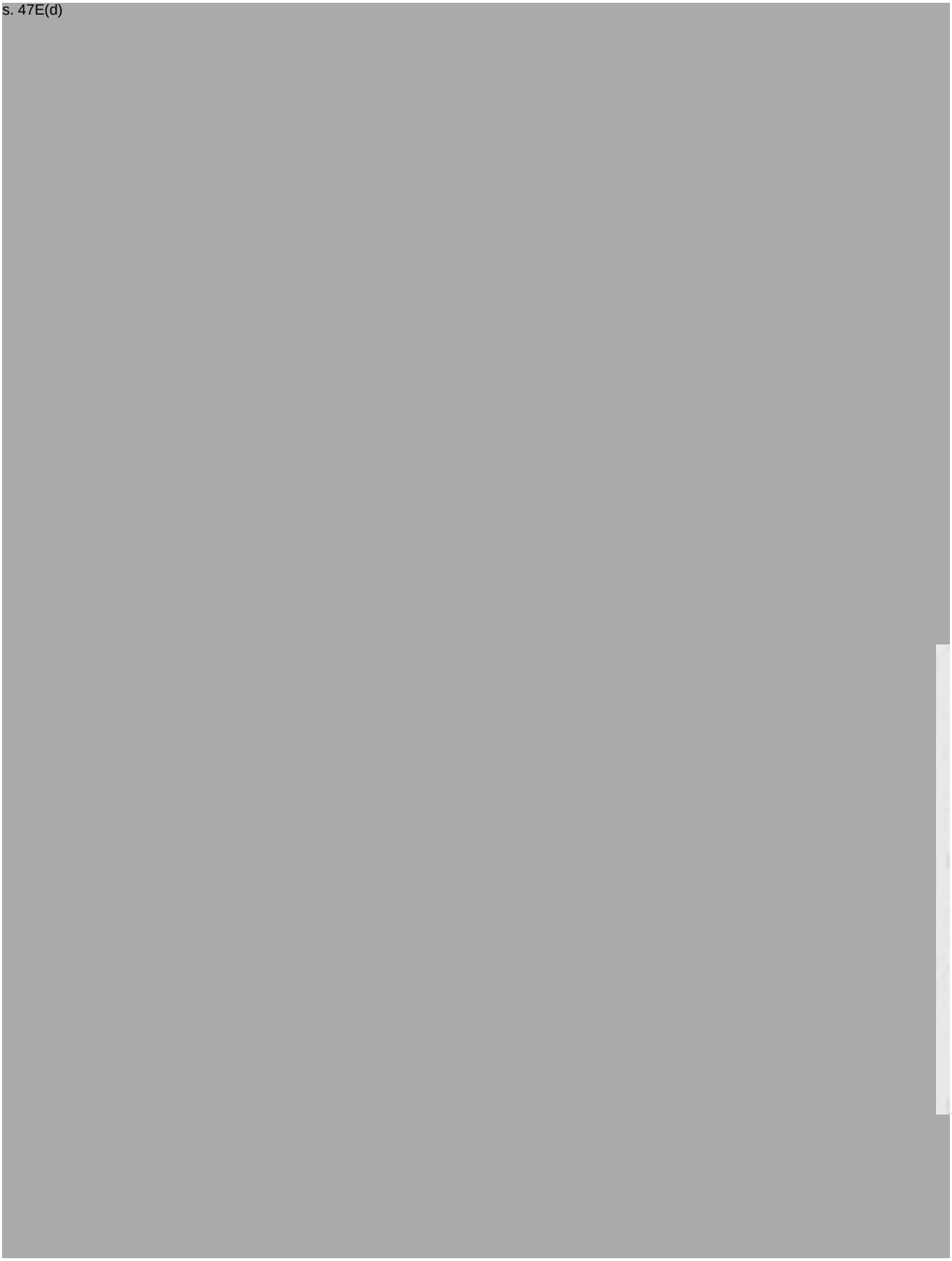
s. 47E(d)



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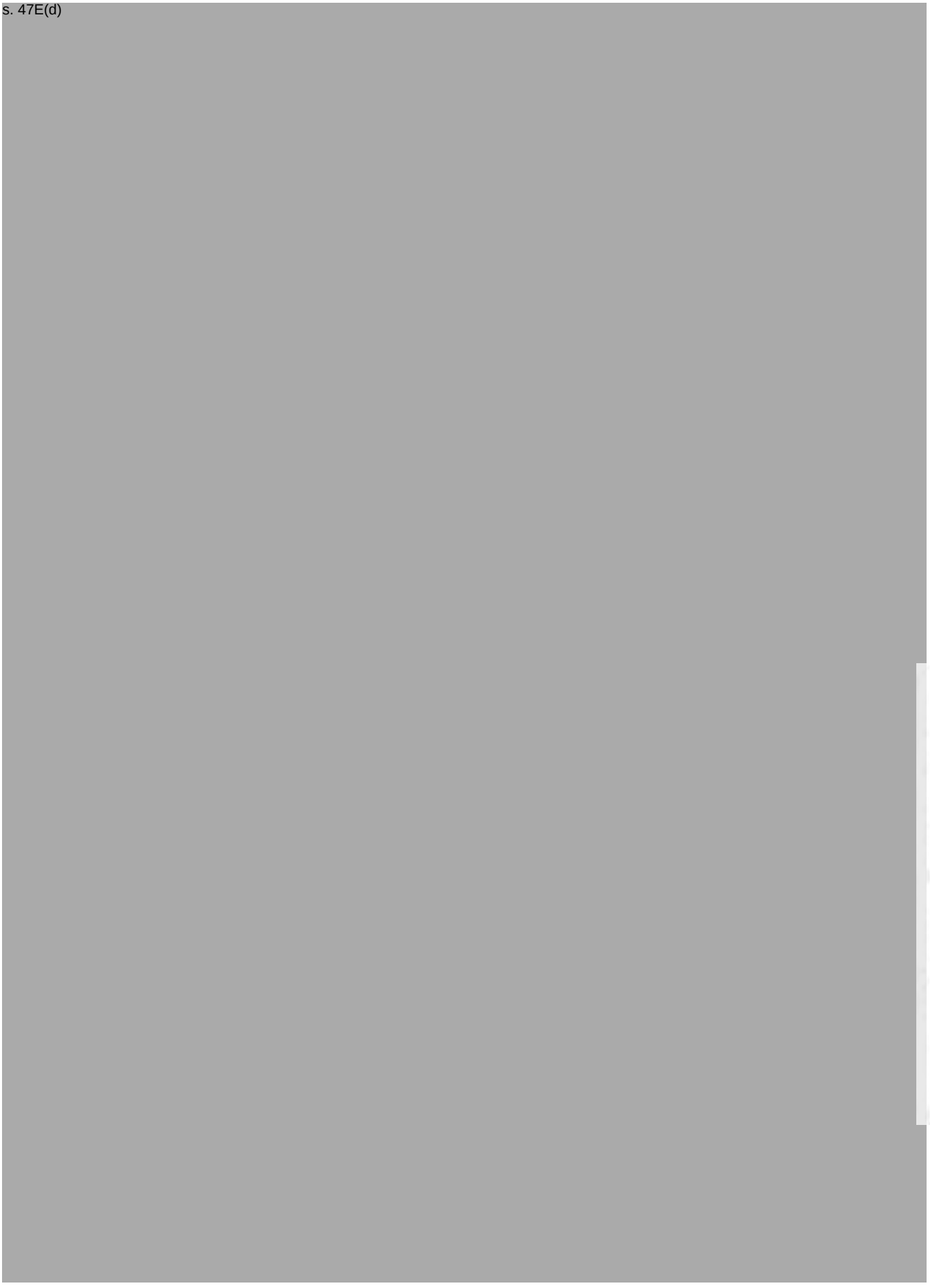

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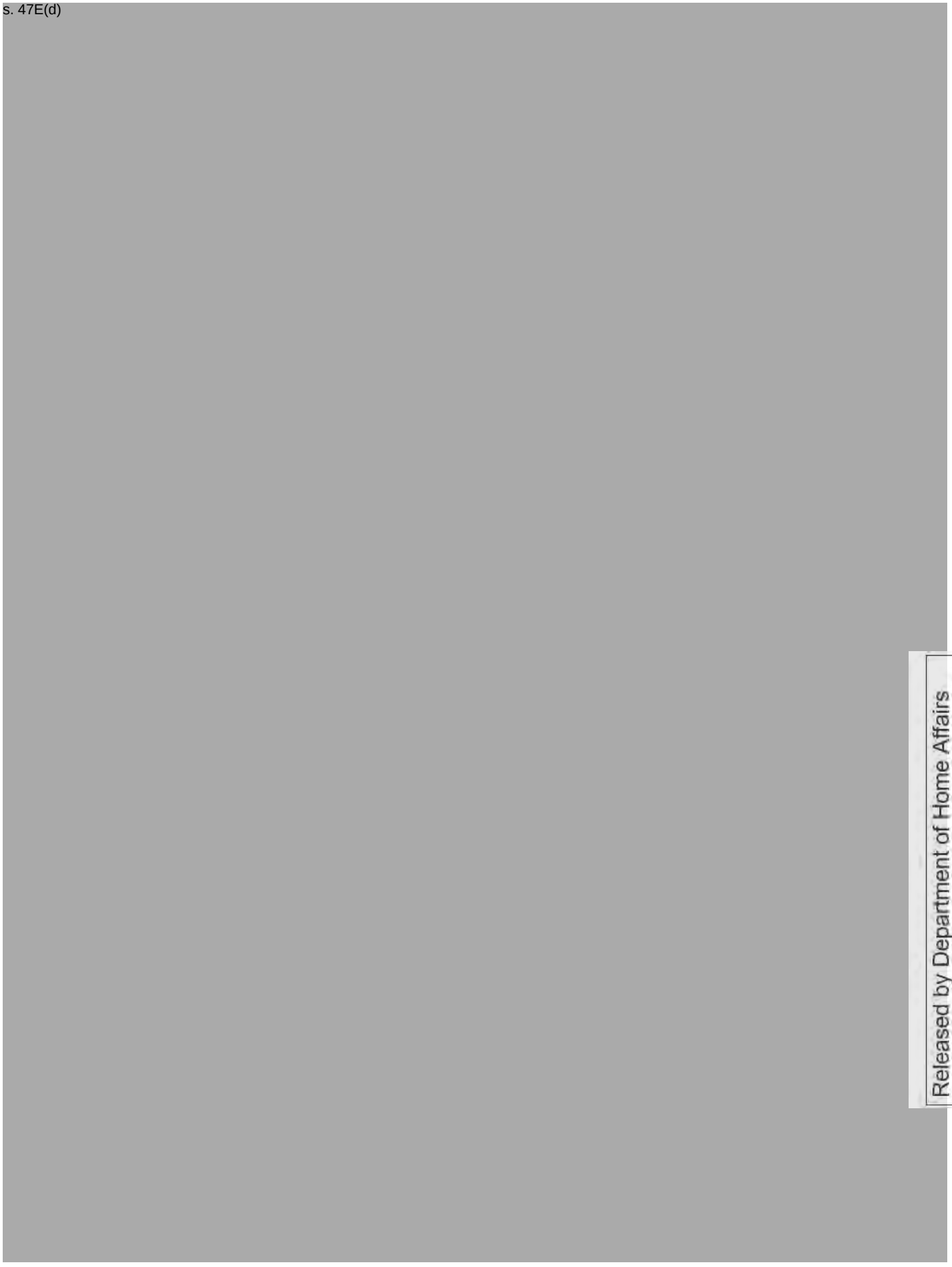

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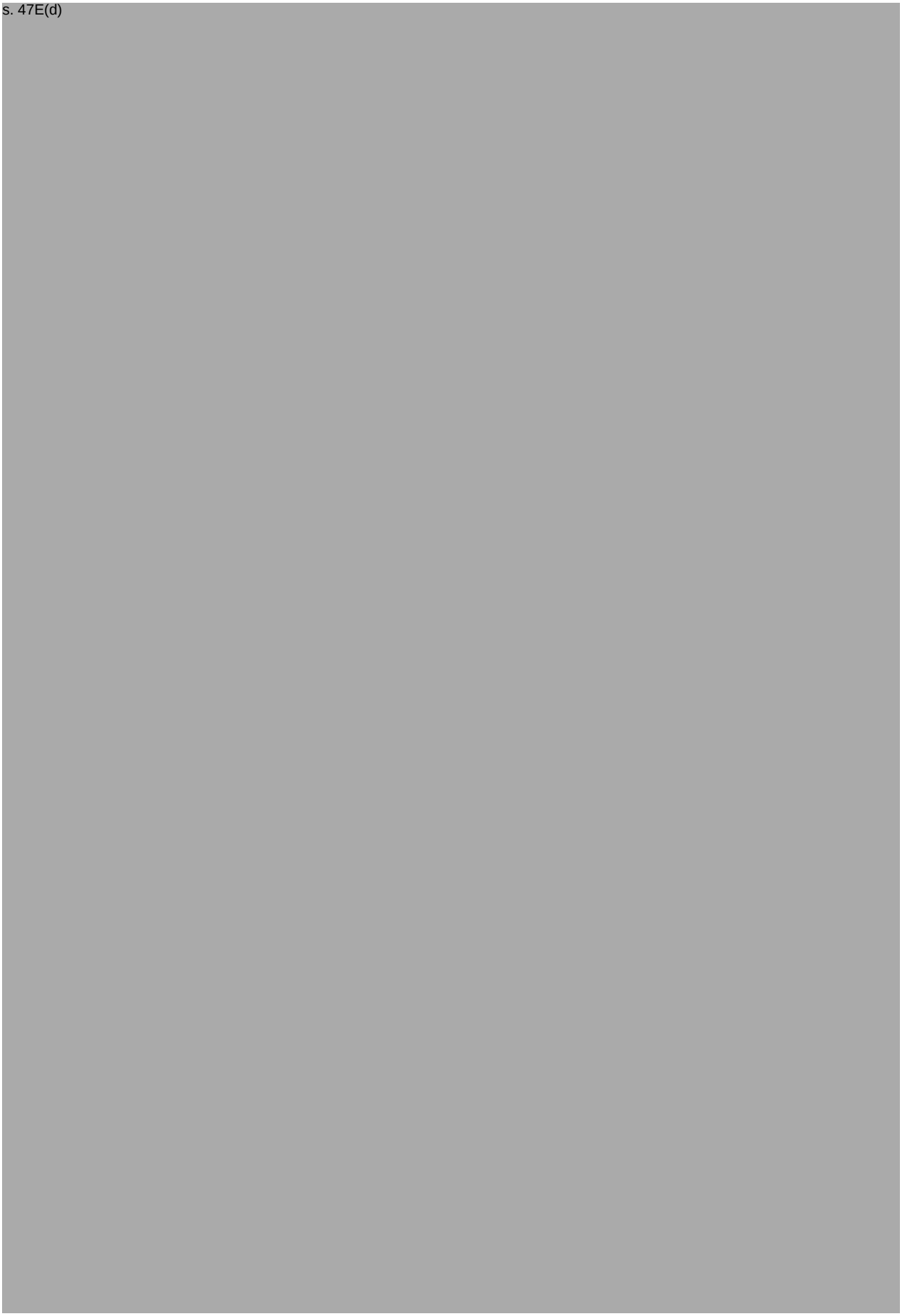

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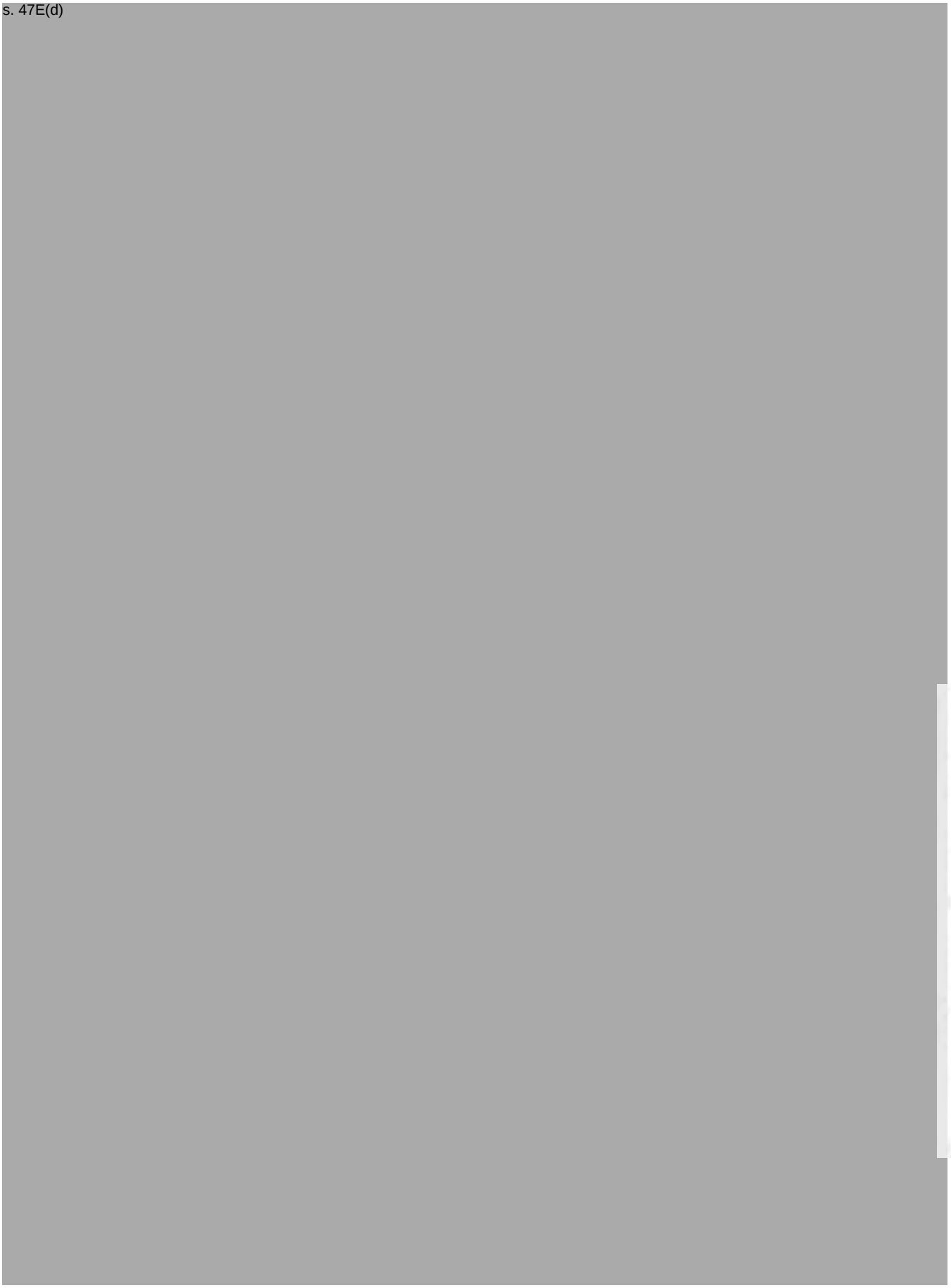

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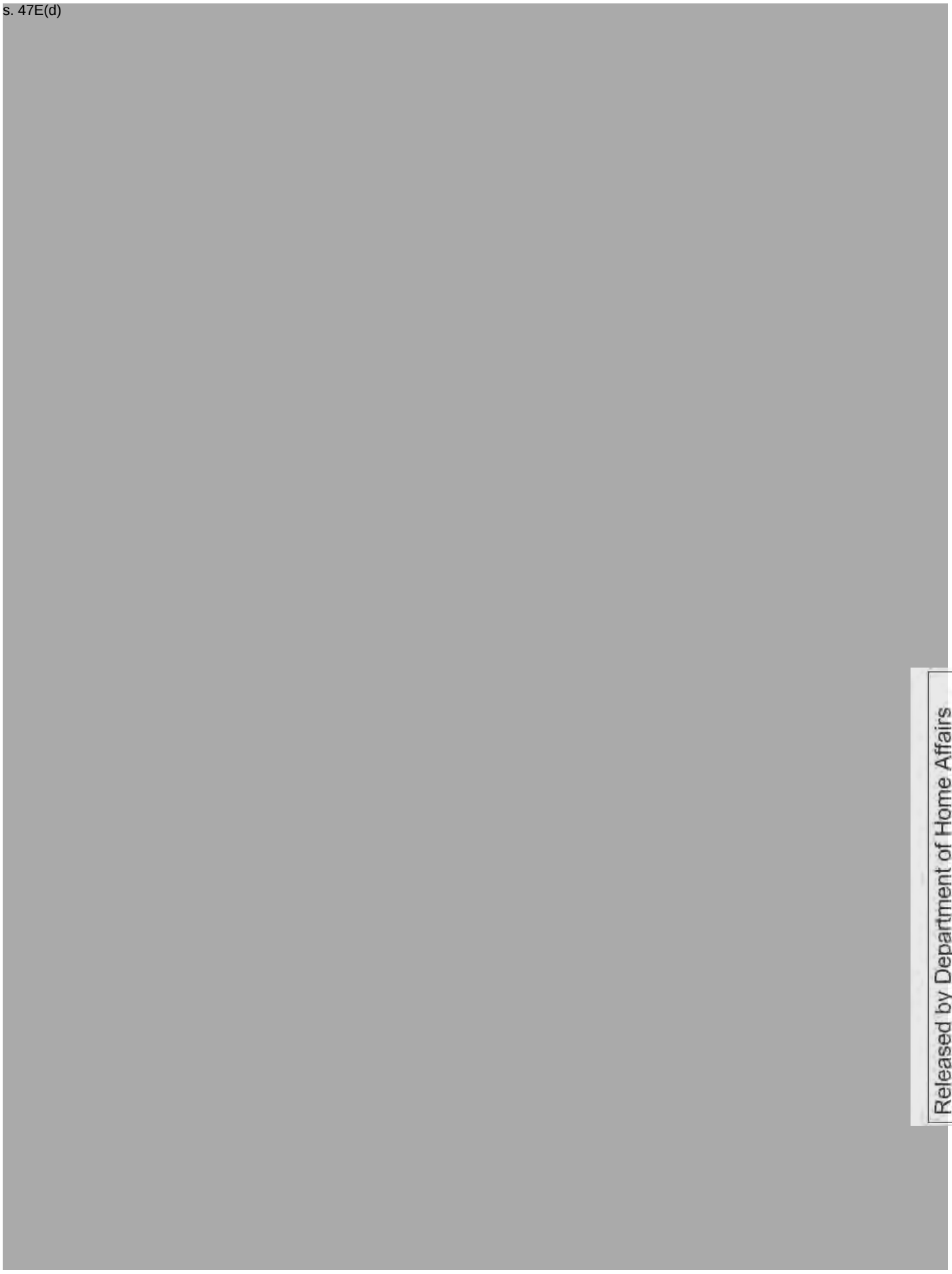

☑ Activity 9 – Refugee law and CP scenarios

s. 47E(d)

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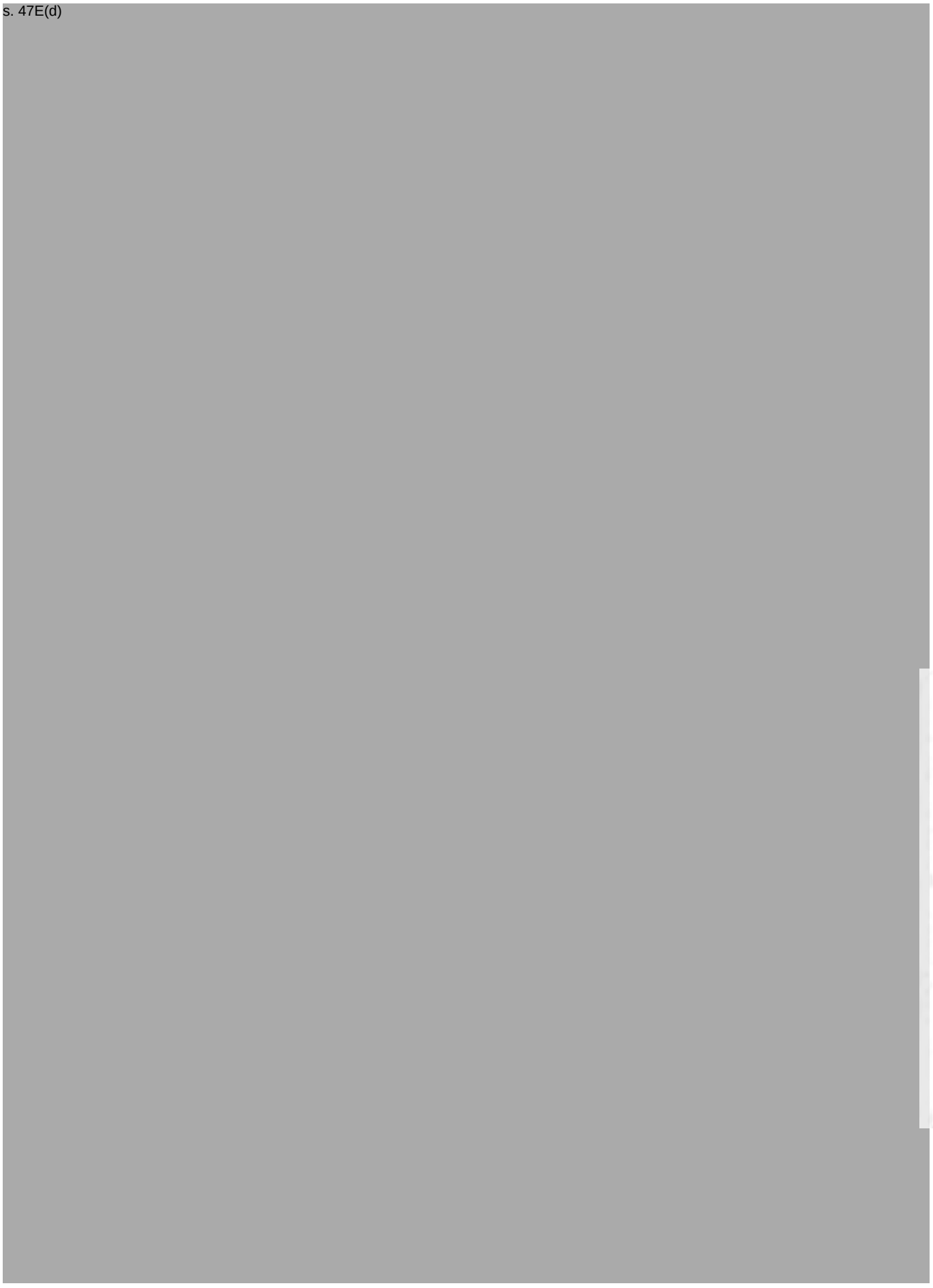
s. 47E(d)



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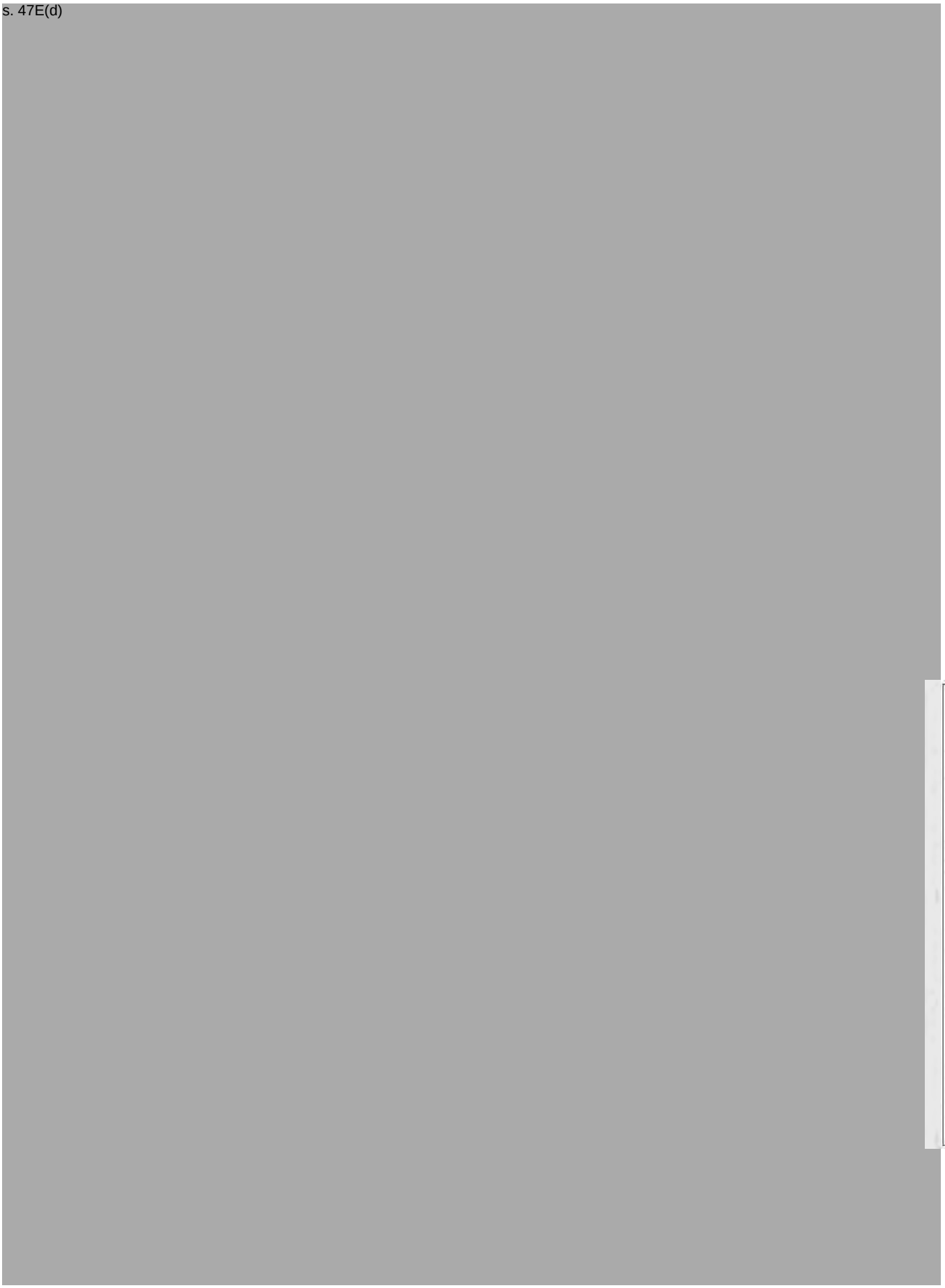

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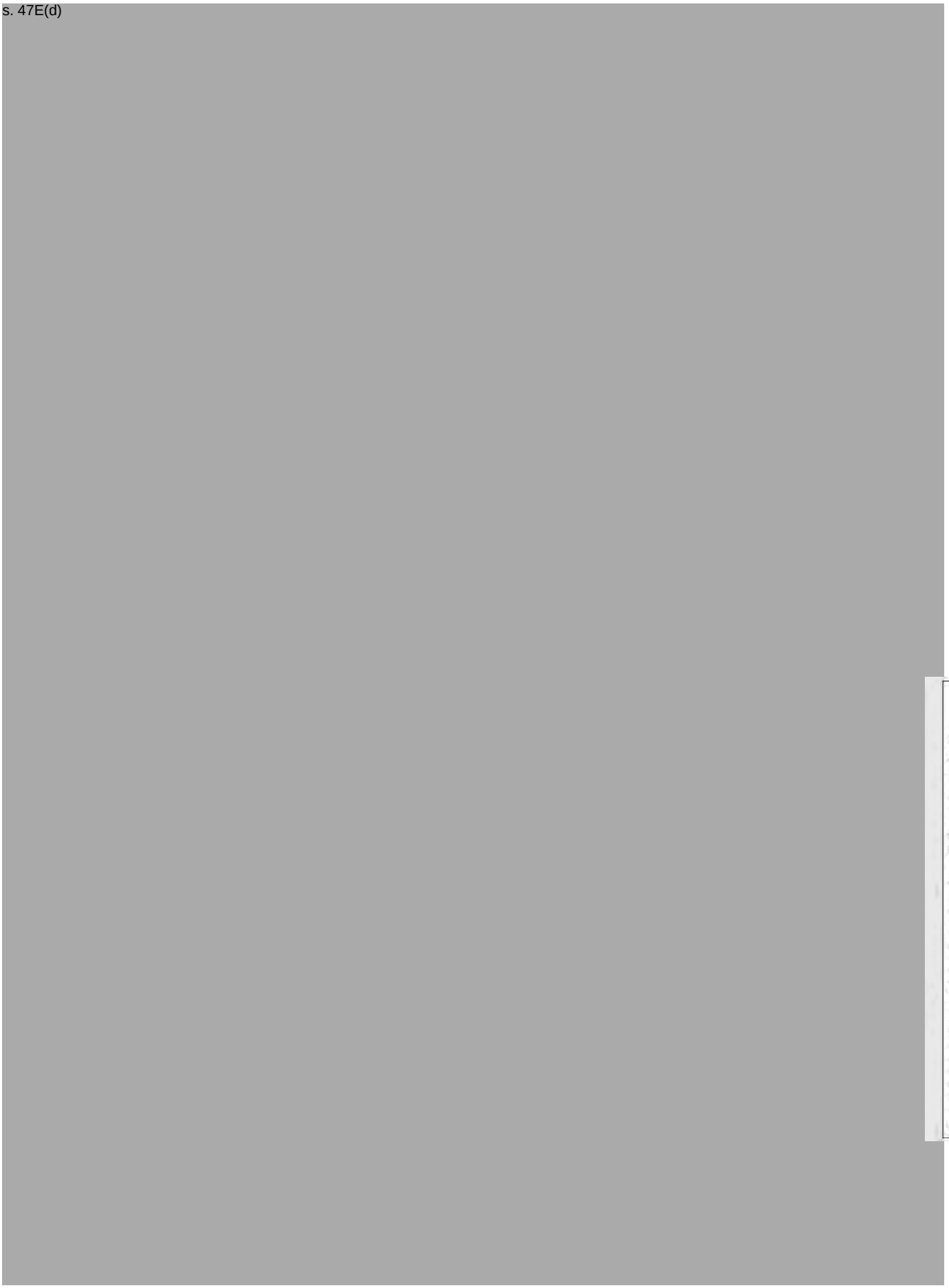

s. 47E(d)