

4. CONVENTION GROUNDS – RACE, RELIGION, SOCIAL GROUP ETC

Codified in **s5J Migration Act - Meaning of well-founded fear of persecution**

- (1) The person has a *well-founded fear of persecution* if:
 - (a) the person fears being persecuted **for reasons of (NEXUS REQUIREMENT) race, religion, nationality, membership of a particular social group or political opinion**; and
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (b) that reason must be the **essential and significant reason**, OR those reasons must be the **essential and significant reasons**, for the persecution; and

RACE – Race is interpreted broadly and will generally encompass all kinds of ethnic groups that are referred to as “races” in common usage. E.G. – Jews, Romas, Hazara from Afghanistan (**UNHCR**)

RELIGION

Per **UNHCR Guidelines** religion can include:

- **Religion as belief** (may incl. theistic, non-theistic and atheistic beliefs), persecution for religious belief can include not believing in a certain religion
- **Religion as identity** (cultural association with a religion regardless of actual practice)
- **Religion as a way of life** (clothing choices, observing religious holidays etc.)
- Religion as a way of life.

1. What constitutes a religion? In determining whether religion, look at indicia: (**New Faith**)

- that there is belief in the supernatural;
- that the system of ideas relates to the place of humanity in the universe and relationship w the supernatural;
- that the ideas are accepted by adherents as requiring the observation of particular codes of conduct;
- that the adherents constitute an identifiable group; and that they see the system as constituting a religion

2. Is R practicing the religion? Apply Cases!!!

SAY: Per Merkel J in **Wang** to satisfy the concept of religion for the purposes of Art 1A(2) there must be some **manifestation or practice of faith**, in a like-minded community

- **Nader** – Person may be persecuted even if they **do not fully understand religion**. Or professed to convert
- **Prashar v MIMA** (FCA 2001 per Madgwick J) – can include persecution **for not holding a religious belief**
- **Walt** – **Degrees of understanding will vary**. Wrong to assume person has minimum understanding of its tenets.

NATIONALITY – Doesn’t just refer citizenship, but includes membership of an ethnic or linguistic group and may occasionally overlap with the term “race” (**Hathaway**)

POLITICAL OPINION

- Persecution may occur on the basis of either an actual or imputed political opinion (**Chan** per Gaudron J)
 - Can be persecuted for perceived political belief in addition to actual belief
- Not necessary person is a member of political party/group (**V v MIMIA**), all about appearance.

MEMBERSHIP OF A ‘PARTICULAR SOCIAL GROUP’

SAY: Membership of a PSG is defined in **s 5L**, with the ‘social perception’ approach from **Applicant A and Applicant S** providing the basis for its codification in the **MA**. For [R] to be considered a member of a PSG, four components **s 5L** must be satisfied. [R’s] characteristic must be (**GO THROUGH EACH**):

- (a) Shared by each member of the group; and
- (b) Shared by the applicant or is perceived as shared; and
- (c) Of a specific type; and
- (d) Not a fear of persecution.

(a) Characteristic shared by each member of the group / **(b)** Shares or perceived as sharing the characteristic

- **Size of the group has no bearing** on its consideration as PSG, group may be “very numerous” (**Khawar**)
- Perceived → Group need not identify as being part of the PSG, e.g. Germans of Jewish heritage in WWII.

(c) Of a specific type (can be any of) →

- (i) the characteristic is an **innate or immutable characteristic**;
 - Incl inborn characteristics (e.g. gender, skin colour, disability)
 - The shared characteristic need not be voluntarily entered into (**Khawar**).
- (ii) the characteristic is so **fundamental** to a [R’s] **identity or conscience**, [R] should not be forced to renounce it;
- (iii) the characteristic **distinguishes the group from society**;
 - Incl inborn characteristics (e.g. gender, skin colour, disability)

Examples of PSG

- **Gender** – **SAY**: Women in some societies have been classified as PSG, e.g. women in Pakistan in *Khawar*. However, Lord Hope in the UK's *Shah* case cautioned the comparison of women as a PSG across different states, noting that the finding of "Pakistani women" as a PSG does not mean "same result will be reached in every other country where women are discriminated against"
 - ✓ Women in Pakistan (*Khawar*)
 - ✓ Married women in PNG (*1512766 (Refugee)* AATA)
 - ✓ Married women in PNG for whom a bride price has been paid (*1512766 (Refugee)* AATA)
 - ✓ Administrative Appeals Tribunal – "Discriminatory withholding of state protection for women" allowed women to be considered a PSG (*1412142 (Refugee)*)
 - × Women in PNG (*1512766 (Refugee)* AATA)
- **Sexual identity**
 - ✓ Homosexuals in Bangladesh (*S395* (HCA 2002))
 - Gay, lesbian and transgender may also be recognised as a PSG
- **Other**
 - ✓ Age
 - ✓ Disability
 - ✓ Past social status (industrialist under communist rule) (*Canadian Refugee Board*)
 - ✓ Ethnic Chinese in Cambodia (*Lek*)
 - ✓ Young Tamil males from Jaffna or LTTE-controlled areas in Sri Lanka (*Paramanathan*)
 - ✓ Castes in India (*Prashar*)
 - ✓ Conscientious objects (*Lehane J in Mehenni*)
 - ✓ People suffering from an illness or disability
 - ✓ People suffering from schizophrenia (mental illness) (*Denissenko*)
 - ✓ People with HIV or AIDS (*Kuthyar*)
 - × Mafia (*Kashayev*)
 - × Wealth based groups (*Ratnayke*)
 - × Persons targeted for extortion by the NPA in the Philippines (*Cabarrubias v MIMA* FCA 1998)
 - × Unsuccessful asylum seeker returnees (*SZRCF*)

5. WELL FOUNDED FEAR

Section 5J(1)(b) A person has a well-founded fear of persecution if

- (b) 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

ANALYSE → **Australian test** – '**real chance**' of being persecuted =

- **Substantial**, as distinct from a remote chance (Mason CJ in *Chan*)
- Person can have a WFF of persecution **even if the possibility of persecution occurring is below 50%** (*Chan*, affirmed in *Guo*)

Relevance of past persecution – **SAY**: Past events are not a certain guide to the future (*Guo*), but are a logical starting point for the decision maker (*Abebe v The Commonwealth*). Relevance of past persecution will depend on:

- degree of probability they have occurred, and likelihood that future events will distort pattern of harm (*Guo*)

Change behaviour – **SAY** → then go to IFA below:

- **SAY**: A finding of a WFF however is restricted by s 5J(3) whereby a person [R] may be found not to have a WFF of persecution if [S/HE] can take reasonable steps to modify [HIS/HER] behaviour to avoid the chance of persecution. This principle, originating from the HCA case of *S395*, is seen to apply when considering whether an applicant faces a **real chance** of being persecuted under s 5J(1)(b) per *ESD17 v MIBP*. The Federal Court has held that in considering a claim relating to modification of behaviour we must first ensure that all elements of s 5J(1) are satisfied (*ESD17 v MIBP* per Ranganath J)... s 5J(1)(c) below

6. INTERNAL FLIGHT ALTERNATIVE / RELOCATION – s 5J(1)(c)

SAY: There must be a **real chance** that the persecution relates to **all areas of [R's COUNTRY]**. Following the implementation of s 5J, there is not a requirement to consider the reasonableness of relocation re refugee claims under the MA in contrast to the RC.

- In this case the persecution is **likely to not relate** to [X] areas of the country...
 - However, [R] must be able to **get necessary travel documents** (*Al Amidi*) and **access the area safely**
- In this case the persecution is **likely to relate to all areas** of [COUNTRY] as...

Where the persecutor is the state

- Relocation will not be an option in many cases.

Where the persecutor is a non-state agent

- Internal relocation will not be an option if there is a risk that the non-state actor will persecute the applicant in other areas of the country. A determination of this will need to be made.

CONCLUSION – **SAY** (if there is IFA): Although there seems on face value to be an IFA limiting the availability of a finding of refugee status within the bounds of s 5J(1)(c), [R] may still be eligible for complementary protection under s 36(2)(aa) and s 36(2B)(a) which provides a lower threshold than s 5J(1)(c). We will however continue on the assumption that s 5J(1)(c) has been satisfied.

7. BEHAVIOUR MODIFICATION – s 5J(1)(c)

SAY: Assuming s 5J(1) is satisfied, as discussed previously, there will be no WFF of persecution if R can take reasonable steps to modify her behaviour (s5J(3)) so as to avoid that **real chance** of persecution. (ANALYSE BELOW)

Section 5J Migration Act (Dec 2014)

- (3) Person does not have a WFF of persecution if person could take **reasonable steps to modify his or her behaviour** so as to avoid a **real chance** of persecution in a receiving country, **other than a modification that 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 (S395).

Implications of Section 5J(3)

- Does not appear to apply to behaviour **giving rise to imputed political opinion/religious belief**
 - Mirrors S395 which suggested behaviour giving rise to **imputed opinion will not be a breach** (unless reflective of held opinion)