

Topic Three - The Refugee Definition

[Applicant] will argue that pursuant to **s 36(2)(a) Migration Act ('MA')** s/he is a non-citizen in Australia that the Minister ought to be satisfied Australia has protection obligations under the **1951 Refugee Convention ('the RC')**.

S 36(2)(a) of the Act no longer expressly incorporates Australia's obligations under the **RC**. Nonetheless, as Australia remains a signatory of the RC, it is necessary to consider whether [Applicant] is protected under **s 36(2)(a)** in light of **Article 1A(2)** of the **RC** and **s 5H(1) MA**. The elements are as follows:

As per **Article 1A(2) RC**, the term refugee shall apply to any person who owing to a *well founded fear of being persecuted* for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is *outside* the country of his nationality and is *unable*, or owing to such a fear, *unwilling* to avail himself of the protection of that country.

Article 1A(2) defines "refugee" as a person who:

Owing to well-founded *fear of being persecuted* for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is *outside* the country of his nationality and is *unable or, owing to such fear, is unwilling* to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is *unable or, owing to such fear, is unwilling* to return to it.

S 36(2)(a) Migration Act

2. A criterion for a protection visa is that the applicant for the visa is:
 - a) A non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a **refugee***

S 5H(1) Migration Act: Meaning of refugee (1)

For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a *refugee* if the person: (a) In a case where the person has a nationality—is *outside the country* of his or her nationality and, *owing to a well-founded fear of persecution*, is *unable or unwilling* to avail himself or herself of the *protection of that country*; or (b) In a case where the person does not have a nationality—is *outside the country of his or her former habitual residence* and *owing to a well-founded fear of persecution, is unable or unwilling to return* to it.

Elements

- a) Outside their country of nationality
- b) Fear 'persecution'
- c) For one of the five listed reasons: race, religion, nationality, membership of a particular social group or political opinion
- d) Fear of persecution must be well-founded
- e) No state protection
- f) Limitations on Convention

a) Outside Country of Nationality

1. Is the Applicant outside his/her Country of Nationality?

[Applicant] fled their country of nationality, [country], on [date] and came to Australia. This has triggered responsibility under Convention for other states to protect [Applicant] (**Art 1A(2) UNHCR Handbook para 74**).

- How did [Applicant] get into Australia? (If via visa/plane – we know that his passport would have indicated he is a X citizen)
 - Act of fleeing engages the responsibility of other states to protect that person
 - Nationality = citizenship (identity documents?)
 - Linguistic testing to determine what country of origin

2. Dual Nationality

Art 1A(2) Refugee Convention If a person who has more than one nationality, the term “country of nationality” means each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed (taken advantage) himself of the protection of ONE of the countries of which he is a national.

b) Persecution

Section 5(1) Migration Act

A person has a well founded fear of persecution if:

- Person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- There is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
- The real chance of persecution relates to all areas of a receiving country.

1. Persecution under Australian legislation

It must first be determined that [Applicant] fears persecution.

- Not defined in RC, but s 5J (4) MA states must involve:
 - Convention reason must be ‘essential and significant’; AND
 - Must involve *serious harm*; AND
 - Must involve *systematic and discriminatory conduct*
- s 5J MA must be interpreted in light of CL on persecution (Ex Memo to 5J)

a) *Serious Harm (s 5J(4)(b))*

Serious harm is defined in **s 5J(5)**. The most relevant here is:

- A threat to the person’s *life or liberty* (freedom);
 - **Chan**: Freedom to practice religion of choice can be serious harm
- Significant *physical harassment* of the person;
- Significant *physical ill-treatment* of the person;
- Significant *economic hardship* that threatens person’s capacity to subsist;
 - Eg: If X loses his job: pay cut would not effect X’s capacity to subsist
- Denial to *basic services* which threatens person’s capacity to subsist;
- Denial of capacity to *earn livelihood* of any kind, where denial threatens the person’s capacity to subsist.

OR something else – **s 5J(5)** is not limited