



Australian Government

Department of Home Affairs

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Legal Framework for Protection Processing (Refugee Law and Complementary Protection)- February 2024

Training Workbook

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Name:	
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1	24/07/18	s. 22(1)(a)(ii)	Initial Creation
2	24/05/19	s. 22(1)(a)(ii)	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	s. 22(1)(a)(ii)	Inclusion of updated slides, updated LEGEND references of PPCF documents and general updates relating to outdated departmental references.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	s. 22(1)(a)(ii)	Updates to contents to better reflect document structure. Minor stylistic changes for consistency throughout the document. Update to <i>BYE15 v Minister for Immigration and Border Protection</i> [2016] FCA 263 as the text noted it was on appeal in 2016 but this has not been updated.
5	26/05/2020	s. 22(1)(a)(ii)	Minor updates to content. Updated flowchart on page 23. Updated slides.
6	08/06/2023	s. 22(1)(a)(ii)	Re-drafted and updated to re-structure training.
7	01/02/2024	s. 22(1)(a)(ii)	Minor content updates

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Reference Materials and Resources

- *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 and Sexual Orientation Guidelines (VM-5345) - LEGEND
- Use of Country of Origin Information (VM-3245) - 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
 - <https://www.icc-cpi-int/sites/default/files/RS-Eng.pdf>
- Interpreting the Rome Statute - Elements of Crimes
 - <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>
- Protection visa Help Desk [s. 22\(1\)\(a\)\(ii\)@homeaffairs.gov.au](mailto:s.22(1)(a)(ii)@homeaffairs.gov.au)

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
FC	Federal Court (of Australia)
FCFM	Federal Circuit and Family Court (of Australia)
FFC	Full Court of the Federal Court
FMCA	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 and Family Court.
PV	Protection visa
PPV	Permanent Protection visa
Refugees Convention	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 <i>Tribunals Amalgamation Act 2014</i> . 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
Tribunal	Used collectively to refer to the AAT, RRT, or IAA. Where required, a specific body may be referred to.
UAA	Unauthorised Air Arrival
UMA	Unauthorised Maritime Arrival

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Acronym	Description / Meaning
UNHCR	United Nations High Commissioner for Refugees
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).

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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 (PV) applicants or those who work in roles that require a knowledge of the Refugee Law and Complementary Protection (CP) Legal Framework.

Module duration

8 half days, online via Microsoft Teams. 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. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au) 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 PV caseload.

Prerequisite 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) • Legal Framework under the Migration Act (LIOL-10636) <i>Handbook ADD2013/680031</i>		
Decision Making Principles (CURR-3873) • Decision Making Principles (LIOL-10632)		

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Title	Tick when complete	Date completed
Decision Making Principles: Assessment (LIOL-10633) <i>Handbook ADD2013/679980</i>		

Step-by-step procedure for this course

- Step 1 Complete the prerequisite learning
- Step 2 Print this workbook if preferred or save a soft copy
- Step 3 Read the introduction to this workbook on page 10
- Step 4 Read the historical recap on PV processing pages 12 and 13.
- Step 5 Complete knowledge quiz in the Activity Handout.
- Step 6 Complete the pre session questionnaire (emailed separately by PALSS)
- Step 7 Bring prerequisite learning handbooks (PODMs only), this Participant Workbook, Legislation Handout and Activity Handout to training
- Step 8 Attend all Microsoft Teams sessions and complete activities during training
- Step 9 Complete the Refugee Law / CP quiz (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 engages Australia's protection obligations as a refugee under Australia's domestic law.
 - Whether someone engages Australia's protection obligations for complementary protection reasons under Australia's domestic law.

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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 PV processing.

Historical recap:

- 1989: first time Australia enacted specific provisions to deal with refugees under the 1951 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 Handbook.
- 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 an Independent Merits Reviewer (IMR). An RSA/IMR did not result in the grant of a PV, instead a recommendation was made to the Minister that the person engaged protection obligations and the visa application bar should be lifted to the person to apply for a PV. allow
- 11 November 2010: *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 High Court cases – determined that RSA process conducted for the purpose of the 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: *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 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 under the Act.
- 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 v Director General of Security* [2012] HCA 46 High Court case – PIC 4002 (relating to ASIO security assessment) found invalid.

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- 16 May 2013: Parliament passed the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (UMA Act), which implemented 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 Temporary Protection (subclass 785) visa.
- 2 December 2013: TPV Regulations disallowed by the Senate, meaning any TPVs granted were invalid.
- 14 May 2014: *Migration Amendment Act 2014* 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). Introduced statutory definition of 'refugee', 'well-founded fear' and other matters. Also re-introduced TPV (subclass 785). The measures were in part intended to deal with the 'legacy caseload' – unauthorised maritime arrivals who arrived between 13 August 2012 and 1 January 2014 and who were not transferred to a regional processing centre.
- 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. Introduced amendments to the application bars (s. 46A; s. 46B and s. 91K) and amendments to strengthen the integrity of processing of PVs (s. 91W, s. 91WA and s. 91WB).
- From 1 October 2017, legacy caseload UMAs who had not applied for a TPV or a SHEV were barred from applying for any type of temporary or permanent visa in Australia. They also no longer had access to support services including income support and rental assistance, but could be granted a BV with permission to work and access to Medicare and education for school-aged children while they made arrangements to leave Australia.
- 13 May 2021: *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (CIOR Act) passed. The CIOR Act came into effect on 24 May 2021, the day of Royal Assent and introduced s. 36A into the Act and made related amendments to s. 197C, affirming that Australia's refugee and CP obligations must be assessed before other matters such as ineligibility, character, protection in another country or other visa criteria are considered. The purpose was to ensure that a 'protection finding' in relation to an applicant is made for the purposes of s. 197C(3) of the Act (relevant to the obligation to remove an unlawful non-citizen from Australia).
- From 14 February 2023, the Government made permanent Resolution of Status (RoS) (subclass 851) visas available to TPV and SHEV holders who had applied for or held one of those visa types before that date. RoS visas were not available to those who enter Australia irregularly without a valid visa on or after 14 February 2023.

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Comparison TPV / SHEV and PPV

Element	TPV/SHEV	PPV
Who	UMA, UAA	Onshore applicant
How arrived	boat / air arrival no visa	Lawful arrival then claimed protection
When arrived	2008-2014	No current date of arrival restrictions
Subclass	785, 790	866
Grant	TPV 3 Years SHEV 5 Years	Permanent
Legislation	<u>Validity requirements:</u> <u>s 46 Migration Act;</u> <u>Regulations:</u> Item 1403 Schedule 1 (TPV) Item 1404 of Schedule 1 (SHEV) <u>Criteria:</u> <u>Includes s 36 of the Act;</u> <u>Regulations:</u> Schedule 2 (785 for TPV; 790 for SHEV)	<u>Validity requirements:</u> <u>s 46 Migration Act</u> <u>Regulations:</u> Item 1401 Schedule 1 <u>Criteria:</u> <u>Includes s 36 of the Act;</u> <u>Regulations:</u> Schedule 2 (866)

Principle of *non-refoulement*

Non-Refoulement* Obligations Convention relating to the Status of Refugees and its Protocol ('Refugees Convention') • Article 33(1) International Covenant on Civil and Political Rights ('ICCPR') • Article 6 – inherent right to life • Article 7 – prohibition on torture, cruel or inhuman or degrading treatment or punishment • 2nd Optional Protocol - abolition of the death penalty Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') • Article 3 - prohibition on torture  Department of Home Affairs * Non-refoulement is defined in s 5(1) of the Act	Notes: _____ _____ _____ _____ _____ _____ _____ _____
---	--

A key aspect of finding a person to be a refugee under the Refugees Convention 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 within the meaning of Article 1A of the Refugees Convention. This is one of the central reasons why the PV scheme was originally established, to facilitate a visa scheme for persons who engage Australia's *non-refoulement* obligations under Article 33(1) of the Refugees Convention.

There are exceptions to *non-refoulement* for persons excluded from being refugees. Article 1F provides for exclusions to being a refugee. Article 33(2) provides for exceptions to the *non-refoulement* obligations that result from a person being a refugee.

Australia accepts that it also has *non-refoulement* obligations 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')
- **Second Optional Protocol** to the ICCPR aiming at the abolition of the death penalty

These international obligations were codified into the Act by the *Migration and Maritime Legislation (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act). For example, ss. 36(2)(a) and (aa) contain the criterion for being a refugee or engaging complementary protection, while the exclusions in Article 1F have been codified into s. 5H(2), and the exceptions in Article 33(2) have been codified into s. 36(1C). Some of the key provisions of the legal framework are indicated on the slides below.

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Legal Framework

Legal Framework

Migration Act 1958

- s. 5 – interpretation (definitions)
- s. 46A, s. 46B, s. 48A, s. 91E, s. 91K – application bars
- s. 35A – legal framework
- s. 36(1A) – PV common criteria
- s. 5H and s. 5J – Definition of a Refugee

Migration Regulations 1994

- Protection visa application criteria
- Schedule 1 – application validity
- Schedule 2 – criteria for a Protection visa including time of application criteria and time of decision criteria

Case Law



Legal Framework (cont.)

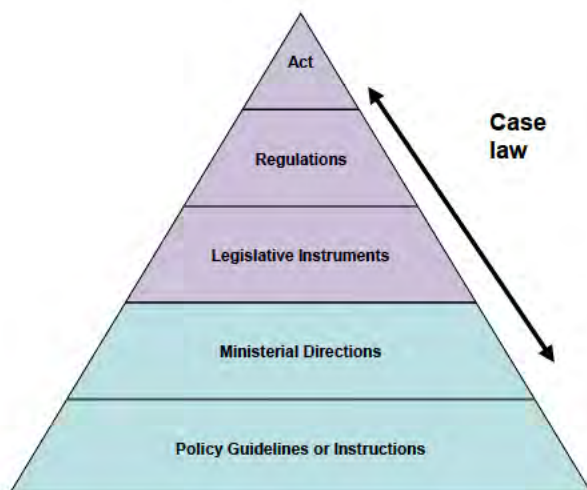
s. 5(1): protection visa has the meaning given by s. 35A.

s. 35A

- Provides for a Class of visa known as the Protection visa (permanent and temporary)
- Additional Classes may be prescribed by regulations;
- The criteria for a protection visa is under s. 36 AND any other relevant criteria in the regulations (if there are no criteria in the regulations for a Class then a valid application cannot be made).



Sources of Law



As a consequence of codification, the legal framework relevant to protection processing derives from the Act and the *Migration Regulations 1994* (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 our understanding of protection processing and the interpretation of the provisions in the Act and Regulations. Where it interprets the applicable provisions, case law is binding on decision makers. For this reason, you will find references to case law throughout this training and

reference materials.

This diagram refers to the 'hierarchy' of law, policy and case law as a way to illustrate that the legislation sits at the top of the hierarchy and takes precedence over policy, with case law sitting alongside legislation. The Act takes precedence over all other forms of law. Regulations are an important source of law, but cannot override the Act. Case law provides guidance on the interpretation of the legislation.

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).

Where a section is referred to you may begin a sentence with 'Section 5J(4) states...' and within a sentence it is now acceptable to put an 's.' before the reference: for example 'As stated in s. 5J(4)...'. When referring to multiple sections you can use 'ss.'. For example, 'Both ss. 46A and 46B are bars to lodging a valid PV application.'

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...

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

The Act makes no reference to the Refugees Convention in the context of PVs. For this reason this training manual does not make substantial reference to the Refugees Convention.

However, s. 36(2)(a) of the Act did historically 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.

This training manual may still refer to the Refugees Convention and terms used prior to the RALC Act when referencing historical case law that is still applicable. This is because the intention of some amendments under the RALC Act was to reflect the same meaning of aspects of the refugee assessment as applied prior to the RALC Act.

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 to a higher court from a lower court in the court hierarchy. This will usually be the person seeking protection and their name will usually be in the form of a 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.

If the decision maker wishes to refer to a specific paragraph, this should be indicated in square brackets at the end of the citation (for example *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [27]).

In 2023, the court abbreviations are HCA (High Court of Australia); FCAFC (Federal Court of Australia – Full Court); FCA (Federal Court of Australia); and FedCFamC2G (Federal Circuit and Family Court of Australia – Division 2 General Federal Law). The example above is what is called a medium neutral citation, and is preferred for use by decision makers as it is the most accessible format.

Decision makers may come across case law references in other formats (for example *Ovcharuk v Minister for Immigration & Multicultural Affairs* (1998) 158 ALR 289). This refers to a judgment published in a law report (in this example, the Australian Law Report), and follows the formula: *Applicant pseudonym v Minister for portfolio name* (year of publication) Volume number Law Report series Starting page. If a particular part of the judgment is being referred to, the page on which it appears should be indicated at the end of the citation following a comma (for example *Ovcharuk v Minister for Immigration & Multicultural Affairs* (1998) 158 ALR 289, 291).

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

Overview of Review Rights Merits Review = Re-make decisions • AAT (Migration and Refugee Division) - PV applicants • IAA (within the AAT (Migration and Refugee Division)) - for PV fast track review applicants • AAT (General Division) - s. 36(2C), s. 36(1C), s. 5H(2) and s. 501 matters (character matters) Judicial Review = Error of law (jurisdictional error) • Federal Circuit and Family Court • Federal Court • High Court	Notes: _____ _____ _____ _____ _____ _____ _____ _____
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Certain visa applicants that are refused may have a legal right to seek to have the decision 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 review' applicants and which decisions are reviewable by the Immigration Assessment Authority. Generally speaking, most UMAs are fast track review applicants.

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

- affirm the original decision
- vary the original decision
- remit the matter for reconsideration by the department, with or without a direction as to certain findings
- set aside the original decision or
- substitute a new decision.

The AAT (Migration and Refugee Division) (or IAA) may review decisions to refuse or cancel a PV other than for 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. Neither are decisions about 'excluded fast track review' applicants. For more information on 'excluded fast track review' applicants, see the unit 'Excluded fast track review applicants'.

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) (except in the cases of 'fast track review' applicants).

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 and Family 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.

Common criteria for a protection visa

PPV, TPV & SHEV Common Criteria

Section 36(1A) = For a PV grant, an applicant **must** meet:

1. **one of the criteria in s. 36(2)** (next slide)
2. **s. 36(1B)** - assessed by ASIO to **not** directly or indirectly be a risk to security
3. **s. 36(1C)** - Is **not** a person who the Minister considers on reasonable grounds to be a danger to the Australia's security **OR** having been convicted by a final judgment of a particularly serious crime, is a danger to the community

* Also consider other relevant PV criteria under the Act/Regs

Legislation Handout: Page 17

Notes: _____

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 35A(2), (3) and (3A) create a distinction between the different PV classes of Permanent Protection visa (PPV), Temporary Protection visa (TPV) and Safe Haven Enterprise visa (SHEV). Additional PV classes may be made by the Regulations. As at 2023, no additional PV classes have been made.

Section 36(2) Criteria

The s. 36(2) criteria comprise of 4 grounds:
The decision-maker must be satisfied that the protection visa applicant is a non-citizen in Australia:

1. in respect of whom Australia has protection obligations because the person is a refugee (s. 36(2)(a)); or
2. is a member of the same family unit of such a person who also holds a protection visa (s. 36(2)(b)); or
3. in respect of whom there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to a receiving country, there is a real risk that they will suffer significant harm (s. 36(2)(aa)); or
4. is a member of the same family unit of such a person who also holds a protection visa (s. 36(2)(c)).

Legislation Handout: Page 17

Notes: _____

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:

- One of the criteria in s. 36(2), that is either:
 - o must be a refugee under s. 5H
 - o meet the complementary protection (CP) criteria under s. 36(2)(aa)
 - o be a member of the same family unit (MSFU) of someone who is a refugee under s. 5H or
 - o be a member a MSFU of someone who meets the CP criteria under s. 36(2)(aa) AND
- Section 36(1B) – Not assessed by ASIO to be directly or indirectly a risk to security AND
- Section 36(1C) – Not be a person who the Minister considers, on reasonable grounds (a) is a danger to Australia's security; or (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

Sections 36(1B) and (1C) are covered in a separate training module and will only be briefly addressed in this course.

Considerations in the assessment process

Pre-consideration	Application bars and application validity
Parallel-consideration (Part 2)	Section 36A record
Part 3	Identity (including ss. 91W and 91WA) and Member of the Same Family Unit (MSFU) <i>(covered in a separate module)</i> and Establishing a country of reference and receiving country
Part 4	Summary of claims <i>(covered in a separate module)</i>
Part 5	Findings of Fact <i>(covered in a separate module)</i>
Part 6	Whether the person is a refugee (s. 36(2)(a)) - s. 5J - well-founded fear of persecution including: ▪ refugee protection reasons (s. 5J(1)(a)) ▪ real chance of persecution in relation to home region and the real chance relates to all areas of the country (s. 5J(1)(b) and (c)) ▪ persecution (ss. 5J(4) and (5)) ▪ effective protection measures (s. 5J(2) and s. 5LA) ▪ modification of behaviour so as to avoid a real chance of persecution (s. 5J(3)) ▪ bad faith <i>sur place</i> actions (s. 5J(6)) - s. 5H(2) - exclusions to being a refugee <i>(covered in a separate module)</i>
Part 7	Whether the applicant meets the CP criterion (s. 36(2)(aa)) - CP assessment: ▪ significant harm (s. 36(2)(aa) and s. 36(2A)) ▪ real risk (s. 36(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 <i>(covered in a separate module)</i>
Part 8	Protection in another country (s. 36(3) – (7))
Part 9(a)	Exclusion to being a refugee and ineligibility from meeting the CP criteria (s. 5H(2) and s. 36(2C)(a))
Part 9(b)	Security and character exceptions (s. 36(1A)(a)): - Does not have an adverse security assessment (s. 36(1B)) - Is not a person who the Minister considers, on reasonable grounds:

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	▪ is a danger to Australia's security (ss. 36(1C)(a)/ 36(2C)(b)(i)) or ▪ having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community (ss. 36(1C)(b)/ 36(2C)(b)(ii)) (<i>covered in a separate module</i>)
Additional considerations	Excluded Fast Track review applicant (consideration only if a fast track applicant is on a refusal pathway)
Note	Throughout the assessment process: - Credibility considerations - Code of procedure (subdivision AB)

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Pre-consideration: Application Bars and Application Validity

Consider valid applications only s. 47: Minister <u>must</u> consider a <u>valid visa application</u> until it is either: • withdrawn; or • Minister refuses or grants the visa; or • Can't be considered because limit on visas (s. 39) or suspension on considering it (s. 84) The Minister is not to consider an <u>invalid visa application</u> • A finding by the Minister that a visa application is not valid and cannot be considered is <u>not a decision to refuse to grant the visa</u> Legislation Handout: Page 21	Notes: _____ _____ _____ _____ _____ _____ _____ _____
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Application validity is a pre-consideration to the assessment process. It is undertaken by the National Allocations and Finalisation Section (NAFS). Application validity is important as, under s. 47 of the Act, the Minister cannot consider invalid applications. A determination that a visa application is invalid is not a decision to refuse the visa.

Even though PV applications are assessed for application validity prior to allocation to decision makers, it is still important for decision makers to understand application validity to ensure they can identify any potential validity issues that arise during the course of their assessment.

Application Bars

Application Bars 1. 'Unauthorised maritime arrivals' – s. 46A s. 46A – Minister's discretion to lift bar when in the public interest to do so. 2. 'Transitory persons' – s. 46B s. 46B – Minister's discretion to lift bar when in the public interest to do so. 3. Previously refused a PV or had a PV cancelled – s. 48A s. 48B provides the Minister with the discretion to waive a s. 48A bar if it is in the public interest to do so. 4. Person covered by CPA or prescribed safe 3rd country – s. 91E s. 91D(1) – countries may be prescribed by regulation (currently none) 5. Person who is holding or held temporary safe haven visas – s. 91K s. 91L – Minister's discretion to lift bar when in the public interest to do so. Legislation Handout: Page 20 (ss. 46A & 46B), page 28 (s. 91D) and page 32 (s. 91Q)	Notes: _____ _____ _____ _____ _____ _____ _____ _____
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There are five application bars under the Act which prevent a person from making a valid PV application.

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 s. 46A cannot make a valid application for a visa.

Since 2015, the s. 46A bar has applied to all UMAs who are unlawful non-citizens or who hold a bridging visa, TPV, or another prescribed temporary visa. The visas prescribed for s. 46A are the Temporary Safe Haven (Class UJ) visas; Temporary (Humanitarian Concern) (Class UO) visas; Subclass 785 visas

granted before 2 December 2013; and Safe Haven Enterprise (Class XE) visas (Regulation 2.11A). Prior to 2015, s.46A only applied to UMAs who were unlawful non-citizens.

Subsections (1A) and (1AA) make clear a child born in the migration zone or in a regional processing country (RPC) to UMA parents is also a UMA. This is the case even if, by operation of s. 78 of the Act, the child holds one of the following visas:

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

Section 46A(2) provides that if the Minister considers that it is in the public interest to do so, the Minister may, by written notice, determine that s. 46A(1) does not apply to a UMA for a specified visa class. This is referred to as 'lifting the bar'. The Minister's 'bar lift' powers may only be exercised by the Minister personally, and are non-compellable, meaning the Minister does not have a duty to consider whether to exercise the power or not.

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 and lifts the bar. 'Transitory person' is defined in s. 5 as (amongst other types of persons) a person who was taken to a regional processing country (RPC) 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.

Section 46B(2) provides that if the Minister considers that it is in the public interest to do so, the Minister may, by written notice, determine that s. 46B(1) does not apply to a transitory person for a specified visa class.

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

Section 48A of the Act provides that once a PV application has been refused, or a PV has been cancelled, a person cannot apply for a further PV on any other grounds while they remain 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. As an invalid application is not a refusal, s. 48A does not apply to an applicant who has previously made an invalid application or applications for a protection visa.

Section 48B provides that if the Minister considers that it is in the public interest to do so, the Minister may, by written notice, determine that s. 48B does not apply to prevent a PV application being made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day on which the notice is given.

Persons from prescribed safe third countries (s. 91E) – not currently operative

Non-citizens to whom Subdivision AI of the Act applies are prevented by s. 91E from making a valid PV application.

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, with the result that there are no non-citizens subject to the s. 91E bar.

Section 91F provides that if the Minister considers it is in the public interest to do so, the Minister may, by written notice, determine that s. 91E does not apply to prevent a PV application being made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day on which the notice is given.

Temporary safe haven visa holders (s. 91K)

Section 91K provides that a current or former temporary safe haven visa holders (other than UMAs) cannot make a valid application for any visa other than a temporary safe haven visa.

The s. 91K visa application bar is not applicable to UMAs following the introduction of the s. 46A application bar, which allows 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.

Section 91L provides that if the Minister considers it is in the public interest to do so, the Minister may, by written notice, determine that s. 91K does not apply to prevent a PV application being made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day on which the notice is given.

Application Validity

Application Validity	
1. Application bars 2. Form 866 (PPV & TPV) or 790 (SHEV) (substantial compliance = claims) 3. Fee – \$40 – Nil for additional applicants 4. Location of applicant 5. Where/how the application must be made 6. Provided residential address 7. Provided personal identifiers (required under policy) – s. 46(2A) (Above requirements from Schedule 1 and Division 2.2 of Migration Regulations) Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____

As well as the 'application bars', s. 46 of the Act provides for the making of valid visa applications and enables the Regulations to make provisions for making valid applications. Under s.46AA, a PV application will not be valid if, when the application is made, there are no prescribed criteria in the Regulations for the visa class.

Further, for an application to be valid it must satisfy any applicable validity criteria under both the Act and the Regulations.

Item 1401 of Schedule 1 of the Regulations contains provisions for making valid PV 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 (PVs require the applicant to be in Australia and the application to be made in Australia). Item 1401 of Schedule 1 of the Regulations also sets out that a PV application will be invalid where the applicant holds or has ever held certain visas, is an unauthorised maritime arrival and was not immigration cleared on their last entry into Australia (subject to the exception in Item 1401(3A)).

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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.

Regulation 2.07 applies to visa applications generally and:

- provides that regulation 2.12C and Schedule 1 set out the visa application charge payable in relation to an application.
 - o Item 1401 of Schedule 1 provides that the application charge for a PV is \$40
- requires the applicant to:
 - o complete the approved form in accordance with any direction
 - o provide a residential address in the application
- provides that the Minister may, by legislative instrument, specify the approved form for making an application, the way in which the application must be made and the place at which an application must be made.
 - o Migration (Arrangements for Protection, Refugee and Humanitarian Visas) Instrument (LIN 20/169) 2020 is currently in force
 - o It provides that PV applications must be made using form 866 and submitted via the Internet or by post to the address listed in the instrument.

What is 'substantial compliance' for a PV application form?

In *Bal v Minister for Immigration and Multicultural Affairs* (2002) FCAFC 189 the Court held 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] FCA 263, the Court affirmed that *Bal*, and the cases it referred to, does not stand for the proposition that substantial compliance requires that 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 application for a PV 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 refugee protection reason or make a claim for protection on the basis of complementary protection. It is not necessary to analyse the nature of the claims made in the PV application form for the purpose of determining whether the decision maker, could or should have been satisfied that any of those claims satisfy the criteria for a PV as part of assessing whether an application is valid. This is a matter for the decision maker in assessing whether the applicant meets the PV 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 will be invalid.

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Conversion of visa applications and criteria in the Regulations

Conversion Regulations & Application Validity s. 45AA(3): An application for the pre-conversion visa: • is not and never has been a valid application for the pre-conversion visa; and • is a valid application for a visa of a different class (specified by the conversion regulation)	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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 for 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, Regulation 2.08F prescribes certain applications for PPVs to be taken to be applications for a TPV. They are those made before the commencement of the Regulation by:

- (a) an applicant who holds, or has ever held, any of the following visas:
 - (i) a Temporary Protection (subclass 785) 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.

Regulation 2.08F has effect for those applications:

- If the Minister has not made a decision under s. 65 before the commencement of the Regulation
- When the AAT remits a pre-conversion application
- When a court orders the Minister to reconsider the pre-conversion application
- When a court declares or concludes that a decision of the Minister in relation to the pre-conversion application is invalid, void or has no effect; or
- Where a court quashes a decision of the Minister in relation to the pre-conversion application.

The Regulation commenced on 16 December 2014. There are unlikely to be many, if any, applications to which this Regulation still applies.

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Parallel consideration: Part 2 Section 36A

Parallel consideration (Part 2) Section 36A - Inserted into the Migration Act taking effect on 25 May 2021 <i>[Migration Amendment (Clarifying International Obligations for Removal) Act 2021]</i> - A Protection visa (PV) applicant may be assessed to engage protection obligations but be refused the visa on other bases. - Purpose of s. 36A is to ensure non-citizens who engage protection obligations but refused a PV (other than under s. 36(3)) are not authorised for removal from Australia. - A decision under s. 36A is required is for all current PV applications, including those lodged before 25 May 2021 but not decided.	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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A s. 36A record is not made for the purposes of a decision under s. 65 of the Act. That is, making a s. 36A record does not form part of the exercise of a PODM's decision making power under s. 65. Rather, it is a parallel consideration that sits alongside the assessment process.

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 PV, Australia is 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 PV, but engages *non-refoulement* obligations, 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. A s. 36A record is a record of the protection findings in relation to an applicant that is relevant to the consideration of whether the applicant can be removed.

Section 36A(1) provides that, in deciding a valid PV application, the decision maker must consider and make a record of whether they are satisfied of any of the following:

- that the applicant satisfies the criterion in s. 36(2)(a), and that the applicant also satisfies the criterion for a PV in s. 36(1C) (is a refugee).
- that the applicant satisfies the criterion in s. 36(2)(aa) (engages complementary protection obligations).
- that the applicant satisfies the criterion in s. 36(2)(a) with respect to a country but does not satisfy the criterion in s. 36(1C), and would satisfy the criterion in s. 36(2)(aa) with respect to the country except that they are a non-citizen referred to in s. 36(2)(a) (is a refugee but is excluded from *non-refoulement* obligations as they are a danger to Australia's security or the community, and engage complementary protection obligations but are prevented from grant of a PV under the Act as they have been found to be a refugee).

These categories reflect where the applicant meets Australia's protection obligations at international law, as incorporated into the Act.

The decision record templates include the s. 36A record.

Section 36A(2) requires decision makers to consider and record whether they are satisfied of any of the elements in s. 36A(1):

- before deciding whether to grant or refuse to grant a PV

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- before considering whether the applicant satisfies or fails to satisfy any other criteria for the grant of a PV
- before considering whether the grant of a PV is prevented by any provision in the Act or Regulations and without regard to s. 36(2C) and s. 36(3).

The intention is to ensure that a 'protection finding' is made for the purposes of s. 197C where *non-refoulement* obligations are engaged, regardless of whether the PV application will be refused for other reasons.

Section 197C relates to s. 198. Section 198 requires the removal of unlawful non-citizens in the circumstances set out in that section. Section 197C(1) provides that for the purposes of s. 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen, but s. 197C(3) has circumstances where such removal is not authorised. One of the circumstances in s. 197C(3) relates to the making of a 'protection finding' which is done under s. 36A. The result is that s. 36A ensures that an applicant's protection claims are assessed, and a finding is made, before removal under s. 198 is considered.

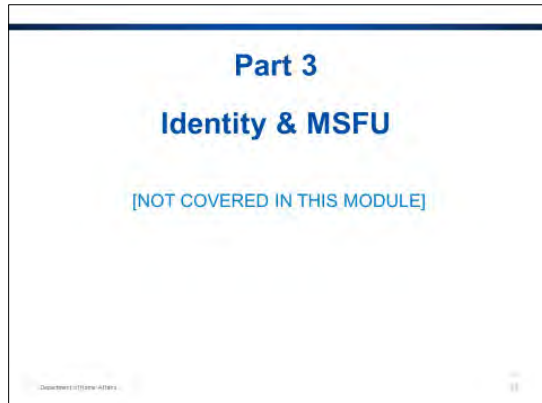
Section 36A(3) provides that s. 36A(1) does not apply if:

- the applicant (the family applicant) is a member of the same family unit as another non-citizen (the family visa holder) who holds a PV of the same class as the family applicant is applying for; and
- the family applicant's PV application was made before the family visa holder was granted a PV; and
- the family visa holder is a non-citizen referred to in s. 36(2)(a) or (aa).

This concerns MSFUs and the fact that the requirements under s. 36A(1) do not apply where a member of the same family unit is granted a PV of the same type of visa. Where an MSFU is on a negative pathway, despite one or more family members being on a positive pathway, decision makers are to undertake a s. 36(2)(a) and s. 36(2)(aa) assessment (where necessary) in order for a 'protection finding' to be made for the purposes of s. 197C(5). MSFUs who have not raised their own claims should be invited to do so for the purpose of this assessment.

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Part 3: Identity and Member of the Same Family Unit



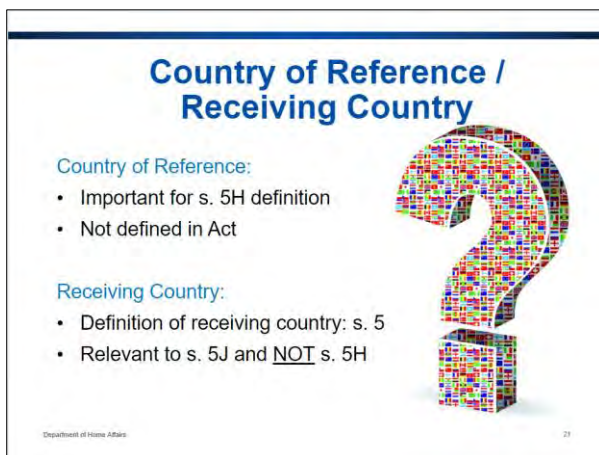
Identity is covered in the Advanced Identity Awareness Module of the PODM Essentials Training course. Sections 91W and 91WA are covered in the Section 91W and section 91WA module of the PODM Essentials Training course.

MSFU is covered in the MSFU module of the PODM Essentials Training course.

Country of Reference and Receiving Country

The terms 'country of reference' and 'receiving country' are important because they form the basis of establishing the country against which to assess the applicant's refugee and CP claims. The terms are used interchangeably to refer to the country against which the applicant is making protection claims. Once the country of reference/receiving country are established then the PV decision maker can also conduct other aspects of the 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



Notes: _____

Although s. 5H(1) doesn't mention 'country of reference' or 'receiving country', the concept is nonetheless important to that section.

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*

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- (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. [...]*

A decision maker therefore needs to establish what is the applicant's country of nationality, or country of former habitual residence, to determine that the applicant is outside that country. This will be the applicant's country of reference/receiving country.

Receiving Country

Receiving Country Receiving Country: • relevant to s. 5J, s. 5LA and CP • defined in s. 5(1): Receiving country, in relation to a non-citizen, means: a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or b) if the non-citizen has no country of nationality — a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country. • Not to be confused with nationality under s. 5J(1)(a) Legislation Handout: Page 8 (s. 5(1))	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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).

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 the receiving country may not be difficult. However cases where the applicant is making 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 could arise and are more difficult.

Section 5H(1) codifies Article 1A(2) of the Refugees Convention into the Act by incorporating similar wording. The department's position is that the case law on Article 1A(2) is also applicable to s. 5H(1). This includes analysing 'what is a country' for the purposes of country of reference and receiving country.

Definition of receiving country

Section 5(1) of 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 the 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 (Faili Kurds, Rohingya, Palestinians are some examples unless they have acquired the nationality of another country), then decision makers should consider their claims against their

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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 (although this does not require a 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 was 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?

What is a Country?

Is the asylum seeker's country of reference/ receiving country a 'country'?

- A country is any nation or State which is generally recognised in international law and relations.
- The issue of whether a place is a 'country' sometimes arises in the context of failed States or countries claiming independence.
- Stateless persons and country of 'former habitual residence' (e.g. Farsi Kurds).
- Evidence of identity, nationality or citizenship



Notes: _____

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 in *Tjhe Kwet Koe v Minister for Immigration & Ethnic Affairs & Ors* [1997] FCA 912. In that case, the Court found that Hong Kong at the time, prior to the handover to China in 1997, met the criteria in the affirmative. 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. Autonomous regions are areas such as Aceh and West Papua in Indonesia; Hong Kong, in China; and the Kurdistan Autonomous Region in Iraq. 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

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it is unlikely that the regions are 'countries'. If there is doubt, seek further guidance from the Protection visa Help Desk.

Al-Anezi v Minister for Immigration and Multicultural Affairs [1999] FCA 355

Background: Al-Anezi was a stateless 'Bedoon' who feared persecution in his country of birth, Kuwait. He had more than one country of former habitual residence, having subsequently lived in Iraq for a number of years, and had 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 refugee protection 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 or Iraq. The result of the Court's reasoning is that Mr Al-Anezi (or another applicant in similar circumstances) doesn't need to satisfy the s. 5H definition in relation to all countries of former habitual residence. Where the applicant does have more than one country of former habitual residence, after completing the ss. 36(a) and (aa) assessments, a decision maker will need to consider whether s. 36(3) applies (that is, whether the applicant has protection in the other country of former habitual residence (s. 36 (3)-(7)).

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Part 4: Summary of Claims

This is covered in the 'Writing a Protection Visa Decision Record' module of the PODM Essentials Training course and Summary of Claims is not covered by this module. However, decision makers should be aware that this part of the decision record should include an accurate summary of all of the applicant's material protection claims, including written claims in the PV application or supporting submissions and oral claims raised at interview.

For applications that have been remitted to the Department by the AAT or IAA with a direction or recommendation (for example, that the applicant satisfies s. 36(2)(a) or s. 36(2)(aa)), this part of the decision should summarise the applicant's material claims to the extent necessary to provide relevant background and context to the remittal direction and address any claims not considered by the AAT/IAA. The decision maker should consider on a case-by-case basis the appropriate level of detail to include in the summary of claims for remitted applications. For further guidance on assessing remitted applications, decision makers should refer to the PV Processing Guidelines.

Part 5: Findings of Fact

This is covered in the 'Writing a Protection Visa Decision Record' module of the PODM Essentials Training course and this module does not specifically cover Findings of Fact, although this forms part of credibility considerations which are discussed below. Decision makers should be aware that this part of the decision record should generally include findings of fact on all the applicant's material claims for protection (expressly raised and those clearly arising on the facts), as set out in the Summary of Claims. This means that a clear finding should be made as to whether the decision maker accepts the claim or does not accept the claim, supported by objective, probative evidence and reasoning.

While there is no legal requirement to make findings of fact on claims that are accepted, as a matter of policy and good decision making, it is recommended that decision makers set out the claims that are accepted and briefly explain their reasons for accepting those claims. If the decision maker does not accept some or all of the applicant's claims, there is a legal requirement to make findings of fact and include reasoning to explain why those claims are not accepted in order to demonstrate that the findings have been reasonably made based on the available evidence.

For applications that have been remitted to the Department by the AAT or IAA with a direction or recommendation (for example, that the applicant satisfies s. 36(2)(a) or s. 36(2)(aa)), the decision maker is bound by that direction or recommendation. In relation to other criteria or provisions that are not subject to the direction or recommendation, the decision maker can make their own findings. The same principles that apply to assessing credibility and making findings of fact in other (non-remitted) applications (as discussed above) also apply to remitted applications. The level of detail required in this part of the decision record for remitted applications should be considered by the decision maker on a case-by-case basis, to ensure that it clearly explains which claims are accepted or not accepted (taking into consideration the remittal direction) and addresses any claims not considered by the AAT/IAA.

For further guidance on assessing remitted applications, decision makers should refer to the PV Processing Guidelines.

Part 6: Is the Person a Refugee?

s. 5H(1) and s. 5J	
A	What is a Refugee: - What is a refugee (s. 5H(1)) - Is the applicant outside their country of nationality or habitual residence? (s. 5H(1))
B	Is the fear well-founded? - What is a well-founded fear? (s. 5J(1)) 5 refugee protection reasons - subjective and objective elements - real chance of persecution relates to all areas of a receiving country - Limitations and exceptions to well-founded fear (ss. 5J(2) & (3)) - Persecution (ss. 5J(4) & (5)) - Conduct to disregard (s. 5J(6))
C	Non-application of s5H(1) – Exclusion to the definition of a refugee (s. 5H(2)) [covered in Part 9 and a separate module]

Notes: _____

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 matters you need to consider in determining whether an applicant is a refugee.

What is a refugee for the purposes of the Act?

What is a Refugee?

The definition of a refugee in s. 5H(1):

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

- 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
- 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.

Decision maker findings will be in relation to s. 5H concerning whether the person is a refugee.

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Notes: _____

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 in s 36(2), 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.

Section 5H of the Act defines who is a refugee for the purposes 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.

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Well-founded fear of persecution

Well-Founded Fear of Persecution

s. 5J(1):

A person has a well-founded fear of persecution if:

- The fear of persecution is for reasons of race, religion, nationality, membership of a particular social group (s. 5K/5L) or political opinion; AND
- If returned the person faces a real chance of persecution for one (or more) of the 5 reasons; AND
- The real chance of persecution relates to all areas of the receiving country

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Notes: _____

At this stage, decision makers should have considered the country of nationality or former habitual residence. The meaning of well-founded fear of persecution is set out in s. 5J of the Act, which requires decision makers to consider the following factors:

- the three elements constituting a well-founded fear of persecution (s. 5J(1))
- the two circumstances where there is not a well-founded fear of persecution (s. 5J(2) and (3)),
- two provisions that clarify the meaning of 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) excludes 'who is a refugee'. Decision makers need to first consider whether an applicant is a refugee, before considering whether they are excluded under s. 5H(2).

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

Overview of the refugee protection reasons

Does the Harm Arise For a s. 5J(1)(a) Reason?

Refugee protection reasons under s. 5J(1)(a):

1. Race
2. Religion
3. Nationality
4. Membership of a Particular Social Group (PSG)
5. Political Opinion



Notes: _____

Section 5J(1)(a) of the Act requires that for there to be a well-founded fear of persecution, the reasons for the persecution must be for one of the 'refugee protection reasons', drawn from Article 1A(2) of the Refugees Convention and set out in s. 5J(1)(a) of the Act. That is, for reason of:

1. Race
2. Religion

3. Nationality
4. Particular Social Group (PSG) or
5. Political opinion

A person needs only to claim fear of persecution on one ground although usually applicants claim a number of grounds.

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 that the case law related to the Refugees Convention reasons is applicable to the reasons specified in s. 5J(1)(a). The exception is PSG, which is now defined under the Act in s. 5K and s. 5L.

Issues Across All Refugee Protection Reasons	
 Need a refugee protection reason but a claim can raise multiple grounds	 Decision makers must consider claims raised and those apparent on the face of the material
 Imputed refugee protection reasons	 Refugee protection reasons may change over time
 Any ground that claims State persecution brings in issues of 'prosecution v persecution'	 Whether applicant should behave discreetly

Notes: _____

Cross cutting issues

What is the claim?

Decision makers must have regard to all claims made and consider whether the claim falls within s. 5J(1)(a) of the Act. Claims must also be considered where they arise clearly on the basis of information that is before the decision maker and has been accepted (*NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (No.2) [2004] FCAFC 263).

Facts that require a constructive or creative reading to formulate a claim are not clearly arising on the material before the decision maker, and do not need to be considered.

Imputed grounds

A person may sometimes claim harm not on the basis that they actually possess one of the characteristics included in the refugee protection reasons but rather that somebody else will persecute them because that characteristic or belief is *believed* or *attributed* by the persecutor 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 refugee protection reasons.

Refugee protection reasons may change over time

Refugee protection reasons may change over time. Changing circumstances in the applicant's receiving country, such as a change of government, or the involvement of international peace keeping forces, may impact on whether the applicant has a well-founded fear of persecution for the refugee protection reason initially claimed. Changing political or armed conflict situations may mean that the applicant is no longer within the race, religion, or political affiliation that was previously being persecuted. Changing societal and

cultural opinions may mean that applicants who are members of a particular social group no longer face persecution for that reason.

A persecutor's motivations may also change over time. What might initially start out as a non-refugee protection reason (for example, persecuting a person because they owe a debt) may over time turn into a refugee reason (continuing to persecute the person because they are a particular race, religion, nationality or hold a particular political opinion, for example).

Decision makers should always check the most recent country information to ensure that the claimed refugee protection reason is still the essential and significant reason for persecution.

Persecution vs prosecution

While this is discussed in detail later, the issue of persecution vs prosecution often arises in the consideration of refugee protection reasons. For example, a person may claim to be persecuted for reasons of religion because they practice their religion in an unregistered church, contrary to the laws of the State. This will require consideration of whether they are being persecuted (in this example, for the refugee protection reason of religion) or whether they are being prosecuted as a result of their failure to comply with the law.

Race

s. 5J(1)(a) Reason - Race	
What is 'race'?	- Not a precise concept - Social construct
Test	- Is it an identifiable ethnicity? - Self identification as a member of a race - Spiritual, cultural and linguistic heritage
Examples	- Nuer in South Sudan - Jews in Germany - Tamil in Sri Lanka - Rohingya in Myanmar

Notes: _____

'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

While *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 did not address a refugee issue, 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.

The courts have said that race should be understood in the 'widest sense' and said 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] FCA 1490).

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 refugee protection reason, for example, PSG and political opinion.

Examples of 'race' may include:

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

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

A finding for a refugee protection reason based on race does not require that victims be from a minority. For example, in the early 1960s (prior to the Rwandan genocide) the ruling Tutsi minority persecuted the Hutu majority in Rwanda. In the South Sudanese civil conflict, the Dinka are the majority ruling class, while the Nuer are the minority. However, depending on the particular circumstances, Dinka applicants may have a well-founded fear of persecution for the refugee protection reason of race.

***SZDTM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 188**

Background: SZDTM 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.

The Tribunal characterised the harm feared as a result of criminal behaviour rather than for refugee protection reason, and also found that there was only a remote risk of SZDTM being harmed in future anti-Chinese activity.

The Federal Court held that the Tribunal erred in finding that the 'criminal offences' (referring to the anti-Chinese riots and acts committed against the Chinese community in Indonesia by State and non-state elements) were 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, without considering the racial basis of the offences [37].

Justice Bennett stated (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

Refugee Protection Reason – Religion	
What is 'religion'?	• Meaning interpreted in case law
Test	• Is it a religion? • Is the religion practised? • Is the religion practised in a like-minded community?
Examples / Considerations	• Scientology, Islam, Christianity • Who's religious belief? Applicant or persecutor?

Notes: _____

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

In *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 and suggested the following elements may indicate the existence of a religion:

- Involves a belief in the supernatural
- The ideas relate to man's nature and place in the universe and his relation to things supernatural
- Involves 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 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 guidance.

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

1. Is it a recognised religion? E.g. Scientology, Catholicism, Islam, etc.
2. Is the religion practiced in a like-minded community? Falun Gong, for example, was not considered by the Federal Court to be 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 refugee protection reason of religion:

Persecution for reasons of religion 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.

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- 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 and Wang v Minister for Immigration and Multicultural Affairs [2000] FCA 1599

Background: Zheng and Wang were required by the Chinese State to register and practise their religion in the registered church.

The Tribunal 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 Tribunal 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 Tribunal accepted that there were significant differences between practising religion at an unregistered and a registered Protestant church. The Tribunal found however that, as Wang could practise his religion as a Protestant Christian in China at churches which are registered as official churches under Chinese law, any punishment or mistreatment that he may experience as a result of practising his religion at an unregistered church would be the result of violating a law of general application, rather than persecution for reasons of religion.

The Federal Court set aside the Tribunal decision and held that a law regulating the practice of religion, requiring that it be practised or observed in a particular way or applying only to persons practising 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: [66].

NASJ v Minister for Immigration [2005] FMCA 124

Background: NASJ had been harassed for handing out (proselytising) Scientology leaflets.

The Tribunal found 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 she was under no past or present or future obligation to undertake that activity. The Tribunal found that NASJ could practise her religion openly in Russia and any chance of harm would be remote if she refrained from handing out leaflets.

The Federal Magistrates Court (Federal Magistrate Barnes) found no error in the Tribunal's finding. It was held that this was not a case where NASJ 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).

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*.

Justice Merkel in *Wang*, in considering the objects of the [Refugees Convention], 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-minded community ...

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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.

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

- The applicant not having a particular religion;

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

Background: The Prashars were nationals of India who came from the city of Jalandhar. Before their marriage they had the same ancestral name. Under the religious law practiced in Jalandhar, such a union is forbidden. Both were ambivalent about their religion and religion generally.

The Federal Court held that persecution for reasons of religion may extend to include cases of reprisal because an applicant does not have a particular religion.

***Cameirao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1319**

Background: In *Cameirao* 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. Her persecutors were Catholic and she claimed she was persecuted for leaving her husband, contrary to Catholic beliefs about marriage.

The Federal 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.

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

***GNZ18 v Minister for Immigration* [2020] FCCA 2971**

Background: GNZ18 is a Hazara Shia Muslim from Afghanistan. One of his claims for protection was on the basis that he was no longer a practicing Shia and that he would be persecuted for an imputed religion of something other than Shia Muslim. He also made claims based on his Hazara ethnicity.

The Tribunal considered GNZ18's evidence that he has been a non-practising Shia in Afghanistan and found that he would not face harm because of imputed atheism or apostasy.

The Federal Circuit Court considered GNZ18's claims that the Tribunal had conflated his claims in relation to his ethnicity and imputed religion. The Court found that while the Tribunal focused more on the religious claims, it was not to the exclusion of his ethnicity based claim. The Court found no error in the Tribunal's reasoning.

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 questioning 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.

Some common errors include statements like:

- *'The applicant claims to have been a Christian for 5 years. I expect that a person who claims to have been a Christian for that long would be able to recite some of the beatitudes in Matthew 5:3-12 of the Bible or at least one of the parables of Christ.'*
- *'The five exercises of Falun Dafa should be practiced regularly to strengthen the gong. This is essentially the practice of Falun Gong. The applicant states he undertakes exercise 1 to 2 every*

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day over the last 4 years. Since the applicant does not do exercises 3 to 5 I have serious doubts about the credibility of the applicant being a follower of Falun Gong.'

The above examples fall within the error of ‘arbiter of doctrine’.

If an applicant states that a certain story or event or dogma was essential and meaningful to their conversion but is vague and cannot tell much about it then the assessment of the level of knowledge is that which the applicant provides, rather than the decision maker setting a benchmark. For example:

'Eight years ago on coming to Australia the applicant states he met Christians on the boat and they talked about their faith. The applicant said that the most meaningful thing about Christianity is forgiveness rather than debt for sins. I asked that applicant what he meant and whether there was something in Christianity that showed what forgiveness meant. The applicant stated that the most impressive thing for him in Christianity was the Lord's Prayer and how it is all about forgiveness and that it really was the Lord's Prayer that made him convert to Christianity. I asked the applicant if he could tell me part of the Lord's Prayer or describe how it relates to forgiveness. The applicant repeated that the Prayer was just about forgiveness. I asked whether there was anything else in the Lord's Prayer other than forgiveness and the applicant responded saying that it was only about forgiveness. I asked how forgiveness was shown in the Lord's Prayer and the applicant did not answer.'

According to the applicant's claim the key reason for converting to Christianity was forgiveness and the Lord's Prayer. The applicant was unable to give me any further details on how the Lord's Prayer relates to forgiveness or recite any lines from the Prayer. Given that the applicant says that this Prayer is pivotal to his conversion and the reason why, yet cannot tell me anything about it other than vague statements about forgiveness, I doubt whether the applicant is a Christian as claimed.'

Here the decision maker does not establish a knowledge test about what a Christian convert of 8 years *should know*; instead the statements of the applicant about his own knowledge are used to draw the conclusion.

Nationality

Refugee Protection Reason – Nationality

What is 'nationality'?	• Membership of an ethnic or linguistic group • Social and cultural concept – not just citizenship
Test	• Is there membership of an ethnic or linguistic group? • Must be a particular nationality
Examples / Considerations	• African tribes, Former Yugoslavia, Kurds • Coexistence of more than one nationality in a State

Notes: _____

[illegible]

Nationality is 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. Section 5H(1)(a) uses 'nationality' as a requirement for a person to 'be outside their country of nationality' as part of the meaning of refugee. 'Nationality' is not defined for the purposes of s. 5H(1)(a), so decision makers need to refer to the laws of the receiving country and whether the applicant's circumstances fall within those laws.

Section 5J(1)(a) also 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 encompasses ethnic, cultural and linguistic groups rather than just a matter of citizenship in a country.

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Using the broader sense of nationality as including cultural, linguistic and ethnic groups, the claims made for being persecuted for that reason can often overlap with race, religion or political opinion and, in some instances, may fall within membership of a PSG. Claims of persecution on the basis of imputed nationality have also been raised. In *SZRTN v Minister for Immigration and Border Protection* [2013] FCA 1156, the applicant, a national of Western Samoa, was raised in Australia since he was 5. He claimed that his imputed nationality (a nationality other than Samoan) would result in his being persecuted because he had no familiarity with Western Samoan culture. The delegate accepted that imputed nationality could amount to a refugee protection reason although in this case found that the feared harm did not amount to persecution. The Tribunal affirmed the delegate's decision not to grant a PV (primarily on the basis that the applicant disavowed his claims to fear harm for a Convention reason and it was not satisfied that the CP criteria was met). The applicant appealed on the basis of CP grounds and the Court dismissed the appeal.

If the applicant is claiming persecution on the basis of their ethnicity and has not specifically classed the claim as falling under 'race' for s. 5J(1)(a) purposes, the claim could be categorised as falling under either 'race' or 'nationality.' Note that care should be taken to determine if there are political opinions or religious views that are perceived to 'attach' to that ethnicity or race which may give rise to separate claims to consider.

Membership of a particular social group (PSG)

Refugee Protection Reason – PSG

What is a PSG?

Two types of PSG claims:

- s. 5L other PSG claims (not family)
- s. 5K PSG consisting of family

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Notes: _____

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).

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Membership of a particular social group other than family

Refugee Protection Reason – PSG (Not Family)	
Legislation	Defined in s. 5L
Test	1. Must have characteristic shared by all members of the group; AND 2. The person shares, or is perceived as sharing, the characteristic; AND ONE OF • Characteristic is innate or immutable; • 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 AND 3. Characteristic can't be shared fear of persecution

Notes: _____

The Act defines PSG (other than family group) in s. 5L of the Act. The definition incorporated existing case law.

There are 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.

There is also an additional element – *must* have one of the following:

- 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; or
- the characteristic distinguishes the group from society.

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. The shared characteristic cannot be a fear of persecution. For example, if considering an applicant claiming to be a member of a PSG of 'young women from Somalia' who fears the harm of female genital mutilation (FGM), the characteristic of fearing FGM cannot be the shared characteristic of the group. Rather, the shared characteristic will be that they are all young women, or young women from Somalia.

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, congenital 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.

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 is HIV-positive are immutable characteristics. If a person is a member of a group that has a characteristic that cannot be

changed, this will satisfy the criterion 'innate or immutable' for membership of a PSG. 'Masking' or hiding a characteristic does not mean it is not 'immutable' since the characteristic still remains, 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 the characteristic itself. For this reason, a person claiming a PSG on the basis of acts alone will be unlikely to establish there is an innate or immutable characteristic for their claimed PSG. For example, a claim of membership of a PSG comprising of 'people who install satellite dishes in mosques' is unlikely to include an innate or immutable characteristic. If there is some characteristic that leads to such people installing satellite dishes in mosques (for example, this is an act done only by a particular minority or segment of society) then the PSG more accurately should be described in consideration of that characteristic rather than the behaviour that shows it.

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 relates 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.

For example, a group of people who engage in certain practices that are not classed as a religion but are expressive of certain views and wear distinguishing clothing may fall under this description. One example is the followers of Bhagwan Shree Rajneesh, sometimes referred to as the 'Orange People,' who rejected traditional Hindu teachings and practiced commune life. Followers had no consideration of marriage or having stable partners because to do so reflected social bondage. Followers also tried to influence government elections (sometimes by direct methods that included poisoning). While political opinion or religious views may underlie the membership of such a group, it is also possible that members of the group were identifiable by living in one of the communes or wearing the bright orange clothing. The communes and the clothing could arguably have been considered as fundamental to the identity or conscience of the group as a whole. If there is published information available about groups such like the 'Orange People' it would be prudent to see whether actions such as wearing a type of identifiable clothing is considered by the group as being fundamental to their identity or conscience.

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, a decision maker will still have to consider whether it is fundamental to the particular *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 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.

A group can be distinguished from society at large by a characteristic if the group is recognisable in the society because of that characteristic. Country information on the legal, social, cultural and religious norms of the society concerned will assist to determine whether a claimed group is distinguished from society at large.

Characteristics that distinguish a group from society but are not innate or immutable, or fundamental to identity or conscience, might include characteristics such as being a 'returnee from the West'. While this might be an immutable characteristic (if the applicant is known for having sought protection in another country) it may also be a characteristic that distinguishes the group from society through factors such as a

lack of knowledge of local customs or societal norms, a member's appearance or their accent, if they have spent a long time in the West.

Characteristic is not a fear of persecution

The characteristic shared by members of the group cannot be a shared fear of persecution. A group comprised of people claiming to fear the same persecution (for example, fearing FGM or arbitrary arrest and torture) does nothing to distinguish that group in any way. If a shared fear was able to form the basis for a PSG, this would mean that any person who feared persecution for any reason would potentially engage protection obligations. This would be inconsistent with the intention of the Refugees Convention and its codification into the Act to limit the scope of protection to certain categories of persons.

The then Federal Circuit Court considered this in the matter of *AJP18 & Anor v Minister for Home Affairs & Anor* [2019] FCCA 2424. In that case, the applicants made claims for protection on the basis of being members of a PSG 'victims of loan sharks'. The Tribunal had considered this PSG, finding that the country of origin information on loan shark practices supported a finding that people who were victims of loan shark practices were capable of forming a PSG. Before the Court, the Minister argued that the Tribunal erred, as the shared characteristic was a fear of harm from the loan sharks. The Court affirmed the Tribunal's findings, stating that victims of loan sharks can mean 'people who have been caught up in the predatory lending practices of loan sharks' [15], which may be a PSG.

Where an applicant is making a claim for a PSG that appears to be on the basis of a shared fear of persecution, decision makers should consider if there is an underlying claim for a fear of persecution.

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. Behaviour modification under s. 5J(3) is discussed later.

Assistance with using facts

Breaking down the term 'PSG' may assist decision makers to establish 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.

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. Where a claim is not expressed but arises on the facts, decision makers may be obliged to consider the membership of a PSG ground: 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 if 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 while 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).

For example, an applicant claims that he has a well-founded fear of persecution for being a 'Punjabi Sikh'. He states he will be targeted because he owns land and because he is a Jatt. As a decision maker, to consider whether the applicant will be persecuted for reasons of membership of a PSG comprising of 'Sikh land owners' may be difficult since the evidence may indicate that generally, 'Sikh landowners' are not persecuted. However, the evidence may indicate that Sikh landowners with other characteristics may be targeted, such as 'Punjabi Sikh Jatt landowners' (*SZBJH v Minister for Immigration and Citizenship* [2008] FCA 501).

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 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)).

While previous findings are useful in providing guidance as to what groups previously have, or have not, been accepted as PSGs, decision makers should always refer to the most recent country information in relation to these countries when considering the claims before them, rather than relying on these previous findings in other cases.

Occupation-based particular social group claims

The essential requirement in determining whether a PSG comprising of occupational acts 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

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*, [1998] FCA 722

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

are clearly linked then decision makers may proceed to consider one of the claims and explain how, in doing so, the other claim is also addressed.

Membership of a particular social group consisting of family

Refugee Protection Reason – PSG (Family)	
Legislation	Defined in s. 5K
Test	A person claiming persecution for reasons of PSG (being a family member): • Disregard fear of persecution of any other family member (whether alive or dead or former member) if the fear of persecution is not for one of the refugee protection reasons; AND • Disregard fear of persecution that the person claiming PSG has ever experienced, or family member experienced, if it were assumed that the fear of persecution in the first paragraph never existed

Notes: _____

Section 5K defines membership of a PSG consisting of family.

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 satisfied 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 will be persecuted for a refugee protection 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, because of his family relationship to a person who is being (or would be) persecuted for a refugee protection reason.

Some family groups do not fall within s. 5K. This is because s. 5K requires decision makers to disregard any claims where the person claims 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 refugee protection 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 refugee protection reason and therefore must be disregarded by decision makers for the purposes of the refugee assessment under s. 36(2)(a). This was considered by the Court in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61. In that case, the applicant was claiming harm on the basis that his grandfather had committed a murder. The Court noted at [19] that "Gang wars have resemblances with blood feuds, and it is plain that the Minister's intention was to restrict the capacity to claim visas on grounds of these kinds."

Political Opinion

Refugee Protection Reason– Political Opinion <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <tr> <td style="width: 20%; background-color: #0056b3; color: white; text-align: center; font-weight: bold;">What is 'political opinion'?</td> <td style="padding: 5px;"> - Ordinary meaning in English language - Definition shaped by case law </td> </tr> <tr> <td style="background-color: #0056b3; color: white; text-align: center; font-weight: bold;">Test</td> <td style="padding: 5px;"> - Does the applicant hold, or is believed to hold, a political opinion? </td> </tr> <tr> <td style="background-color: #0056b3; color: white; text-align: center; font-weight: bold;">Examples / Considerations</td> <td style="padding: 5px;"> - Actual or imputed political opinion - Gender issues - Corruption and criminality - Contrary to interests of the State or authorities </td> </tr> </table>	What is 'political opinion'?	- Ordinary meaning in English language - Definition shaped by case law	Test	Does the applicant hold, or is believed to hold, a political opinion?	Examples / Considerations	- Actual or imputed political opinion - Gender issues - Corruption and criminality - Contrary to interests of the State or authorities	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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'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) have not been interpreted by the Courts so the term should be interpreted as having its ordinary meaning (see the *Acts Interpretation Act 1901*; *Minister for Immigration and Multicultural Affairs v Y* [1998] FCA 515). Some judicial consideration prior to the RALC Act has been given to the term as stated in the Refugees Convention.

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**

Background: Mr V 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.

The Tribunal 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 refugee protection reason).

The Federal Court dismissed the appeal. However Hill J gave guidance on the meaning of political opinion [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*).

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under the Freedom of Information Act 1982

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

Background: Applicant C 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 C reported these activities to the police through anonymous phone calls. Applicant S made claims for protection on the basis of being persecuted as a family member of Applicant C.

The Tribunal found, with regard to the issue of 'political opinion' that Applicant C 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.

The Federal Court: 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 [25].

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.

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 Hindus or Muslims because of human rights activities, however, SZHHK was not able to provide details of her activities.

SZHHK v Minister for Immigration and Multicultural Affairs [2006] FCA 1471

Background: SZHHK, 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.

The Federal Magistrates Court pointed out that the Tribunal had identified the claims made in the PV 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 PV 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 [sic] 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].'"

1801303 (Refugee) [2022] AATA 2294

Background: the applicant, an Egyptian woman, sought review of the Department's decision to refuse her PV application. The applicant held liberal views on sexuality and gender rights and was employed as a women's rights activist.

The Tribunal considered that a claim for imputed political opinion arose on the facts, although it was not raised by the applicant ([182]-[184]). The Tribunal noted the Department's policy that sexuality and gender can demonstrate a political opinion and expressing opinions or engaging in activities that express opinions about the receiving country's attitude to sexuality and gender can be considered as opinions that are

'political' in nature. The Tribunal found that if the applicant was to return to Egypt, she would face a well-founded fear of harm based on an imputed political opinion arising from her advocacy and support for women's rights within Egyptian society. The matter was remitted to the Department with the direction that the applicant satisfies s. 36(2)(a).

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 Immigration and Multicultural Affairs v Y* [1998] FCA 515**

Background: 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'.

The Tribunal found 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 the Brazilian State.

The Federal Court (per Davies J at 4-5) held that a stance against police criminal activity falls under 'political opinion':

...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.

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.

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

Background: Zheng, a PRC citizen, claimed to be persecuted on the basis of political opinion arising from his exposure of his corrupt superior who held a high position in the Loans Department of the government owned Construction Bank of China.

Tribunal: found that the failure of the authorities to act on Zheng'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.

The Federal Court 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 Court provided guidance on the circumstances for when exposing corruption may 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'

Justice Nicholson commented on the matter of Y (above) in the matter of V⁸ [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'

Justice Whitlam 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.

Investigations 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 Multicultural Affairs* [2006] FCA 1632. However,

Knowledge of a fact can amount to a 'political opinion'

In certain circumstances knowledge of a fact can amount to a political opinion. In *Udaya Saman Perera Ranwalage v Minister for Immigration & Multicultural Affairs* [1998] FCA 1480 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.

Justice Heerey found that the Tribunal erred in relying upon a supposed dichotomy between political opinion and personal knowledge. It was held that the accusations, which the person was perceived as wanting to express, involved an opinion that a Minister in the United National Party was unfit for public life. In such circumstances, accusations relating to criminal conduct are likely to form part of political discourse.

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.

⁸ *V v Minister for Immigration and Multicultural Affairs* [1999] FCA 428

(*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 custom.

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* [1997] HCA 22.

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 in the reasonably foreseeable future. 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**

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

The Federal Court 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). Specifically, ‘...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.

***Mehenni v Minister for Immigration and Multicultural Affairs* [1999] FCA 789**

Background: The applicant, Rabah Mehenni, was an Algerian national. Under Algerian law, men of military age were liable to conscription and the Algerian army continued to confront Islamic groups. Deferral of military duties was permissible, including for periods of study, which Mr Mehenni had undertaken in the Soviet Union, before travelling to South Africa then on to Australia. He claimed that his refusal to return permanently to Algeria would be viewed as desertion as he had refused to return and had refused a request to work for the Algerian Intelligence.

The Tribunal found that Mr Mehenni had avoided the attempts of the Algerian intelligence to obtain information from him, but found that the law on conscription was applied in a non-discriminatory manner and deserters were not subject to excessive or inhumane treatment. Accordingly, the Tribunal found that Mr Mehenni did not engage protection obligations.

The Federal Court (Justice Lehane) 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**

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

The High Court 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.

Persecution

Persecution	
s. 5J(4)(a)	A refugee protection reason/s must be the essential and significant reason for persecution
s. 5J(4)(b) & s. 5J(5)	Serious harm (non-exhaustive list): - A threat to the person's life or liberty - Significant physical harassment or ill-treatment - Significant economic hardship that threatens the person's capacity to subsist - Denial of access to basic services or denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist - May also include serious mental harm/denial of fundamental human rights
s. 5J(4)(c)	Systematic and discriminatory conduct

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As previously outlined, the structure of s. 5J of the Act requires decision makers to consider the following factors which form the basis for a well-founded fear of persecution:

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

This unit will consider the assessment of persecution under ss. 5J(4) and (5).

Connection with refugee protection reasons

While the Act does not require the criteria for the refugee assessment to be considered in any particular order, for policy reasons decision makers should consider whether an applicant fears harm for a refugee protection reason before considering whether the harm amounts to persecution under s. 5J(4) and (5) of the Act. This is because, if an applicant does not fear harm for a refugee protection reason, there is no need to consider the refugee criterion further. This is also consistent with the decision record template, which considers the criteria in this order.

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

- 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 circumstances in s. 5J(4) need to be considered. Section 5J(4) requires that the applicant fear persecution for one or more of the five reasons given and:

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

The essential and significant reason for the persecution – s. 5J(4)(a)

Essential & Significant

Section 5J(4)(a) guidance:

- Requires decision maker to have already determined there is a fear for one of the refugee protection reasons
- Involves consideration of whether the refugee protection reason for the persecution is the *essential and significant reason*:
 - this requires an assessment of the comparative strengths or significance of each reason
 - In considering essential and significant:
 - It is an *error* to consider that a *personal motivation* for persecution operates to *exclude any other reason* (*Rajaratnam v MIMA* [2000] FCA 111)
 - DM should examine the *underlying reasons* for the refugee claimant *being targeted* (*MIAC v MZYRI* [2012] FCA 1107, at [29])
 - coincidental not sufficient

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

Assessment of the essential and significant reason is an objective assessment, based on country information. It is not sufficient to say that the applicant fears harm for a persecution reason, therefore it is the essential and significant reason for persecution. The decision maker is required to consider the perspective of the persecutor and determine whether a reason, or reasons, under s. 5J(1)(a) are the 'essential and significant reasons' for the persecution of the applicant. While a persecutor may personally gain from inflicting the persecution, such as killing a person to seize their land, or extortion of the applicant, 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]).

Some acts by persecutors will be motivated by self-interest, so decision makers need to consider the reason why the persecuting party has that interest to determine if an underlying reason for the targeting is for a refugee protection reason, or whether the person was selected for no other reason or purpose than satisfying the perpetrator's self-interest (see *Rajaratnam v Minister for Immigration and Multicultural Affairs* [2000] FCA 1111).

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).

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Serious harm – s. 5J(4)(b) and 5J(5)

Serious Harm

s. 5J(4)(b)

- Provides that if a person fears harm for a refugee protection reason, the persecution must involve serious harm to the person.

s. 5J(5)

- Contains a non-exhaustive list of 'serious harm'

Meaning of 'threat'

- Whether there is likelihood of threatened harm occurring:
 - VBAO v MIMIA [2006] HCA 60
- If no likelihood → threat not 'serious harm'

Threat to person's life or liberty

High Court:

- MIBP v WZAPN & ANOR; WZARV v MIBP [2015] HCA 22



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When introduced, ss. 5J(4)(b) and 5J(5) were intended to have the same meaning as the repealed ss. 91R(1)(b) and 91R(2) and use almost identical wording. The Department's position is that the case law on ss. 91R(1)(b) and 91R(2) is also applicable to ss. 5J(4)(b) and 5J(5).

Section 5J(4)(b) of the Act provides that if a person fears harm for a refugee protection reason, the persecution must involve 'serious harm' to the person. This requires the decision maker to consider the claims made by the applicant about the type of harms they will face and determine whether they are 'serious harms'. Guidance of what might constitute a 'serious harm' is listed in s. 5J(5) of the Act, which contains a non-exhaustive list of types of serious harm:

- a threat to the person's life or liberty
- significant physical harassment of the person
- significant physical ill-treatment of the person
- significant economic hardship that threatens the person's capacity to subsist
- denial of access to basic services, where the denial threatens the person's capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

Serious harm may also include the denial of fundamental human rights and serious mental harm.

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CRR18 v Minister for Immigration & Anor [2019] FCCA 2203

Background: CRR18 was a female citizen of the People's Republic of China who sought protection in Australia on the basis, amongst other reasons, of a fear of psychological harm arising from the death of her husband. Her husband had died following an altercation with a group of people, including a local village officer. She had accused the local village officer of corruption after he forcibly resumed villager's land, dispossessing the villagers and building homesteads.

The Tribunal found that s. 5J(5) could not include psychological harm, and as a result that CRR18's harm did not amount to the 'serious harm' for the purposes of s. 5J(5).

The Federal Circuit Court confirmed that, in a sufficiently serious case, psychological harm could amount to 'serious harm' (as conceded by the Minister). However, in CRR18's case, the Tribunal did not discount that psychological harm could be serious harm, but rather that the particular psychological harm experienced by CRR18 did not amount to serious harm.

Note: The revised Explanatory Memorandum to the 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 harms. .

Meaning of 'threat'

In the context of s. 5J(5) of the Act, the word 'threat' refers to the likelihood of harm occurring, rather than the communication of an intention to harm. A declaration or the possibility 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 a persecutor makes a verbal threat and there is no likelihood of the threatened harm being realised, 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).

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 considered whether detention amounted to a threat to liberty. The Court determined that mere detention will not amount to a 'threat to liberty' for the purposes of establishing serious harm under ss. 91R(1) and 91R(2)(a). The Court found that the likelihood of a period of temporary detention of a person for a Refugees Convention reason is not, of itself and without more, a threat to liberty within the meaning of s. 91R(2)(a) of the Act. The Court considered that a qualitative judgement, including an evaluation of the nature and gravity of the loss of liberty, is required. This can mean taking into account factors such as the length and conditions of detention, any harm that might result from the loss of liberty and the frequency with which a person might be detained.

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Significant physical harassment or ill-treatment

Serious Harm (cont.) Significant physical harassment or ill-treatment • For example, treatment for mental health claims Significant economic hardship • 'Significant' • Such that it threatens 'capacity to subsist' • Whether level of threat of hardship challenges the individual's ability 'to continue to exist or remain in being' • Whether the applicant is skilled and has experience Land seizures Legislation Handout Page 14	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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There may be instances of harm that don't meet the threshold for 'threat to life or liberty' but do amount to either significant physical harassment under s. 5J(5)(b) or significant physical ill-treatment under s. 5J(5)(c). Common claims of either significant physical harassment or ill-treatment often arise when an applicant has a claim based on their mental health. In many places, in the absence of modern mental health treatments, family or the local community might turn to more traditional treatments for mental health and many of those treatments can amount to significant physical harassment or ill-treatment, such as procedures to 'exorcise' supposed demonic possession, or treatments to beat or starve supposed 'evil' spirits out.

2005215 (Refugee) [2020] AATA 6034

Background: The applicant, a national of Ethiopia, claimed protection on the basis of his membership of a PSG of persons with mental health illnesses. He claimed that treatment of persons with mental health illnesses, including restraints, discrimination, harassment and stigmatisation amounted to serious harm.

The Tribunal was satisfied that the applicant had a well-founded fear of persecution for reasons of his PSG membership on the basis of country information about the treatment of mental health. In particular, the Tribunal found that the use of restraints was common, discrimination, stigmatisation and human rights abuses were experienced by people with mental illnesses and that schizophrenia was considered to be the result of religious causes such as possession, bewitchment or the 'evil eye', with religious healers sought for treatment rather than health professionals. The Tribunal noted that, despite some recent progress in mental health services in Ethiopia, there was still a real chance the applicant would face serious harm if returned.

Significant economic hardship

One of the instances of 'serious harm' is significant economic hardship that threatens the person's capacity to subsist. This is a high threshold that requires the harm to threaten a person's ability to 'continue to exist or remain in being', according to the Court in *SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 143 (*SZBQJ*). This threshold was reaffirmed in *SZIGC v Minister for Immigration and Citizenship* [2007] FCA 1725.

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

Background: SZIGC was a Chinese national who 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.

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The Federal Court held 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).

***Lek Kim Sroun v the Minister of Immigration, Local Government and Ethnic Affairs* [1993] FCA 493**

Background: This case concerned a number of Cambodian applicants of Chinese and Vietnamese ethnicity claiming persecution by the Khmer Rouge in respect of employment and education (among other things). Some applicants claimed they were forced to pay bribes in order to obtain employment or education. One delegate found that '...in a society where bribery is endemic, the degree of the problem was not such as to amount to 'persecution'. In relation to an applicant who was unable to obtain Cambodian Government employment, the delegate found 'that the denial of government employment was not a substantial restriction on the right to work but only a limitation on the field of available employment' and therefore did not amount to persecution.

The Federal Court held that these findings were open to the delegates. In relation to an applicant who was targeted 'aggressively' for payment of bribes which significantly affected his ability to carry on his business activities, the Court found the delegate did not sufficiently address the issue of whether this amounted to persecution and the matter was remitted for reconsideration. Regarding all these claims, the Court noted the approach 'involves the making of a judgment on a matter of degree'. The Court made reference to a passage from Goodwin-Gill, 'The Refugee in International Law' (1983), which states:

The core meaning of persecution...[i]n its broader sense ... remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education ...

Land seizures

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 race, religion, political opinion, or targeted at a particular social group can amount to persecution under s. 5J(4) and s. 5J(5).

SZALM & Ors v Minister for Immigration [2004] FMCA 262 was a pre-RALC case that considered land seizures in Zimbabwe under ss. 91R(1) and (2), on the basis that the applicants were members of a particular social group. The 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.

In *S2012*, the applicants claimed that race, religion and political opinion were the reasons they were dispossessed of their land.

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

Systematic & Discriminatory Conduct

Section 5J(4)(c) guidance:

- Persecution requires selective harassment which discriminates against a person for a refugee protection reason
- Non-systematic or random acts are not selective or targeted and will not meet the statutory requirements



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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 refugee protection 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 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.
- 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 persecution for a refugee protection reason. It is not a necessary element of persecution that the individual should be a victim of a series of acts. The fear of a single act of serious harm, **done for 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). Justice McHugh qualified his statement in *Chan* in *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, stating that 'systematic conduct' did not mean that persecution has to be part of a systematic course of conduct by an oppressor. Rather, 'systematic' meant 'non-random'. In *SBWD v Minister for Immigration and Citizenship* [2007] FMCA 1156 Lindsay FM held that the phrase 'systematic and discriminatory conduct' in what is now s. 5J(4)(c) should be interpreted consistently with the comments of McHugh J 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.

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.

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- Must be linked to one of the refugee protection reasons. It is not sufficient for the conduct to be only systematic and discriminatory.

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)).

If a person has been selected for persecution 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 cases 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**

Background: *SZDTM* was an Indonesian citizen of Chinese ethnicity and of Catholic religion, sought a protection visa on the basis that she had a well-founded fear of persecution on grounds of her race and religion. She also raised the claim of persecution by reason of her being a member of a minority social group of middle-aged female Christian Chinese persons in Indonesia who face persecution by native Indonesians. She claimed to have experienced persecution as a student due to race and religion and that her parents were also persecuted due to race and religion.

The Tribunal 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 community.

The Federal Court held this to be incorrect because, 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.

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Persecution by State or non-state agents

Persecution – By State or Non-state Agents

If state is involved – is the law 'appropriate and adapted' to achieving a legitimate state objective? (Applicant A)

- Laws of general application – e.g. punishment for offences
 - [Prosecution vs Persecution](#)
- Military conscription – conscientious objectors
- Questioning or interrogation
- Civil war



Notes: _____

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 more readily available. Decision makers will need to consider whether the actions of the State are a result of law of general application. If it is not a law of general application and is one that applies in a discriminatory manner, then decision makers need to consider whether the discriminatory law is for a legitimate State objective and is appropriately adapted to meet that objective. 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 'Effective Protection Measures' for further information.

If the State is not directly involved:

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

- Is the State indirectly involved through provision of resources, including funds, to the persecutor?
- If the State has no indirect involvement, does the State offer adequate protection?
- If there is no adequate protection, is it because the State is unwilling or unable to provide the protection?

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.

For example, in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 Kirby J said 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

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.

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 Minister 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), since the essential and significant reason for the punishment will be to impose a lawful sanction.

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 assess and make findings about how the law is implemented. While a law may be one of general application, if the law is in fact applied in a way that targets 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 gives 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 objective 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.

For example, laws which prosecute people for illegal departure from a country will not generally amount to persecution. The Federal Court considered the detention and imposition of a penalty for Sri Lankan illegal departees in the case of *ABJ16 v Minister for Immigration and Border Protection* [2017] FCA 1371, upholding the Tribunal's findings that the process on return to Sri Lanka, including any brief period on remand and any penalty imposed on the applicant, was non-discriminatory enforcement of the law of general application, which was appropriate and adapted to achieving a legitimate state objective.

Military service and conscientious objector claims

As a law of general application, military conscription (compulsory military service) will not of itself amount to persecution if it is applied across the population without discrimination. However, once there is evidence of a person fearing serious harm because of refusal to undergo compulsory military service, it is not enough simply to say that conscription is a law of general application and therefore the applicant does not meet the criteria for persecution. The applicant may have a genuine conscientious objector claim that may expose them to persecution because of their objections. When dealing with claims relating to compulsory military service, decision makers should be aware of possible conscientious objector claims, even if they are not expressly articulated. Decision makers should consider:

- Whether the applicant has raised such a claim expressly;
- If not, consider whether there is evidence which may give rise to such a claim;
- If there is such a claim, decision makers are required to consider it, including consideration of whether there is fear of persecution or fear of generalised violence (*AZAAB v Minister for Immigration and Citizenship* [2009] FCA 248).

Some principles from case law:

- Where an obligation to perform military service is universal upon all males in the applicant's 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).

Detention for questioning or interrogation

Being detained for questioning or interrogation pursuant to a law of general application with no further harm has been considered not to amount to persecution. If the person faces harm during the questioning for a refugee protection 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 refugee protection 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 detained under a law or government policy and are selected for detention for a refugee protection reason (for example, race) and those responsible for the detention are aware that the likely consequence of the detention will be the physical mistreatment of the detainee, 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 Multicultural 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 ss. 5J(4)(a) and (c) and the seriousness of the threat of such harm should be considered under s. 5J(4)(b) and s 5J(5).

Punishment for offences under a law of general application

Summary of Prosecution v Persecution

Prosecution under law of general application may not amount to persecution for political opinion

Things to consider:

- Is punishment disproportionately severe?
- Is punishment a result of law of general application, rather than a refugee protection reason?
- Is government so repressive?
- Indirect discriminatory effect?
- Human right abuses?



Notes: _____

It will generally be difficult for the applicant to establish persecution where they claim that they have been, or expect to be, 'persecuted' for committing offence under a law of general application.

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 offence is:

- harsh
- excessive

- cruel
- inhuman; or
- degrading

in comparison to other offences.

Decision makers should also consider whether the 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 penalty or punishment is only applied selectively (and the selection is for 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

Background: Lama was a Nepalese citizen who claimed 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.

The Tribunal found that the law against bovicide in Nepal is a law of general application, as it applies equally to all persons in Nepal whether Hindu or not. It was 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 Tribunal stated 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.

The Federal Court held that (at [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

Subjective element: Does the applicant fear persecution?

Subjective Element Legislation: • s. 5J(1)(a) – “The person fears being persecuted....” • s. 5J(4) – “If a person fears persecution...” Elements: • Look at state of mind and genuine fear • Repeated return / delay in making protection claims • Child / person with intellectual disability ◦ <i>Chen Shi Hai v MIMA</i> [2000] HCA 19  Dissemination of Home Affairs Legislation Handout: Pages 13 - 14	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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In addition 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 because s. 5J(1)(a) provides that a person will have a ‘well-founded fear of persecution’ if ‘the person fears being persecuted’. 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 a difficult assessment.

However, there may be occasions where there is doubt the applicant actually holds fear of persecution. For example, 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 give rise to the question of whether the applicant does actually fear persecution. The applicant’s reasons for engaging in the conduct that the decision maker considers creates doubt about their fear of persecution should be taken into account. Since fear is a subjective state (that is, an emotion) it is difficult to establish that the subjective state does not exist. Accounts of the applicant, or facts that show a willingness to return to the country from which refugee status is claimed, and no indication of the applicant taking measures to avoid persecution on those returns, could lead the decision maker to doubt whether the fear is actually held.

The consequence of finding that an applicant does not hold a fear of persecution is that s. 5J(1)(a) will not be met, and the criterion in s 36(2)(a) will not be satisfied. Decision makers should record the information put to the applicant for comment and the responses provided. Reasoning should also be provided about why the responses by the applicant are accepted or rejected. Where the decision maker finds that the fear is not held, they should use reasonable and logical inferences from the evidence and take into account any responses from the applicant 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 applicant 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).

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

Objective Element	
s. 5J(1)(b)	There is a real chance, if returned to their receiving country, the applicant would be persecuted for a refugee protection reason in their 'home region'
s. 5J(1)(c)	The real chance of persecution relates to all areas of a receiving country

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The 'objective' element of well-founded fear is contained in s. 5J(1)(b) and (c) of the Act. This is known as the 'real chance' test. It consists of two elements. Firstly, s. 5J(1)(b) requires the decision maker to consider whether there is a real chance that the applicant would be persecuted for a refugee protection reason. As a matter of policy, it is practical to first consider whether the applicant faces a real chance of harm in their 'home region'. This is the area that the applicant previously lived, or had substantial ties. If a decision maker is not satisfied that the applicant has a real chance of serious harm in their home region, then s. 5J(1)(b) will not be satisfied. If s. 5J(1)(b) has been satisfied, the decision maker then secondly needs to consider s. 5J(1)(c) and whether there is a real chance of harm in all areas of the receiving country.

What is real chance?

To establish if there is a well-founded fear of persecution, s. 5J(1)(b) of the Act requires decision makers to make a finding of whether there is a 'real chance' that the person would be persecuted if returned to the receiving country. Case law has established the threshold for 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 Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 on the insertion of s. 5J(1)(b) into the Act stated (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%; and
- 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 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 just 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 of 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; and
- 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 in the future, but there needs to be some evidence of either past events recurring or if a new issue has arisen, of an intervention that gives rise to events of persecution occurring to persons such as the applicant (*Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA).

Past events may 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 considered 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).

The access test: safe and lawful 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 refugee protection reason).

Prior to the RALC Act, it was necessary for decision makers to consider an applicant's safe and lawful access to their home region (if this has been assessed as a safe area) on return. While this was not included in the introduction of s. 5J(1)(b), it remains a matter of policy that decision makers, in assessing s. 5J(1)(b) (and s. 5J(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
- 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 s. 5J(1)(b). In these circumstances, failure to do so may amount to a legal error.

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

There are three situations 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 (that is, there is not a real chance of persecution in all areas of the receiving country, and not for reasons of effective protection measures).
- There are effective protection measures in another area of the country (covered later in this unit).
- The person could take reasonable steps to modify behaviour so there is no real chance of persecution (covered later in this unit).

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

Real Chance of Persecution in Home Region

Element 1 – Real chance test

- Assess factual basis of fear looking at Country of Origin information
- Apply "real chance" test (from *Chan*) – it is a forward looking test



"What if I'm wrong" – decision makers to consider this only if there is "**real doubt**": *MIEA v Guo Wei Rong* (1997)

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Real Chance of Persecution in Home Region (cont.)

Element 2 - Access to the 'home region'

- Must consider access
 - safety and
 - lawfulness
- Can person use the 'access'?
 - involves consideration of the applicant's particular circumstances.

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The Department's position is that s. 5J(1)(b) requires decision makers to assess whether there is a real chance of persecution for 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 is practical for decision makers to first consider whether an applicant will be persecuted in their home region before considering whether there is a real chance of persecution in the rest of the receiving country. 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 decision makers must be satisfied that if the applicant is returned to the receiving country, they have a real chance of persecution for 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)(b), the following should be considered by decision makers:

- Whether the applicant has a real chance of persecution for a refugee protection reason in their home region (including making a real chance assessment and whether the 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?

Real chance of persecution relates to all areas of the country – s. 5J(1)(c)

Real Chance of Persecution in All Areas of Country Element 1 – Real chance of persecution in all areas of the country? • consider the real chance test against areas in the country other than the 'home region' Element 2 - Access to the identified 'safe area' • Must consider access: – safety and lawfulness – consider applicant's personal circumstances Legislation Handout, Page 13	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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Section 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 not defined in the Act, the intention is to assess whether the real chance of persecution exists in all areas of the country.

The RALC Act inserted s. 5J(1)(c) into the Act to implement aspects of what is known as the 'internal relocation' principle. In particular, the aspect of the principle that 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]).

However a key difference between s. 5J(1)(c) and the broader principle of 'internal relocation' is that s. 5J(1)(c) does not 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 lawfully). Decision makers should not refer to 'internal relocation' as a principle in their s. 5J(1)(c) assessment, since the statutory implementation has removed reference to it and reference to it may give rise to concerns that the decision maker has considered factors they should not have. *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(1)(c).

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

In assessing s. 5J(1)(c), decision makers should consider the following:

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

For discussions about the real chance and safe and lawful access tests, 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

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- ensure that the difference between the safe areas and the areas which are not safe is demonstrated sufficiently; and
- ensure that the safe 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'. 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 safely and lawfully access the place on return.

The Courts have given some consideration to the meaning of 'all areas'. In *FCS17 v Minister for Home Affairs* [2020] FCAFC 68 the Court noted that 'all areas of a receiving country' was not to be read as literally geographical and that the phrase should be interpreted as referring to areas inhabited or habitable in a receiving country. The Court gave the example that a person may be able to escape persecution in the middle of a scorching and inhospitable desert or upon a frozen mountaintop, but it would be absurd and unreasonable to include such areas in the assessment of the refugee status of the person.

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

Real Chance of Persecution in All Areas of Country (cont.)

Not a real chance in all areas?

1. No reach of persecutor
2. Effective protection in another area
3. Modify behaviour in another area to 'decrease profile' and avoid real chance

**All 3 scenarios can operate in any area of the country and may be considered concurrently



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No reach of the persecutor

Sometimes the alleged persecutor only operates within a limited geographical sphere and has no influence over others to inflict persecution on their behalf outside that sphere. In such situations, if the applicant can safely and lawfully enter another area of the country, there may 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 will be an issue of not having a well-founded fear of persecution under s. 5J(2), rather than an issue of relocation. However, if the applicant has to move to another area of the country to access the effective protection measures, then the safety and lawfulness 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 decision makers may need to consider the particular attributes of the applicant when considering whether they are able to access the protection measures. 'Effective protection measures' are considered in the next unit.

Reasonable steps to modify behaviour

Similar to effective protection measures, 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. Circumstances could arise where a person could take reasonable steps to modify behaviour and, having taken those steps, would not be persecuted in their home region. In other circumstances, a person may be engaged in certain actions in their home region and even if it was reasonable to stop, they may claim they are known for those actions in that area so that it would not make a difference whether they modified their behaviour. Decision makers should assess whether it is a reasonable step for the applicant to stop that action and move to a safe area where their actions are unknown and where they will not face persecution for their previous actions. Behaviour modification is considered in a later unit.

'Exceptions' to well-founded fear of persecution – s. 5J(2) and s. 5J(3)

Exceptions to Well-Founded Fear of Persecution

An applicant will not have a well-founded fear of persecution if:

1. effective protection measures are available to the person in a receiving country
2. the person could take reasonable steps to modify their behavior to avoid a real chance of persecution in their receiving country, and the exceptions in ss. 5J(3) (a) to (c) are not applicable



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As previously outlined, the structure of s. 5J of the Act requires decision makers to consider the following factors which form a basis for a well-founded fear of persecution:

- the three elements that constitute a well-founded fear of persecution (s. 5J(1))
- the two circumstances where there is not a well-founded fear of persecution (s. 5J(2) and (3))
- two provisions that clarify the meaning of 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 three elements required to establish a well-founded fear of persecution under s. 5J(1) and the two provisions that clarify the meaning of persecution.

In this unit 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 modify behaviour') of the Act.

Effective protection measures

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

Available Effective Protection Measures

s. 5J(2):
A person does **not** have a **well-founded fear of persecution** if **effective protection measures** are available to the person in a receiving country.



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Available Effective Protection Measures

s. 5LA(1):
Effective protection measures are available if:

- a) Protection against persecution could be provided by
 - i. the State; or
 - ii. a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State
- b) that is willing and able to offer such protection

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It is important to distinguish between 'effective protection measures' in the receiving country (s. 5J(2) and s. 5LA) and protection in another country (ss. 36(3)-(7)). The two considerations are not the same and a determination with respect to one of them is not a finding in relation to the other. That is, a determination that an applicant has access to effective protection measures in the receiving country under s. 5J(2) does not answer the considerations to be made when considering whether they have protection in another country under s. 36(3), and vice versa.

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 in the unit 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 a substantial part of the territory of the State and the State or party/organisation is willing and able to offer such protection.

Available Effective Protection Measures s. 5LA(2) : A party/organisation or State will be considered to be <i>able</i> to offer protection if: • The person can <u>access the protection</u>; - AND • The protection is <u>durable</u>; • For State protection – protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.  ACCESSIBLE  DURABLE Department of Home Affairs Legislation Handout: Page 15 ⁸⁷	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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The State, a party or an organisation are taken to be able to offer protection against persecution to a person if:

- the person can access the protection
- 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 considered under s. 5LA(2).

State protection

Available Effective Protection Measures Considering whether a State is able to protect: • Does it have appropriate criminal law? • Does it have a reasonably effective police force? • Is there an impartial judicial system? • Is the protection <u>accessible</u>? • Is the protection <u>durable</u>? MUST still make a finding on <u>willingness</u> of the State (no protection if a 'blind eye' is turned to the applicant's persecution: SZONJ)  ACCESSIBLE  DURABLE Department of Home Affairs 82	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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?

Section 5LA(2) does not require absolute protection of an individual. Consequently, in order for there to be effective State protection, a decision maker only needs to find an appropriate criminal law, a reasonably effective police force and an impartial judicial system exist. For protection obligations to be engaged, a

State's failure to provide effective protection needs to be for a refugee protection reason. A 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 similarly 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 Affairs* [1998] FCA 1666).

***Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18**

Background: Respondents S152 were Ukrainian nationals and the husband claimed to have suffered serious harm as 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. He 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, that 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.

High Court: The High Court agreed with this approach and noted that (at [28] per Gleeson CJ, Hayne and Heydon JJ):

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.

The judicial system should prosecute matters according to the laws of the State, provided such laws are not aimed at depriving people of fundamental human rights and 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 an 'adequate level of State protection' is. The High Court in *Minister for Immigration and Multicultural and Multicultural 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(2)(c).

Where there is evidence the State turns a 'blind eye' to certain situations that involve refugee protection 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

Available Effective Protection Measures	
Considering whether a non-state party/organisation is able to offer protection:	
- Who is the party/organisation and does it control the State or a substantial part of the territory of the State - Why would the party be willing to protect the applicant? - Does the party/organisation offer accessible and durable protection?	 ACCESSIBLE  DURABLE
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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 provides services to the exclusion of the government or on behalf of the government, where the government is unable to exercise control in that area.

A 'substantial part' of the territory of the State could mean a considerable amount or size of territory and in some instances it may be arguable that an area of *considerable worth* constitutes holding a 'substantial part of the territory' even if the proportion of territory held is geographically less than the remainder of the country. It would have to be explained why that territory has considerable worth, for example, it has the only international airport, it is the central point of government, hosts services, offers modern facilities, or is central place of employment prospects.

Willing and able

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

'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'. While *SZONJ* was prior to the introduction of the RALC Act, it can be relied upon to provide guidance on what 'willing to provide protection' means for the purposes of s. 5LA(1)(b), as the intention of s. 5LA(1)(b) was to incorporate the previous understanding of the term. For a decision maker to find that the State effectively turns a 'blind eye' to personally motivated actions (such that there are no effective protection measures), the actions must have an 'official' quality; that is, the actions are officially tolerated or uncontrolled by the authorities. If the lack of protection is due not to an unwillingness of the State (or non-State actor) to act but, for example, is a result of under-staffing or lack of resources, then there would be no evidence of State inaction based for a refugee protection reason.

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

Background: SZONJ had been the victim of sustained domestic violence in Fiji. To satisfy the relevant criterion, she needed to show that either her husband's violence towards her was committed for one of

the five refugee protection reasons or that Fiji's failure to protect her from this abuse could itself be seen as arising from one of those reasons.

The Full Court found (at [25]) that

...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.

Further, it was found (at [32]) that the decision maker must show 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.

The Court concluded that (at [33])

where there is persecution by a non-state agent for a reason that has no [refugee protection reason], and that conduct is condoned or tolerated by the State for a [refugee protection] reason, the victim may be a refugee. However, where there is persecution by a non-state agent for a reason that has no [refugee protection 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 protection] reason that motivates the State or prevents the State from intervening, the test will not be satisfied.

'Able' to provide protection

As set out above, s. 5LA(2) of the Act provides that a State, party or organisation be both willing and able to provide protection for the purposes of s. 5LA(1)(b). A State will be considered able to provide protection if:

- The person can access the protection
- The protection is durable; and
- If provided by the State, it consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system (discussed above).

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 the applicant would need to be in to access the protection. For example, if members of the police force are friends of the persecutor, the victim may not be able to access their protection.

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. For example, persecution may be perpetrated by a militant force and country information shows that another party provides protection for those fleeing the persecution and also that the opposing government forces have been able to gradually deal with the persecutory forces such that in a short time those forces will not be able to persecute. The protection offered, while possibly only needed temporarily, may be considered durable because it outlasts the events of persecution.

Reasonable steps to modify behaviour

Modifying Behaviour

s. 5J(3): No well-founded fear if the person could take reasonable steps to modify behaviour that would avoid a real chance of persecution.



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Notes: _____

Modifying Behaviour

- Cannot consider that reasonable steps should be taken to modify behaviour that would:
 - Conflict with a characteristic fundamental to the person's identity or conscience
 - Require the person to:
 - conceal an innate or immutable characteristic
 - alter, conceal, or cease their religious or political beliefs
 - Conceal their true race, ethnicity, nationality or country of origin
 - Conceal a physical, psychological or intellectual disability
 - Enter or remain in a forced marriage or accept the forced marriage of a child
 - Alter or conceal their sexual orientation or gender identity or intersex status

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Modifying Behaviour

s. 5J(3): Guidance

1. Ensure that the modification does not fall within the exceptions
2. Reasonable steps must consider the circumstances of the person and the environment/society
3. Identify and assess what are the 'steps' the applicant would need to take. Assess practicability and sustainability of the steps
4. Where the persecution seems to be short term, assess how long the modification may be required to be maintained
5. Determine how taking the steps would avoid a real chance of persecution



Department of Home Affairs

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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
- whether the circumstances are such that modification of behaviour is not to be considered.

The Explanatory Memorandum to the RALC Bill 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

The Act also provides for exceptions to behaviour modification. That is, circumstances when it will not be reasonable to expect an applicant to modify their behaviour. Section 5J(3) provides that a person does not need 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.

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 considered the issue of behaviour modification. In that case, Bangladeshi homosexual applicants claimed harm on the basis of their membership of a PSG ‘homosexual men in Bangladesh’. The visa applicants claimed to have been in a relationship in Bangladesh and claimed to have faced threats and violence in the past, including being sentenced to death by a religious council. They claimed to face death if they were returned to Bangladesh. The Tribunal found that the applicants could live discreetly and would not attract attention if they did, and on that basis found there was not a real chance of persecution. The High Court held that the Tribunal had erred by failing to consider whether the applicants would choose to live discreetly of their own

volition or out of a fear of persecution. It held that it was not reasonable to expect an applicant to modify their behaviour in order to avoid persecution.

The Explanatory Memorandum to the RALC Bill explained the relationship between S395/2002 and the 'reasonable steps' test in s. 5J(3).

*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.*

Section 5J(3) could be relevant in cases where a person engages in a profession that may result in the persecutor imputing them with a political opinion, for example, interpreters for Western Forces, working in a printing house that printed anti-government messages, cutting hair in Western styles or being a musician or DJ in a country where music was considered to be anti-religious or to have anti-political messaging. In examples like these, decision makers need to consider whether the applicant could take 'reasonable steps' to modify their behaviour, including a consideration of whether any of the exceptions to behaviour modification apply and whether the applicant would modify their behaviour out of a fear of persecution, or if they would be likely to act discreetly regardless.

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

Sur Place Claims • A person may become a refugee after leaving their home country, due to: ◦ changes in the circumstances in their country ◦ their own actions that may lead to persecution for one of the refugee protection reasons ◦ Australia's actions ◦ actions by other parties which reveal that potential applicants will be applying for protection • Still considered in accordance with s. 5H(1) A person who becomes a refugee this way is called a refugee <i>sur place</i>.	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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A person may become a refugee after leaving their home country, due to:

- changes in the circumstances in their country - e.g. Tiananmen Square protests in the People's Republic of China in 1989
- their own actions leading to possible persecution for a refugee protection reason – e.g. protesting at an embassy
- Australia's actions - e.g. allowing representatives of the applicant's country of origin to visit them in detention and learn the circumstances of their case; and/or
- 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 considered the same as persons claiming to have experienced persecution within their country.

Bad faith *sur place* actions

'Bad Faith' *Sur Place* Actions

Considerations:

- Did the person **engage in conduct** in Australia?
- Is the decision maker satisfied the applicant engaged in this conduct for the **sole purpose of strengthening their refugee claim?** (*MIAC v SZJGV* [2009] HCA 40)

If YES, then...

- The decision maker **must disregard evidence** of that conduct in any way that would support their refugee claim
- However, the decision maker **may take evidence** of that conduct into account in any other way in determining their refugee claim (e.g. credibility)

****Conduct may become genuine over time****

Notes: _____

'Bad Faith' *Sur Place* Actions

s. 5J(6):

- Conduct in Australia to be disregarded UNLESS the person satisfies the Minister conduct was for reasons other than strengthening their claim



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Notes: _____

Whilst *sur place* claims are consistent with the claim to be a refugee under s. 5H, there are cases where applicants for Protection visas 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 engaged in 1) by the application and 2) in Australia, and which 3) the Minister is satisfied was for the purpose of strengthening refugee claims, must be disregarded in assessing the claims for protection.

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 concerning s. 91R(3) is also applicable to s. 5J(6).

Decision makers should note that while the claim itself can be assessed, the conduct is irrelevant to the assessment. For example, a person claiming Christian conversion may have become publicly baptised in Australia. If the Minister is satisfied the public baptism was for the sole purpose of strengthening their refugee claims then the claim of religion (Christian conversion) must be considered but the conduct of public baptism disregarded.

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).

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 assessment 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*,⁹ 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. In these cases, s. 5J(6) will not apply.¹⁰ 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 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 courts have 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

'Bad Faith' Actions

Conduct of third parties:

- The conduct of third parties (e.g. family members) **generally cannot be disregarded** under s. 5J(6): *MZXQU v MIAC* [2008] FMCA 15
- However, **where actions** of third parties are **consequential** from an act of an applicant in Australia, both the acts of the applicant and the consequential conduct may be **disregarded**: *SZSEE v MIAC* [2013] FCCA 1026.

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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 *SZNCU & SZNCU v Minister for Immigration & Anor* [2009] FMCA 233 it was held that the Tribunal 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**

Background: MZXQU 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

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

¹⁰ See *SZGYT v Minister for Immigration and Citizenship* [2009] FCA 705

the government. While in Australia, MZXQU communicated by letter, email and on the phone with his wife, including advising her that he had made a protection application. The authorities monitored the communications and had questioned his wife.

MZXQU accepted that one of his purposes in communicating with his wife about his PV application was to strengthen his claim to be a refugee which resulted in s. 91R(3) being engaged. However, he argued that s. 91R(3) authorised the Tribunal to disregard his conduct, but did not authorise the Tribunal to disregard his wife's conduct.

The Tribunal dealt with the applicant's *sur place* claim as follows:

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 [not in secret or code], despite knowing that their communications could be monitored, and that their comments could disclose the applicant's whereabouts and intentions.

The Tribunal was satisfied for the purposes of subsection 91R(3) of the Act that MZXQU's conduct was solely for the purpose of strengthening his claim to be a refugee and disregarded the conduct in accordance.

However, MZXQU's actual claims in this regard were somewhat different. He 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.*

The Federal Magistrates Court: held that s. 91R(3)(b) only expressly authorised the Tribunal to disregard the conduct in Australia of the person claiming refugee status, but did 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 MZXQU's wife in Burma stood alone, and the Tribunal was not entitled to disregard her conduct. By doing so, the Tribunal mistakenly failed to consider an aspect of MZXQU'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.

In contrast, in *SZSEE v Minister for Immigration and Citizenship* [2013] FCCA 1026 the Court considered that where actions of third parties are consequential to 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) needs to be considered under s. 36(2)(aa) – that is whether it results in a real risk of significant harm.

Part 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 *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

International Legal Framework <i>Non-refoulement obligations:</i> - Article 6 International Covenant on Civil & Political Rights (ICCPR) – inherent right to life - Article 7 ICCPR – prohibition on torture and cruel, inhuman or degrading treatment or punishment - Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty - Article 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) – prohibition on torture  Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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').
- Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (Second Optional Protocol)* in relation to persons who face a real risk that the death penalty will be imposed and carried out for a crime they have been convicted of, or are alleged to have committed.

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When Complementary Protection may cover unsuccessful refugee claims

When CP may cover unsuccessful refugee claims

Some examples of claims that don't meet the definition of refugee but may be CP claims:

- Where claims have no nexus between the refugee protection reasons and 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)

EXAMPLE

Notes: _____

When CP may cover unsuccessful refugee 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.

EXAMPLE

Notes: _____

The various components of the 'refugee assessment' may result in a person facing a real risk of harm but not being able to satisfy the definition of refugee. The claimed risk of harm needs to be assessed under complementary protection because the *non-refoulement* obligation may be satisfied under that assessment.

Examples of where a person may not satisfy the refugee assessment but possibly may satisfy complementary protection:

- where the person may face punishment (e.g. the death penalty) under a law of general application. This also overlaps with the notion that the person fears prosecution rather than persecution
- blood feuds and vendettas do not typically have, as the 'essential and significant reason' for the harm a refugee protection reason, and so will not satisfy the persecution definition. Even if the feud was between families, the provision in s. 5K (PSG consisting of family) will prevent the claimed harm of fear on the basis of family feud alone from satisfying the refugee assessment;
- corporal punishment and imprisonment may not be sufficient to satisfy 'serious harm' but may satisfy harm elements under complementary protection.

Some other examples are referred to in the slides.

Complementary Protection Criteria

CP Criteria	
1	Section 36(2)(aa)- "...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..." CP criteria: • Substantial grounds (s. 36(2)(aa)) • Significant harm (ss. 36(2)(aa) & 36(2A)) • Real risk (s. 36(2)(aa) & SZQRB) • What is taken not to be a real risk of significant harm (s. 36(2B)): - Reasonable in the sense of practical to relocate - Adequate state or non-state protection - The real risk is one faced by the population of the country generally and is not faced by the non-citizen personally • Necessary and foreseeable consequence of the non-citizen being removed (s. 36(2)(aa))
2	Ineligible for meeting the CP criteria (s. 36(2C)) [Covered in part 9(a)]

Notes: _____

Section 36(2)(aa) of the Act sets out the criterion for the grant of a PV 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? (s. 5(1))
- Would the feared harm constitute 'significant harm'? (s. 36(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? (s. 36(2)(aa))
- Would it be reasonable for the non-citizen to relocate to an area where there would not be a real risk? (s. 36(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? (s. 36(2B)(b))
- Is the risk faced by the population of the country generally, rather than faced by the non-citizen personally? (s. 36(2B)(c))
- If the criterion is found to be met, would any of the ineligibility provisions in s. 36(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

Substantial Grounds Substantial grounds = evidence i.e. material supporting the belief, that the applicant would, if removed, face a real risk of significant harm Factors to provide evidence may include: • Past mistreatment; recency of mistreatment • Laws and practices of the receiving country • Patterns of conduct shown by the receiving country in similar cases • Whether the applicant is being targeted (e.g. arrest warrant) • Country information indicating a consistent pattern of gross, flagrant or mass violations of human rights • Credibility and consistency of claims	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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Under s. 36(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, the Second Optional Protocol and the CAT. The risk threshold in s. 36(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

Significant Harm <i>Decision makers must have substantial grounds for believing that, as a necessary and foreseeable consequence of being removed, there is a real risk of significant harm.</i> Section 36(2A): A non-citizen will suffer significant harm if: (a) the non-citizen will be arbitrarily deprived of his or her life; or (b) the death penalty will be carried out on the non-citizen; or (c) the non-citizen will be subjected to torture; or (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or (e) the non-citizen will be subjected to degrading treatment or punishment. Legislation Handout: Page 17	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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 s. 36(2A) of the Act.

‘Significant harm’ is defined in s. 5(1) of the Act to mean harm of a kind mentioned in s. 36(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 s. 5(1) of the Act.

These types of significant harm are those in relation to which a *non-refoulement* obligation may be engaged in relation 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 s. 36(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 s. 36(2B)(c)).

Arbitrary Deprivation of Life

Arbitrary Deprivation of Life

What is arbitrary deprivation of life?

- 'Arbitrary' means without just cause, without due process of law, injustice, unreasonableness, capriciousness.
- Non-arbitrary deprivation of life - natural causes for death (illness), an act of God, general famine or lawfully sanctioned death (death penalty).

Examples:

- **may include** "I fear I am going to be killed by x", Congo military laws, extra-judicial killings, honour killings, Albanian blood feuds
- **will not include** abortion, forced abortion or forced sterilisation.



Notes: _____

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

Arbitrary Deprivation of Life (cont.)

DM to consider 'who is the perpetrator?'

Issues to consider where the State is the perpetrator:

- State includes its government and security forces (military, paramilitary, police and other related agencies).
- State may be directly engaged in the arbitrary killings.
- State may be indirectly involved by failing to strictly control and limit the actions/conduct of its forces/agencies such as extra judicial killings.



Notes: _____

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.

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In the *Suarez de Guerrero*¹¹ case, the UNHRC found that Colombia violated the right not to be arbitrarily deprived of life by failing to prevent their security forces from arbitrarily killing ‘suspects’. 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 order was in response to a spate of kidnappings and extortions related to the narcotics trade. The Bogata police raided a home where they believed a kidnap victim was being held. Despite the victim not being present, police waited for suspected kidnappers to turn up. Seven people, including Mrs Suarez de Guerrero, were shot as soon as they entered the premises. The UNHRC 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 UNHRC 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

Arbitrary Deprivation of Life (cont.) Issues to consider where the perpetrator is a non-state actor: • Has the State taken measures to prevent and punish the deprivation of life by criminal acts? - That is, are there laws in place? Are these laws routinely enforced? • Is the applicant personally at risk? - Cannot just rely on country information suggesting high crime rate and poor police control – need more. 	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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 below.

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 s. 36(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.

¹¹ Human Rights Committee, Communication No. 45/1979: Colombia, 31/03/82, CCPR/C/15/D/45/1979 (Jurisprudence), 31 March 1982

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 for consideration under the complementary protection criterion, 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

Generally, claims that a person needs medical treatment in Australia to stay alive and will possibly die if removed from Australia will not amount to arbitrary deprivation of life: *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326. Further, scarcity of medical resources in the country will also not amount to arbitrary deprivation of life: *MZAAJ & Anor v Minister for Immigration & Anor* [2015] FCCA 151

A person threatening to kill themselves if removed from Australia will also not amount to arbitrary deprivation of life: *EZC18 v Minister For Home Affairs & Anor* [2019] FCCA 464.

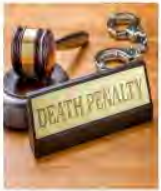
If a non-citizen's life expectancy would be threatened by being removed due to a pre-existing medical condition (both terminal and non-terminal in nature), this would not amount to an arbitrary deprivation of life. Deprivation of life due to natural causes is not arbitrary. However, in some circumstances it may be appropriate to consider whether removing someone with a pre-existing medical condition would amount to cruel or inhuman, or degrading treatment or punishment.

Death Penalty

Death Penalty

What constitutes the death penalty?

- It is State sanctioned and judicially imposed by final judgment
- Only for the most serious of crimes (if not it could be ADL)
- There needs to be a **real risk** that it will be carried out



Lines of enquiry:

- Under what law or regime is the death penalty imposed?
- What is it imposed for?
- Is the applicant ineligible for character reasons under s. 36(2C)?
- What's the likelihood of being tried and the death penalty being carried out? What evidence is available?

Notes: _____

Being returned 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 judgment 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 lawful executions. The death penalty may be imposed only for the most serious crimes and in accordance with law as 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'.

Death Penalty (Cont.) Arbitrary deprivation of life vs death penalty Arbitrary deprivation of life: • When there is no due process of law or where the death penalty is imposed for a crime that is not the most serious of crimes Death penalty: • Where there is due process of law and the penalty is applied to a most serious crime. • Examples: - executions taking place without public scrutiny - under uncertain circumstances - summary judgment - no hearing rights - unfair trial Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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 a theoretical 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 where, for example:

- 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 s. 36(2A)(b) of the Act. However, this may be relevant in determining whether they are ineligible for a PV on the basis of s. 36(2C) or should be refused grant of a visa under s501.

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

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

Issues that cut across all three types of harm:

- Level of severity – consider:
 - high threshold of severity according to international jurisprudence
 - particular vulnerability of the applicant e.g: sex, age, state of health, exploitation of phobias or cultural taboos
 - particular circumstances of the claim e.g: nature, context and duration of treatment, physical and mental effects
- Inconsistency with Article 7 and lawful sanctions
- Intention



Department of Home Affairs

Notes: _____

Torture / Cruel or Inhuman Treatment or Punishment / Degrading Treatment or Punishment (Cont.)

Which lawful sanctions are inconsistent with ICCPR?

- Excludes acts or omissions from the definition of torture, CITP or DTP if it is a lawful sanction
- **But** if act or omission meets the level of severity in the definitions of torture, CITP or DTP, then it will necessarily be inconsistent with the ICCPR

Examples of lawful sanctions that may constitute torture, CITP or DTP:

- Corporal punishment e.g: lashing, stoning, amputation
- Disciplinary action e.g: caning, smacking in schools or at home
- Imprisonment e.g: prison conditions

Department of Home Affairs

Notes: _____

The terms ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are defined in s. 5(1) of the Act. The definitions derive from 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 courts have also indicated that the definitions of ‘significant harm’ do not distinguish between acts or omissions carried out by State or non-State actors (*BPF15 v Minister for Immigration and Border Protection* [2018] FCA 964).

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.

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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 <i>reasonably be regarded as cruel or inhuman in nature</i>	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

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Torture

Torture

Definition in s. 5(1):

An act or omission by which **severe pain or suffering**, whether physical or mental, is **intentionally inflicted** on a person **for the following purposes**:

- (a) obtaining information/confession; or
- (b) punishing the person for an act which that person/another has committed/is suspected of having committed; or
- (c) intimidating/coercing the person/a third person; or
- (d) for a purpose related to an above purpose; or
- (e) for any reason based on discrimination that is inconsistent with the Articles of 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 ICCPR.



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Notes: _____

Torture is defined in s. 5(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 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 ICCPR.

Act or Omission

Torture (Cont.)

DM considerations to assist in determining torture purposes:

- What is the act/s or omission/s?
- Does the harm amount to **severe** physical or mental pain or suffering?
- Was the harm **intentionally** inflicted? For a **purpose**?

Examples of torture purposes:

- obtaining information/a confession, e.g: *electric shock given to suspected terrorist or opponent of authoritarian regime*
- punishing for an act committed or suspected of having been committed, e.g: *amputation of hand for stealing*
- intimidating or coercing, e.g: *cigarette burns given to journalist for publishing articles critical of the regime*

Department of Home Affairs

Notes: _____

Both an action and an omission (that is, a failure to act) could amount to torture.

The terms 'act' or 'omission' should be interpreted to also 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 will 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. Similarly, 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

If severe pain or suffering is inflicted on a person but is not inflicted for one of the above purposes included in the definition in s. 5 (see above), that conduct will not meet the definition of torture. Decision makers may need to consider whether the conduct would fall within the definition of cruel or inhuman treatment or punishment.

Examples of torture

Torture (Cont.)	
Examples of types of harm under torture: • systematic beatings • electroshocks • burns • extended hanging from hand and/or leg chains • repeated immersion in a mixture of blood, urine, vomit and excrement • standing for great lengths • serious and credible threats of harm to the victim or a third person (such as death threats) • simulated executions or amputations REMEMBER: is a prospective test of harm Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____

Neither the ICCPR nor the CAT provides a prescriptive list of examples of treatment that constitute torture. The UNHRC has identified a breach of the prohibition of torture under Article 7 of the ICCPR relating 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 (now the Democratic Republic of 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 also found to constitute torture.

Cruel or Inhuman Treatment or Punishment & Degrading Treatment or Punishment

Cruel or Inhuman Treatment or Punishment & Degrading Treatment or Punishment What constitutes this type of harm? - Article 7 of the ICCPR's purpose is to protect integrity and dignity of the human person - There must be a minimum level of severity - Inclusion in legislation is to give effect to what constitutes a non-refoulement obligation (not protection from all HR violations) <table border="1" style="width: 100%; border-collapse: collapse; font-size: x-small;"> <thead> <tr> <th style="text-align: left;">Likely Inconsistent</th> <th style="text-align: left;">Maybe Inconsistent</th> <th style="text-align: left;">Unlikely Inconsistent</th> </tr> </thead> <tbody> <tr> <td>Female genital mutilation</td> <td>Domestic violence (depends nature of what is being described)</td> <td>Socio-economic claims</td> </tr> <tr> <td>Forced abortion/sterilisation</td> <td></td> <td>Medical claims</td> </tr> <tr> <td>Rape</td> <td></td> <td></td> </tr> <tr> <td>Some lawful sanctions e.g. corporal punishment</td> <td>Some lawful sanctions e.g. prison conditions</td> <td>Some lawful sanctions e.g. prison conditions</td> </tr> </tbody> </table>	Likely Inconsistent	Maybe Inconsistent	Unlikely Inconsistent	Female genital mutilation	Domestic violence (depends nature of what is being described)	Socio-economic claims	Forced abortion/sterilisation		Medical claims	Rape			Some lawful sanctions e.g. corporal punishment	Some lawful sanctions e.g. prison conditions	Some lawful sanctions e.g. prison conditions	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
Likely Inconsistent	Maybe Inconsistent	Unlikely Inconsistent														
Female genital mutilation	Domestic violence (depends nature of what is being described)	Socio-economic claims														
Forced abortion/sterilisation		Medical claims														
Rape																
Some lawful sanctions e.g. corporal punishment	Some lawful sanctions e.g. prison conditions	Some lawful sanctions e.g. prison conditions														

Cruel or Inhuman Treatment or Punishment Definition in s. 5(1): an act or omission by which: (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or (b) 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: (c) that is not inconsistent with Article 7 of the ICCPR; or (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the ICCPR. Department of Home Affairs Legislation Handout: Page 6	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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Cruel or inhuman treatment or punishment is defined in s. 5(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 ICCPR; or
- arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR.

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Act or Omission

Cruel or Inhuman Treatment or Punishment (Cont.) DM considerations: • What is the act/s or omission/s? • Does the harm amount to severe physical or mental pain or suffering? • OR can it reasonably be regarded as cruel or inhuman? • Was the harm intentionally inflicted? (no need for a purpose) Examples: • Interrogation techniques including: - withholding of food and water - hooding - stress positions - sleep deprivation  Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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.

As with torture, the terms 'act' or 'omission' should be interpreted to also 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 s. 36(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, may 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

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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. Mere negligence is insufficient to amount to an intention to inflict cruel or inhuman treatment or punishment (*SZSPE v Minister for Immigration & Border Protection & Anor* [2013] FCCA 1989 (*SZSPE*)).

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 Definition in s. 5(1): an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission: (a) that is not inconsistent with Article 7 of the ICCPR; or (b) 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. Department of Home Affairs Legislation Handout: Page 6	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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Degrading treatment or punishment is defined in s. 5(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:
 - o that is not inconsistent with Article 7 of the ICCPR; or
 - o 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.

According to the definition in s. 5(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 Omission

Degrading Treatment or Punishment

DM considerations:

- What is the act/s or omission/s?
- Will the act/omission **cause** extreme humiliation?
- AND will the act/omission **intend to cause** extreme humiliation?
- Is the extreme humiliation **unreasonable**? Consider proportionality.



Notes: _____

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

The terms ‘act’ or ‘omission’ should be interpreted to also 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 s. 36(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 when considering whether treatment would constitute degrading treatment or punishment in breach of Article 7 of the ICCPR.

Treatment is degrading if it will 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 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

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under the Freedom of Information Act 1982

did so would not fall within the definition. Mere negligence is insufficient to amount to an intention (*SZSPE v Minister for Immigration and Border Protection* [2014] FCA 267).

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. However, placing someone in harsh conditions which cannot be avoided under a law or for a legitimate purpose may not be considered an intention to cause the harm. An ‘oblique intention’ is not an intention at all: *SZTAL v Minister for Immigration and Border Protection*; *SZGTM v Minister for Immigration and Border Protection* [2017] HCA 34 at [67].

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

Significant Harm Overview	
• Recap on harm and tests requiring consideration:	
ADL	arbitrary nature; death penalty for less serious crimes; death penalty without due process of law
DP	State sanctioned; judicially imposed; due process of law; most serious crimes
Torture	act(s)/ omission(s); intentionally inflicted; severe physical or mental pain or suffering; for a purpose
CITP	act(s)/ omission(s); intentionally inflicted; severe physical or mental pain or suffering (no purpose); physical or mental pain or suffering reasonably regarded as cruel or inhuman in nature; inconsistent with Article 7
DTP	intended to cause extreme humiliation; causes extreme humiliation; unreasonable (proportionality); inconsistent with Article 7

Real Risk

[illegible]

In *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, the Court held that the ‘real risk’ threshold under the complementary protection test is the same as the ‘real chance’ threshold, under the

refugee test (as explained in *Chan*¹²). This means that the same considerations in *Chan* apply to considerations of whether there is a real risk.

These considerations include identifying whether there is a real risk 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.

Decision makers 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 evidence 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 refugee criteria.

For example, in *Cruz Varas and Others v Sweden*¹³ 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 a finding as to the subjective fear of the applicant, it is necessary to make a finding that the risk of harm is personal to the applicant. If evidence indicates that an applicant does –engage in activities which suggest they are not at risk of harm, for example, repeatedly traveling to the country in question - this may demonstrate that the applicant is not personally at risk of significant harm.

What is not a real risk?

What is Taken not to be a Real Risk of Significant Harm

Section 36(2B) -
not meet CP criteria if:

- 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; or
- 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; or
- the **real risk is one faced by the population of the country generally** and is not faced by the non-citizen personally

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¹² *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62

¹³ *Cruz Varas and Others v. Sweden* (European Court of Human Rights, Court (Plenary), Application No 15576/89, 20 March 1991).

Relocation Test

Relocation Test Section 36(2B)(a) – taken not to be a real risk if: - Reasonable to relocate in the country Elements: - Fear must be well-founded in relation to country as a whole. - Would it be 'reasonable' to expect applicant to relocate to another part of same country. – Reasonable in the sense of practicable. – Not a reasonable option if applicant is required to modify behaviour to avoid persecution in new location.  Department of Home Affairs Legislation Handout: Page 18	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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 would not be 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.¹⁴

When interpreting s. 36(2B)(a), decision makers may draw guidance from the case law which had developed on the internal relocation principle in the context of the Refugees Convention, as s. 36(2B)(a) was intended to reflect that case law. This approach was endorsed in *MZYXS v Minister for Immigration and Citizenship* [2013] FCA 614.

Relocation Test (cont.) What is reasonable in the sense of practicable? What is reasonable depends on the particular circumstances of the applicant and the impact of relocation on the applicant (SZATV) DM should consider: - The age of the applicant - Absence of family network or other local support - Viability of the propounded place of internal relocation - Support mechanisms available if applicant has already been traumatised - Physical, financial, logistical and other barriers - Quality and adequacy of internal protection in terms of civil, political and socio-economic human rights - The route that must be travelled to get to safety - Consider the applicant's education, employment background and ability to gain employment, language barriers and access to family networks (SZFDV) Department of Home Affairs Legislation Handout: Page 18	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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The test for refugee assessments under s. 5J(1)(c) is whether a person has a real chance of persecution in all areas of a receiving country. As part of this assessment, decision makers are to consider whether the applicant can access a safe 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). In particular, the test under complementary protection requires decision makers to consider whether it is reasonable, in the sense of practicable, for the applicant to

¹⁴ *H.M.H.I v Australia* CAT/C/28/D/177/2001 22 January 2003

relocate to another area where there is not a real risk of significant harm. 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 High Court in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 (Gummow, Hayne and Crennan JJ) 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.

***Harjit Singh Randhawa v Minister of Immigration, Local Government and Ethnic Affairs* [1993] FCA 592**

Background: Mr Randhawa was a Sikh and his father was, until his murder in January 1991, an active and prominent member of one of the political movements seeking recognition of the Punjab as a separate State. In January 1991, Mr Randhawa's father was murdered and so also was a brother who was visiting from Australia. Another brother had disappeared and was feared dead. Other members of Mr Randhawa's family, including his mother, moved from their village and were maintaining a low profile in the Punjab.

The Full Federal Court: considered the issue of 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, they 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

Adequate State or non-State Protection

Section 36(2B)(b) – taken not to be a real risk if:

- Protection obtained from an authority of the country such that there is not a real risk of significant harm

Considerations:

- Similar test to the 'whether protection measures are available' under ss. 5J(2) & 5LA, however, covered in case law only
- Authority can be the State or non-state actors
- Consider whether that authority is 'able' and 'willing' to provide to the applicant protection such that there is not a real risk of significant
- Essential to consider applicant's individual circumstances



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Section 36(2B)(b) of the Act states 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.

Decision makers must make an assessment of whether the level of protection offered by an authority in 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 s. 36(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 complementary protection. 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. In *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953, Sundberg J said there was 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

Faced by the Applicant Personally

Section 36(2B)(c) – taken not to be a real risk if:

- Risk is faced by population generally, not by the applicant personally

Considerations:

- Personal element to be a **real risk** of significant harm.
- A general statement about violence being rife in a country will not be enough – the applicant must be personally affected.



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According to s. 36(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 faced by the population of the country generally. In other words, a person will not meet the criterion in s. 36(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.

Necessary and foreseeable consequences of removal

Necessary & Foreseeable Consequence of Removal

Section 36(2)(aa) –

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..."

- CP is concerned with preventing harm for any reason flowing from removal to a receiving country.
- The phrase is important however as in some cases the harm is not necessarily the consequence of the removal but of the person's own voluntary action.

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As in the context of making assessments under the refugee criteria, 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. 5J(6) of the Act, which relates to disregarding bad faith *sur place* claims, does not apply to complementary protection. That is, any conduct that has been disregarded under s. 5J(6) as part of the refugee assessment needs to be considered under the complementary protection criteria to determine whether it would give rise to a real risk of significant harm.

Behaviour Modification

Refugee Assessment vs Complementary Protection

- Refugee assessment – covered by case law and clarified by s. 5J(3) of the Act (i.e. where applicant can modify their behaviour and no longer have a well-founded fear of persecution)
- Complementary Protection – principles dictated by existing case law



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Part 8: Protection in Another Country

The assessment of s. 36(3) should be undertaken (as necessary) **following** the assessment of the refugee and complementary protection criteria. This is because s. 36A(2) requires that the consideration of protection obligations (as set out in s. 36A(1)) is undertaken without regard to s. 36(3).

What is 'protection in another country'?

Protection in Another Country

Does the applicant have protection in another country elsewhere?

- Australia does not have protection obligations in relation to an applicant who can receive **protection in another country**: s. 36(3)
- There are exceptions when a person is taken not to have protection in another country: ss. 36(4) – (5A)
- Section 36A requires consideration of protection obligations without regard to s. 36(3). Therefore, s. 36(3) should be considered following the refugee and complementary protection criteria assessment.



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Protection in Another Country

ss. 36(3) – (7) Guidance:

1. Does the applicant have a 'right to enter and reside' in another country?
2. Have they taken all possible steps to avail themselves of this right?
3. Do they have a well-founded fear of persecution or a real risk of suffering significant harm in relation to the other country?
4. Would they be returned by the other country to a third country where they will have a well-founded fear of persecution or a real risk of suffering significant harm?



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The concept of 'protection in another country' embodies s. 36(3) to (7) of the Act, which obliges 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. Certain exceptions exist, these are:

- Where the person has a well-founded fear of being persecuted for a refugee protection reason in that country, or the Minister has substantial grounds for believing that as a necessary and foreseeable consequence of removal, there is a real risk the person will suffer significant harm (s. 36(4))
- Where the person has a well-founded fear that the country will return the person to another country and the person will be persecuted in that other country for a refugee protection reason (s. 36(5)) or the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person availing themselves of the right to enter and reside, there would be a real risk that the person would suffer significant harm in the other country (s. 36(5A)).

Subsections 36(6) and (7) state that whether a person is a national of a country is to be determined 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 refugee protection reasons or a real risk of suffering significant harm in relation to the other country? (s. 36(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 refugee protection reasons or face a real risk of suffering significant harm? (s. 36(5) and s. 36(5A))?

Meaning of 'right to enter and reside'

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.

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 amount 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 the 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, or 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.

Lapsed rights

If a right to enter and reside has lapsed it 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).

Meaning of 'reside'

The definition of 'reside' in the Macquarie Dictionary¹⁵ is – “to dwell permanently or for a considerable time; have one's abode for a time”. Therefore transit is not considered to amount to a right to 'reside' in the country. See also *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194.

SZMWQ v Minister for Immigration and Citizenship [2010] FCAFC 97 supports 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.

While a person may have a right to enter and set up their 'abode for a time', there is no minimum or maximum periods expressed in s. 36(3). As mentioned above, if the country concerned allows a relatively short period of residence, decision makers should consider what will happen to the person at the end of that period of residence. Relevant considerations include determining whether the person has a right to renew or prolong residence and the prospects of that occurring, or whether the country will send the person back to a place where they may be harmed.

Whether temporarily or permanently

Section 36(3) of the Act states that the right to enter and reside can be permanent or temporary.

'Temporary' does not require any qualification as to how long the person may enter and reside, it does not require a consideration of 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, that is a consideration under ss. 36(5) and (5A) rather than s. 36(3).

If 'temporary' is taken to be of fleeting duration, the qualification of the term comes from the nature of the word 'reside'. There is no minimum period specified as being sufficient, but the term 'right to reside' suggests something more than a right to a mere transitory presence.

However the right arose or is expressed

The phrasing in s. 36(3) embodies a range of ways a State may allow persons to enter and reside in its territory.

A right to enter and reside could arise from a declaration (written or verbal) of the government of a State that certain non-citizen persons are allowed a right to enter and reside in its territory. 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). For example, under the Trans-Tasman Agreement, an agreement that is not in writing, citizens of New Zealand can enter and reside in Australia, being granted a visa on arrival. Agreements may also include 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.

¹⁵ Macquarie Dictionary Online, [definition](#) of 'reside', accessed 30 May 2023

Connection with the country

It is not necessary that an applicant has a connection with the country in order to establish that they have a right to enter and reside there. 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 relied upon 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 movement allowing persons to move from one State to another. However, it is not enough to consider the terms of the agreement or directives for the union. 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 States 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 example below deal with that treaty.

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

Background: SZLAN and his wife, SZLAO, were Nepalese applicants seeking protection in Australia on the basis of persecution by Maoists in Nepal. They claimed the persecution began after SZLAN, who had a wholesale business in Nepal, sold juice he had sourced from an Australian company that included a contaminated batch. SZLAN's Protection visa application was refused and he sought review in the Tribunal, which upheld the decision to refuse the visa. SZLAN appealed to the Federal Court on the basis that the Tribunal applied the wrong test for determining whether SZLAN has a legally enforceable right to enter and reside in India under the *Treaty of Peace and Friendship 1950*.

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

The Federal Court referred to the findings of Stone J in *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332, at [60]:

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: in SZLAN 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.

Taken all possible steps to avail themselves of that right

Once decision makers are satisfied that the applicant has a right to enter and reside in a third country, they need to go on and consider whether the applicant has 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 courts have rejected different formulations, such as:

- 'All steps reasonably practicable in the circumstances',
- 'All reasonably available steps' and
- 'All reasonably possible steps' (*NBLC, NBLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 272).

The obligation is on the applicant 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 Minister for Immigration and Citizenship* [2008] FCA 904).

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

Background: The facts of this case are set out above. In addition to finding that the *Treaty of Peace and Friendship 1950* applied to SZLAN's circumstances, the Tribunal also found there was no evidence that the applicant took all possible steps to avail himself of the right to enter and reside in India (the 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.

The Federal Court upheld the Tribunal's finding that SZLAN had not taken all possible steps to avail himself of the right to enter and reside in India.

Similarly, in *SZGXX v Minister for Immigration and Citizenship* [2008] FCA 1891, the Federal Court upheld the Tribunal's finding that SZGXX had the right, in accordance with the *Treaty of Peace of Friendship 1950*, to enter and reside in Nepal and had not taken all possible steps to avail himself of that right.

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 refugee protection reason in the third country (s. 36(4)(a))
- 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))
- the applicant has a well-founded fear that the third country will return them to another country where they will be persecuted for a refugee protection reason (s. 36(5))
- 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 is still a requirement to assess the refugee or complementary protection criteria. As noted above,

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s. 36A requires the consideration of protection obligations without regard to s. 36(3) and, accordingly, the refugee and complementary protection criteria should be assessed prior to assessment of s. 36(3). This ensures that a protection finding (where relevant) is made for the purposes of s. 197C.

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Part 9(a): Exclusion to Being a Refugee and Ineligibility from Meeting the CP Criteria

Exclusion & Ineligibility	
s. 5H(2) - refugee exclusion • s. 36(2C)(a) - CP ineligibility Minister has serious reasons for considering : 1. Committed crime against peace, war crime or crime against humanity defined by international instruments prescribed by the regulations; 2. Serious non-political crime before entering Australia 3. Guilty of acts contrary to purposes and principles of UN	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____

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 s. 5H(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 PV on CP grounds, if there are serious reasons for considering:

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

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). Consequently, if the applicant satisfies s. 5H(2), they will be excluded from meeting the criterion under s. 5H(1) and will not be eligible for a PV as a refugee. Similarly s. 36(2C) provides when a non-citizen is taken not to satisfy the PV criterion under the complementary protection provision in s. 36(2)(aa).

Temporal and territorial scope to s. 5H(2) and 36(2C)(a)

Out of the three crime categories mentioned above, only s. 5H(2)(b)/s. 36(2C)(a)(ii) requires 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 (Australia), country of origin or in a third country.

Serious reasons for considering

The threshold for finding whether the person has committed one of the crimes listed 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. A decision maker does need to have strong evidence of the commission of a relevant crime or act, and does need to make a finding on the facts that there is a high probability that the applicant committed the relevant crimes or acts.

Mere involvement with a party, organisation or group which has committed acts that fall within s. 5H(2)/s. 36(2C)(a) will not be enough to establish the person has committed an act under that definition or that they were complicit in the crime.

Considering s. 5H(2)(a)/s. 36(2C)(a)(i) - Crime Against Peace, War Crimes, and Crimes Against Humanity

Whether an applicant has committed a crime against peace (also called the crime of aggression), a war crime or a crime against humanity can be determined by reference to the international instruments set out in regulation 2.03B. This includes the Rome Statute, the most recent embodiment of international criminal law, and therefore the instrument that it is recommended that decision makers consider first, and references below will be to the Rome Statute. However the list in regulation 2.03B is not exhaustive and any and all international instruments that define a crime against peace, war crimes or a crime against humanity can be referred to, if appropriate to the circumstances.

Crimes against peace

Crimes against peace (also known as the crime of aggression) are defined in Article 8*bis* of the Rome Statute, and only apply to international armed conflicts. They include the planning, preparation, initiation or execution of an act of aggression by a person in a position to exercise effective control over the political or military action of a State. The act of aggression constitutes a manifest violation of the Charter of the United Nations.

War crimes

Defined in Article 8 of the Rome Statute. Generally speaking, war crimes are crimes committed in violation of the laws and customs of war which may include acts such as wilful killing and torture or inhuman treatment, including biological experiments.

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 conflict.

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, a crime against humanity requires:

- A specific act, such as murder, enslavement or torture
- That the act is committed as part of a widespread or systematic attack (can be a single instance, if part of a systematic attack)
- That the act is directed against any civilian population

- That the act be committed with knowledge of the widespread or systematic attack (but it does not require knowledge of all the elements of the attack).

Article 7(2) of the Rome Statute confirms that an 'attack directed against any civilian population' means "a course of conduct involving the multiple commissions of acts... against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack".

Crimes under the Rome Statute have both a mental and physical element. The mental element is referred to in Article 30 and requires the applicant to have both intent and knowledge. The physical element is the evidence that the applicant has committed a crime.

The Rome Statute includes a number of defences to the crimes. The defences operate to exclude liability for the crimes. That is, if a defence is found to apply, it will mean the applicant is not guilty of the commission of that crime. Defences may be raised by the applicant or may arise on the facts.

Considering s. 5H(2)(b)/s. 36(2C)(a)(ii) – Serious Non-Political Crimes

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 before entering Australia.

Key words include:

- 'Serious' – considered from Australia's perspective
- 'Non-political crime' – determined by reference to the Extradition Act and Extradition Regulations
- 'Before entering Australia' - but can include continuing crimes such as drug trafficking or people smuggling, which commence in one country and conclude in Australia.

Considering s. 5H(2)(c)/s. 36(2C)(a)(iii) – Crimes Contrary to the Purposes and Principles of the United Nations

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)/s. 36(2C)(a)(ii) is uncertain and it is seldom used. It is generally considered that the terms of s. 5H(2)(c)/s. 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) /s. 36(2C)(a)(i) or (ii).

Part 9(b): Character and Security Exceptions

Not Assessed by ASIO to be Directly or Indirectly a Risk to Security – s. 36(1B)

s. 36(1B) s. 36(1B) - Common PV criteria Section 36(1B): A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the <i>Australian Security Intelligence Organisation Act 1979</i>). Legislation Handout: Page 18 Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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If an applicant is the subject of an adverse security assessment (ASA) issued 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 PV application must be refused as s. 36(1A)(a) requires a PV applicant to satisfy s. 36(1B) *and* s. 36(1C). Decision makers should refer to the Security Checking Handbook for further information about ASAs.

Danger to Australia's Security or the Australian Community – s. 36(1C) and s. 36(2C)(b)

Under s.36(2C)(b)/s. 36(1C), an applicant will be ineligible for grant of a PV if the Minister 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 either a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

Danger to Australia's security

s. 36(1C)(a) & s. 36(2C)(b)(i) s. 36(2C)(b) - CP ineligibility & s. 36(1C) - Common PV criteria Section 36(1C): A criterion for a PV is that the applicant is not a person whom the Minister considers, on reasonable grounds: a) is a danger to Australia's security; or b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community. Legislation Handout: Page 18 Department of Home Affairs	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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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.

Convicted of a particularly serious crime and danger to the community

s. 36(1C)(b) & s. 36(2C)(b)(ii) s. 36(2C)(b) - CP ineligibility & s. 36(1C) - Common PV criteria Section 36(1C): A criterion for a PV is that the applicant is not a person whom the Minister considers, on reasonable grounds: a) is a danger to Australia's security; or b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community. Legislation Handout: Page 18	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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In considering s. 36(1C)(b), each of the following elements should be considered:

- Was there a crime?
 - o Can be established by reference to an applicant's claims, criminal history or other information, including country of origin information or information from a third party.
- Is the crime considered to be particularly serious?
 - o Involves consideration of s. 5M of the Act and whether crime is a 'serious Australian offence' or a 'serious foreign offence'.
- Has there been conviction by a final judgment?
 - o There must be a finding or admission of guilt.
 - o The applicant must have either exhausted all judicial avenues of appeal or no further appeals are forthcoming (for example because they are out of time).
- Is the person a danger to the Australian community?
 - o This should be assessed with reference to the guidance in *WKCG and Minister for Immigration and Citizenship* [2009] AATA 512:
 - the seriousness and nature of the crime committed
 - the length of the sentence imposed
 - the criminal record in totality
 - any mitigating or aggravating circumstances
 - whether rehabilitation has occurred and will continue
 - 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 Refugee Law Guidelines.

Relationship to s. 501

If a decision maker finds that a case does not fall within s. 36(1C)(a) or (b), but there are residual concerns that may be relevant to consideration of s. 501, it is appropriate to raise the case and evidence to a team leader and determine whether it should be referred for consideration by a s. 501 delegate once a s. 36(1C) finding has been made.

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Considerations at every part

Through the PV assessment process decision makers need to follow the code of procedure and consider credibility.

Procedural Fairness

Procedural Fairness

Part 2, Division 3, Subdivision AB Migration Act 1958

Code of procedure for dealing fairly, efficiently and quickly with visa applications

- Takes some common law requirements for procedural fairness and balances the process in the Act of affording natural justice and yet dealing efficiently and quickly with visa applications
- Failure to comply with the requirements of PF may result in a court finding that the decision is affected by jurisdictional error

NB: Administrative processes assessing protection obligations have a common law natural justice requirement. Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M89 of 2010 v Commonwealth of Australia [2010] HCA 41



Notes: _____

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. This is commonly known as the Code of Procedure.

A failure to comply with the procedural fairness obligations will result in the decision being affected by jurisdictional error. This will mean that a court can remit the matter to the Department for reconsideration.

When and how is procedural fairness given to an applicant?

Procedural Fairness

- Communication with the Minister and other obligations – s. 52;
- Minister must consider all information in an application – s. 54;
- Applicant may provide any information for the application until decision made – s. 55; not obliged to wait but implied discretion
- Minister *may* ask for any information thought to be relevant (including from the applicant) and must give that information regard: s. 56;
- 'Hearing rule' – s. 57 concerns 'relevant information'
- Content of invitations (s. 56 and s. 57) and timeframes – s. 58; reg. 2.15
- Decision cannot be made until either applicant responds to invitations, timeframe has lapsed, or applicant states they will not respond to the invitation – s. 63

Legislation Handout: Pages 23 - 25

Notes: _____

The Code of Procedure (ss. 51A-64) provides the requirements for primary decision makers for dealing with all visa applications, including 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 AAT has a similar code (conduct of review) under Division 4 of Part 7 of the Act (ss. 422B – 429A). The IAA also has a code (conduct of review) under Division 3 of Part 7AA of the Act (ss. 473DA – 473DF).

For primary decision makers, s. 51A states that Subdivision AB is ‘an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.’ This means decision makers must 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. This means that decision makers need to do a final check of the file, before finalising their decision, to make sure additional information has not been provided that they have not considered.

Under s. 56 of the Act, decision makers **may** seek further information from the applicant that they consider relevant to the criteria for grant. Decision makers may request such additional information orally or in writing (s. 56(2)). If further information is received, officers must have regard to that information in making a decision whether to grant or refuse a visa (s. 56(1)).

Procedural Fairness ‘Relevant information’, in s. 57, is any information that the Minister considers: • would be the reason, or part of the reason to refuse to grant the visa, or for deciding that the applicant is an EFTRA, and • Is specifically about the applicant or another person and not just about a class of persons (ie not country information), and • Was not given by the applicant for the purpose of the application. Examples: - Information from entry interview - Information from 3rd person - Suspicion that a bogus document has been provided Department of Home Affairs Legislation Handout: Pages 23 – 25	Notes: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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Section 57 requires that certain information **must** be given to applicant’ for comment before it can be relied on to refuse the application. This information is any ‘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 or for deciding that the applicant is an excluded fast track review applicant (s. 57(1)(a))
- 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)).

For example, s. 57 will apply to adverse information provided by the PV applicant at their entry interview or in a previous visa application. This will be ‘relevant information’ because it was not given as part of the current application, is specifically about the applicant, and may be part of the reason for refusing the application – because it contradicts or throws into question other information he or she has provided or goes to their credibility. On the other hand, country information does not need to be put to the applicant because it is caught by s. 57(1)(b). Section 57 will also apply where, for example, the decision maker has reason to suspect that a document provided by the applicant is bogus – because that suspicion may form part of the reason for refusing the application, is specific to the applicant but was not provided by them for the purposes of the application.

Information which may lead to a decision maker finding that a fast track applicant is excluded also needs to be put to the applicant for comment pursuant to s. 57(1)(a)(ii). This can be done (for example), in the same letter seeking their comment on whether a document might be bogus or not.

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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, decision makers 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). This is really crucial: decision makers must not just put the adverse information to the applicant, but must also explain why it is relevant and why it may form the basis of a decision to refuse the application. If this is not done properly there is a risk a court would find the decision is affected by jurisdictional error.

Section 58 sets out the time periods that apply for an invitation under s. 56 or s. 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 should be given to the applicant (i.e. the ‘gist’, should be put to the applicant for comment).

Decision makers should consult the Notification Requirements PCCF document (LS-1818) on LEGEND for further guidance or contact the [Protection](#) visa Help Desk should they require any assistance in this regard.

Credibility

Credibility

Assess credibility of applicant and evidence by testing knowledge and claims against independent information.

Process:

- Establish facts
- Consider facts
- Test claims
- Make and record credibility findings



Department of Home Affairs

Notes: _____

An assessment of credibility is not undertaken at any one time in the protection assessment process. Rather, it is considered at every stage.

For example, in terms of assessing the reasons for the persecution under s. 5J(1)(a), an applicant’s claim of religious practices may not be accepted or considered plausible on the basis that they are not a witness of truth. In assessing an applicant’s well-founded fear of persecution, decision makers are assessing the applicant’s subjective fear (in an objective context). The applicant’s credibility and supporting evidence is relevant to whether the applicant actually holds the subjective fear of persecution, and whether the subjective fear is well-founded.

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 or 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

Credibility	Notes: _____
• Testing applicant's claims: ◦ Linguistic analysis ◦ Knowledge ◦ Corroborative evidence and the poisoned well ◦ Drawing adverse inferences: s. 91V • Reasoning and evidence: ◦ Standard of evidence: clear/concise/sustainable ◦ Demeanour: do not over-emphasise ◦ Contradictions/discrepancies/inconsistencies ◦ Delay: reasons ◦ Interpreting errors	_____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____

Linguistic analysis

Linguistic analysis is currently used only as the last resort as people move from place to place, raising concerns about its reliability. Consequently, it is discouraged under the Department's policies. Other forms of credibility analysis should be first used.

Decision makers may choose to use linguistic analysis to decide whether an applicant had a long association with a particular ethnic group (e.g. Tamils) by assessing the applicant's knowledge of the language of that ethnic group (e.g. Tamil language) (*Fernando v Minister for Immigration and Multicultural Affairs* [2000] FCA 1182). However, linguistic analysis can be flawed and, where used, the application should still be assessed against all the evidence as a whole. When relied on in applications, linguistic assessments have been treated with caution and in some cases, given no weight. For example, in the Tribunal matter of V03/16490 (22 April 2004), the Tribunal considered three linguistics reports, two of which claimed with certainty that the applicant was from different regions to the other and a third which claimed that the applicant was likely from one of those regions, but showed linguistic patterns from the other as well. The Tribunal remarked that the assessments "[reflect] what the Tribunal considers to be the inherent unreliability of these reports".

Religious knowledge

A person's knowledge of religion will depend on the applicant's claimed involvement with the religion (be careful not to be an 'arbiter of religious knowledge' (See 'Testing applicant's knowledge of religion' above)

In *Wang v Minister for Immigration* [2000] FCA 1599, the Court said:

[16] ...Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion.

Nejad v Minister for Immigration and Multicultural Affairs [2000] FCA 741

Background: Nejad, a citizen of Iran claimed to have converted from Islam to the Baha'i faith after being introduced to it by his landlord. When arriving in Australia and making his protection claims at the airport, he did not raise a claim based on his religious conversion, rather he raised claims based on other grounds.

The Tribunal rejected his claims, finding a number of inconsistencies in his claims and in addition, that he lacked anything more than a 'limited and superficial understanding' of the Baha'i faith.

The Federal Court considered it not unreasonable for the Tribunal to expect a convert to have a basic understanding of his or her new faith and that it was open to the Tribunal to take this into account.

The Full Federal Court accepted this proposition, noting the primary judge's qualification that an applicant need not have a detailed understanding of the religious philosophy involved or its precise details.

Political knowledge

In *T v Minister for Immigration and Multicultural Affairs* [2000] FCA 467, the Full Federal Court held that it was appropriate for the RRT to test an applicant's claims based on persecution for reason of political opinion by questioning his knowledge of the history of the political party to which he claimed to belong. The Court described this as "a topic which he could reasonably have been expected to have provided reliable information."

Geographical knowledge

It is open to a decision maker to assess an applicant's awareness of the local geography of his or her home region or other relevant locations to assist with determining credibility.

For example, if an applicant claims to have lived in a particular city, it is reasonable that he or she will have good knowledge of its local geography including locations of civic buildings, topography, roads and markets.

The assessment of geographical knowledge has to be used carefully. It is possible for applicants to research geographical aspects of their claim.

Conversely, some applicants may be generally unaware of, or unable to remember, geography.

M17/2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 86

Background: M17 claimed to be a citizen of Afghanistan. Credibility issues arose with this claim when he was matched with an identity photo of a Pakistani citizen. One of the issues before the Tribunal was whether M17 had geographical knowledge of the areas in Afghanistan that he claimed to come from, given the vagueness of information he supplied.

The Tribunal in its findings, stated it:

has found that the applicant's knowledge and description of matters in Afghanistan was deficient in significant respects. ... The Tribunal considers that such matters as geography are capable of being learnt and, having considered the evidence in its entirety, finds that this explains the applicant's knowledge in this case.

The Federal Court held that:

It is evident from that passage that its denial of any weight to the applicant's geographical knowledge was only one of the reasons why the Tribunal found that he was not a citizen of Afghanistan as claimed but a Pakistani citizen ... It was sufficient for the Tribunal to indicate that

it had not been persuaded by, or had attached little or no weight to, the applicant's evidence of his geographical knowledge. It was not obliged to "give a line-by-line refutation of that evidence" or to give "the sub-set of reasons" why it rejected it.

Drawing adverse inferences

Section 91V of the Act is also relevant when dealing with credibility concerns during a PV assessment.

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. This section aims to address concerns that some applicants are engaging in sophisticated identity, nationality and claims fraud in order to strengthen their claims to engage Australia's protection obligations.

- It was considered a worthwhile credibility tool to give officers the power to compel applicants to make an oath or affirmation that the information they have given in support of an application was true.

If the applicant refuses or fails to comply with the request, or if they comply with the request but the decision maker has reason to believe that the applicant was not sincere, it is open to the decision maker to 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

Decision makers must look at all evidence as a whole, and decide which evidence is relevant or material to the application. By law, decision makers are required to take into account relevant considerations when making a decision on an application.

When looking at evidence, decision makers should consider the:

1. Relevance
2. Reliability
3. Credibility
4. Currency
5. Sufficiency of the material, and as a result of this process,
6. How much weight should be given to the evidence?

Decision makers need to make sure their reasoning is clear, concise and sustainable. In *W148/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 679 the Court held that:

*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.*

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 the decision maker considers may be important to the decision and may be open to doubt, decision makers must at least ask the applicant to expand on those aspects of the account and explain why the account should be accepted (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [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 Minister for Immigration and Multicultural Affairs* [2001] FCA 947. (See also *Kathiresan v Minister for*

Immigration and Multicultural Affairs [1998] FCA 159; and *Sundararaj v Minister for Immigration and Multicultural Affairs* [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' below for further information.

Using information on the Internet

Caution is to be used if considering sources such as Wikipedia as sources of information. Decision makers have discretion to obtain any information they think is relevant to the decision (s. 56), which may encompass using, for example, 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 Minister for Immigration and Citizenship* [2007] FMCA 975 and *MZYYY v Minister for Immigration and Citizenship* [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.

The Department uses information on CISNET. If decision makers find information elsewhere, they can request that it be included on CISNET.

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 Minister for Immigration and Ethnic Affairs* [1989] HCA 62 (per McHugh)).

Contradictions and discrepancies

Decision makers 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. For example, in *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247, the Court 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.

The Court 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.

In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, Kirby J noted that there is no necessary correlation between inconsistency and credibility in cases where applicants are inconsistent in their facts. The Court found 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.

Justice Kirby stated (at [7]):

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.

Where a decision maker finds an applicant to be generally credible, 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 Minister for Immigration and Multicultural Affairs [1999] FCA 192 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.

***Shi Chu Lin v Minister for Immigration and Multicultural Affairs* [1999] FCA 192**

Background: Mr Shi Chu Lin provided a number of different accounts of his background and reasons for persecution in his application, the account prepared by his migration agent and before the Tribunal, where an interpreter was used.

The Tribunal expressed concern about the role played by the migration agent in preparing and submitting an application that was at such odds with the original application and Mr Shi Chu Lin's evidence before the Tribunal. Ultimately, the Tribunal decided the matter on the basis of the original claims and found that they did not engage protection obligations.

The Federal Court expressed similar concerns about the migration agent's role. However, the Court held that the Tribunal had taken care to elicit Mr Shi Chu Lin's account as clearly as possible and that there were no errors in its approach or findings.

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 Minister for Immigration and Multicultural Affairs* [2000] FCA 370).

***SZJYM v Minister for Immigration and Citizenship* [2008] FMCA 652**

Background: SZJYM applied for a PV approximately 6 years after arriving in Australia. SZJYM had obtained a false passport in order to flee China, fearing persecution for practicing her Christian religion. When questioned about the delayed application, she explained she was very fearful of informing the Australian authorities about her false passport and also claimed she was unaware of the PV option. The delegate refused the application, noting that the details provided by SZJYM were vague and lacked substantiation, as well as credibility concerns raised by her explanations for the delayed application.

The Tribunal affirmed the refusal decision, forming an adverse view of SZJYM's credibility because of the delay in making the application.

The Federal Magistrates Court 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 remitted the matter for review by the Tribunal because it held the Tribunal erred by treating SZJYM's delay as conclusive of claim fabrication.

***Pannasara v Minister for Immigration and Multicultural Affairs* [2000] FCA 1331**

Background: Pannasara, a Sri Lankan Buddhist Monk, had departed his country of nationality 10 years before applying for protection in Australia (7 of those years spent in Australia). Pannasara provided

extensive submissions relating to his religion, political opinion and membership of a particular social group (Sinhalese).

The Tribunal, in assessing the application for protection, took into account events that had occurred in Pannasara's country in the intervening years; and Pannasara's personal history during that period.

The Tribunal considered that:

- Delay did not fatally undermine Pannasara'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.

The Federal Court endorsed the Tribunal's assessment of the delay in seeking protection, adding in relation to the second consideration made by the Tribunal that it:

... demonstrates only that the delay by the applicant was relevant in that events that had occurred in Sri Lanka in the intervening years covered by the period of delay were required to be taken into account.

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 Minister for Immigration and Citizenship [2008] FMCA 1225

Background: MZXPV was an Ethiopian citizen and claimed protection on the grounds of his Oromo ethnicity and political involvement. The application was refused and MZXPV sought review before the Tribunal. MZXPV's solicitors requested the presence of an Amharic interpreter during the hearing.

The Tribunal, despite concerns raised by MZXPV's solicitors at the conclusion of the hearing as to the quality of the interpreting, affirmed the delegate's decision to refuse to grant MZXPV a PV. The Tribunal found that MZXPV's evidence was unsatisfactory and considered the evidence regarding election campaign was vague and that some claims were fabricated.

The Federal Magistrates Court held:

- MZXPV had raised concerns about the interpreter at an early stage.
- The case largely turned on the credibility of MZXPV.
- When reading the answers that the interpreter provided, it was easy to obtain the impression that MZXPV was without a clear version of events, constantly trying to create credible answers.
- If the correct interpretation of the answers was read, the impression would be quite different. The poor interpreting created an apparent inconsistency.
- Inadequate interpretation at the Tribunal hearing resulted in a failure by the Tribunal to comply with s 425.

The Court set aside the Tribunal's decision and allowed review because the poor quality of interpreting denied MZXPV proper opportunity to put his case.

There is a difference between poor interpretation and words being actually 'intruded' into the applicant's claims by the interpreter:

W98/45 and Minister for Immigration and Multicultural Affairs [1998] AATA 948

Background: W98/45 was from Algeria and claimed to be a member of the illegal organisation 'Front Islamic de Salut' (Islamic Salvation Front), for which he performed surveillance operations on police

officers who were targets for assassination and informed other members of the targets' movements. During the PV interview there was a suggestion that W98/45 had carried out similar surveillance operations on 20 to 25 occasions.

The Tribunal, in making its findings of fact, highlighted that one of the difficulties with the interview was the quality of the interpretation. At [37]-[38] the Tribunal stated:

... 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 Minister for Immigration and Multicultural Affairs* [1999] FCA 615). But decision makers should not take on the role of medical expert.
- 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.
- Persons engaging protection obligations may be identified as not telling the truth on certain issues and still engage those obligations (*SZIEW v Minister for Immigration and Citizenship* [2008] FCA 522 (18 April 2008)).

SZIF v Minister for Immigration and Citizenship [2008] FCA 913

Background: SZIF's application was considered by a delegate and three different Tribunal members over a four-year period. Two Tribunal decisions were set aside by the Federal Magistrates Court and remitted to be reheard. The third Tribunal member found inconsistencies in the statements provided to the three differently constituted tribunals and the delegate, and rejected a number of SZIF's claims on that basis.

The Federal Court held that the unusual circumstances required particular caution when assessing inconsistency. The third Tribunal needed to ensure it did not overlook the combined effect of delay and disadvantage to SZIF in having to repeat a detailed account of past mistreatment when assessing the overall consistency of his account. The Court stated that the inconsistencies were not properly analysed, several misstated SZIF's earlier position and some involved summaries taken out of context.

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