

THE REFUGEE DEFINITION (Art 1A(2))

- For the exam, know Arts 1A(2), 1C, 1F
- From Art 17 onwards is not examinable EXCEPT Art 33 (must know art 33)

IS X A REFUGEE?

- This issue will be determined by analysing the refugee definition in Art 1A(2) of the Refugee Convention (RC) as implemented in the Migration Act 1958 (Cth) (MA) (MA s 5H(1)).
 - **Art 1A(2) Refugee Convention** – As a result of events occurring before 1 January 1951 and owing to **well-founded fear** of **persecution** 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 (**don't worry about habitual residence**) as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean 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 himself of the protection of one of the countries of which he is a national.

OUTSIDE OF THEIR COUNTRY OF NATIONALITY?

- 'Nationality' refers to 'citizenship' → 'Stateless' = no citizenship
- X is a citizen of ____ X is in ____ and therefore outside the country of his/her nationality.
- X is stateless and is in ____ and therefore outside the country of his/her former habitual residence.
- If more than one nationality, X has to establish that they have a well-founded fear in BOTH countries → see second para of Art 1A(2)

PERSECUTION?

- The Applicant, X, bears the burden of proving there is a 'real chance' of persecution (**High Court in Chan**). Evidence of past persecution is not sufficient. X must show they will suffer persecution in the future

Persecution must involve **serious harm** (MA s 5J(4)(b))

- **MA s 5J(1)** – meaning of well-founded fear of persecution – A person has a **well-founded fear of persecution** if:

- (a) the person fears being persecuted **for reasons** of race, religion, nationality, membership of a particular social group or political opinion; and
 - (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
 - (c) the real chance of persecution relates **to all areas of a receiving country**.
- **MA 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.
- **MA s 5J(3)** – A person does not have a ***well-founded fear of persecution*** if the 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.
- **MA s 5J(4)** – If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the **essential and significant reason**, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve **serious harm** to the person; and
 - (c) the persecution must involve **systematic and discriminatory conduct**.
- **MA s 5J(5)** – Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's **life or liberty**;
 - detention, arrest, interrogation, prosecution and imprisonment in the hands of non-state actors = persecution
 - even if arrest or detention by state is lawful and not arbitrary, it must be effected in a manner to ensure that persons are treated with humanity and not subjected to undignified conditions
 - (b) **significant physical harassment** of the person;
 - e.g. no need to be shot etc
 - (c) **significant physical ill-treatment** of the person;
 - (d) **significant economic hardship** that **threatens the person's capacity to subsist**;
 - denial of access to food, housing, employment, health facilities etc
 - (e) **denial of access to basic services**, where the **denial threatens the person's capacity to subsist**
 - deprived of means of shelter and support when home is destroyed
 - (f) **denial of capacity to earn a livelihood of any kind**, where the denial **threatens the person's capacity to subsist**

- e.g. loss of job insufficient unless they can't find another job and thus cannot subsist
- **Other examples**
 - Prior subjection to harm in the form of rape or trafficking may result in ostracism and exclusion rising to risk of cruel, inhuman or degrading treatment
 - Forced marriage → lead to domestic violence, rape and threat to life
 - Forced into heterosexual marriage given the strong familial and societal pressure that would be brought to bear on his return **(SZANS)**
- **UNHCR Handbook**
 - A **threat to life or freedom for a Convention reason is always persecution**, although other serious violations of human rights for the same reasons would also constitute persecution (para 51).
- **EU Qualification Directive Article 9(2)**
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - Australian High Court case law does NOT recognise mental violence as a ground for persecution.
 - Examples = threats to people closely associated with X to put X under psychological pressure; mock executions etc
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
 - (f) acts of a gender-specific or child-specific nature.
- **International Commentators**
 - Threat to life or freedom for a Convention reason amounts to persecution (Grahll Madsen, Goodwin Gill and McAdam)
 - Socio-economic rights such as discrimination in employment should be recognised as persecution (Michelle Foster).

Persecution must involve **systematic and discriminatory conduct** **(MA s 5J(4)(c))**

- 'Systematic' does not require there to be a series of acts, a single act of oppression is sufficient **(Chan 1989 per McHugh J)**. It is not necessary to fear methodical conduct, X must show it is a 'non-random' act **(Ibrahim 2000 per McHugh J)**.
 - Political protestor who is beaten in a cell = systematic cf police bash person while they were walking on the street = random
- **Chan** – **Facts:** Applicant from China. Discriminated against on the basis of his political opinion and suffered a deprivation of liberty. He was exiled from home village and detained on a number of occasions. His fear was that of future imprisonment. His family had an anti-government profile. **Decision (Tribunal)** – Although Applicant had been discriminated and exiled against, it did NOT amount to persecution. **Decision (High Court)** –
 - **Mason J** – Discrimination involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape amounts prima facie to persecution. **The denial of fundamental rights/freedoms may constitute persecution.**
- **If you quote this in the exam, I will be happy!**

- is also recognised by Australian authorities that serious harm can arise from an accumulation of measures

Discriminatory Conduct

- Law X is a law of general application. Two questions:
 - Is it being applied in a discriminatory way?
 - If yes, is it appropriate and adapted to achieving some legitimate object of the country?
 - Legitimate object = Object that is required to protect or promote the general welfare of the state and its citizens
 - Whether a law is appropriate and adapted in achieving a legitimate object involves consideration of proportionality. The proportionality of the means used to achieve that object (Applicant S; Applicant A)
- Authorities: *Applicant A v MIMA* (1997) 190 CLR 225; *Applicant S v MIMA* (2004) 217 CLR 387
- Applicant A
 - China one child policy
 - Law must be selectively applied for a convention reason
 - If evidence of a discriminatory application, that may be persecution
 - Involuntary sterilisation is the result of overzealous local officials
 - Harsher to people in rural areas
 - This was held not to be a convention ground
 - Failed on the grounds of ‘persecution’ and ‘convention ground’
 - TEST – Whether discriminatory application of a law of general application constitute persecution depends on whether the treatment is appropriate and adapted with achieving a national objective consistent with the standards of civil society
- E.g. Military service is a legitimate objective BUT killing people if they refuse is not appropriate and adapted
- Military service and conscientious objectors
 - UNHCR Handbook:
 - may be sole ground for ref status where military action contrary to ‘genuine political, religious or moral convictions or to valid reasons of conscience
 - Not enough to be in disagreement with govt about military action
 - Condemnation by intl community
 - Endorsed by Aust HCt (Mehenni 1997) and Aust Fed Ct in *Mohammed* (1998)
 - Whether it is the subject of international condemnation as I may justify why the applicant has refused that military service
 - **Mohini** – high court noted that a mere requirement to service in the military is not itself persecution. What must be demonstrated is some discrimination for a convention reason
 - **Mohammad** – federal court said imprisonment for resistance may be reflective of a political view but you’ll also have to look at the broader context. Just because someone has a political view against the war will not of itself amount to a convention reason

- **Australian case: *S v MIMA* (2004) HCA**
 - Recruitment by Taleban
 - Recruitment was ad hoc and random – picked able bodied people. so no targeting of certain people → hence, no convention reason which was held at first instance BUT see HIGH court
 - Application filed Afghan to avoid being recruited from military service.
 - HCt:
 - Q for military service claims is:
 - Is treatment appropriate and adapted to achieving a national objective
 - **Because it was random and ad hoc it was not a law of general application. Because a law of general application must be more systematic**
 - **Although it could be said that the objective of conscription was to protect the nation, Taliban is considered by international standards as a ruthless body founded on extremist religious tenets and that must affect the legitimacy of the objects. Even if there is a legitimate object, their conduct is not appropriate and adapted to achieving that objective**
- **There is no right to conscientious objection**
 - UNHCR – Forced conscription = persecution. Alternative service must be afforded
- **UK case - *Sepet v Bulbul* (2003), H Lords (obiter):**
 - What is the reason for objection?
 - Due to individual beliefs
 - Just don't want to obey the law
 - refugee status should be accorded to one who has refused to undertake compulsory military service b/c this would/might req him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community or where refusal to serve would earn grossly excessive or disproportionate punishment'
 - Sepet finding has been endorsed in Australia
 - SZAIC v MIMIA [2004] FMCA 103 (Raphael FM)
 - North J in dissenting judgment in SZAOG v MIMIA (Full Fed court, 2004)
 - So some recognition of this element

Summary

- Adapted and appropriate + national objective
 - Grey area around right to objection
 - Case will be stronger if undertaking military service to commit gross atrocities
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- Migration Act 1958 (Cth), Extracts, ss 5, 5H-5LA, s 36 (Moodle)
 - Appellant S395/2002 and 396/2002 v MIMA [2003] HCA 71 (extracts)(Moodle)(15 pages)

FOR A CONVENTION REASON?

- Gender or sexual orientation = particular social group
- If not for a convention reason, they must argue complementary protection
- For reasons of – casual link
 - Casual link between a risk of being persecuted and one of the convention grounds
 - Specifically, the difficulty centers on whether the Convention ground must be linked to the intention of the persecutor; to the intention of the persecutor or of the state withholding protection; or whether it is sufficient for there to be a link simply to the applicant's predicament of being persecuted. We do not suggest that these three options are mutually exclusive categories. After all, in many cases the nexus clause will be straightforwardly satisfied by direct or circumstantial evidence of the persecutor's intent to harm or of the state's refusal to protect for a Convention reason. However, in this sub-chapter we take the view that while evidence of intention, either to harm or to withhold protection, is relevant and sufficient to satisfy the nexus clause, it is not a necessary condition for establishing that the risk of being persecuted is linked to a Convention ground. Rather, the nexus requirement is satisfied where the applicant's predicament – the reason for exposure to her well-founded fear of being persecuted – is linked to a Convention ground.
 - **Intention of persecutor**
 - When an applicant has been subjected to past persecution, evidence of intent may be available: for example, where homophobic or racially inspired insults or taunts were uttered in the course of inflicting harm
 - Alternatively, other circumstantial evidence, including the location and timing of attacks – for example where a person was attacked on leaving church or participating in a political rally – may indicate the Convention reason for the harm.
 - Where an applicant has not suffered previous persecution, evidence of others similarly situated may provide proof of the Convention reason for the applicant's well-founded fear of being persecuted,³⁵ or country condition reports may suggest relevant institutionalized or widespread discrimination against certain groups that make clear why the applicant is at risk
 - **Intention of the persecutor or of the state**
 - The risks of associating nexus with persecutorial intent have been ameliorated to some extent by the recognition in some jurisdictions that the risk of "being persecuted" involves an assessment both of the risk of serious harm and of failure of the state to protect against such harm. Since it is the risk of "being persecuted" that must be linked to a Convention ground, nexus is established where either of the two constituent elements of this notion – the risk of harm or failure of state protection – is linked to a Convention ground
 - Accordingly, even where the perpetrator of the serious harm is thought to be motivated by personal or other non-Convention reasons, nexus is still established where the state is unwilling to protect for a Convention reason.
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- A person may be at risk for one of the Convention reasons despite that not all persons defined by that ground are at risk

- Accordingly, the fact that not all women in a certain country are at risk of being persecuted does not detract from the cogency of a claim by a woman whose gender puts her at risk of harm
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- The applicant need not in fact possess the relevant Convention-related characteristic; it is rather sufficient that a potential persecutor has attributed, or will attribute, the ground to the applicant
 - **Art. 10(2) of European Union Qualification Directive:** When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.
 - For example, a persecutor may mistakenly assume that a person holds the same political opinion as a family member, placing her at risk on the basis of a perceived or imputed political opinion
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- **MA s 5J(4)(a)** – If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution.
 - A Convention reason may explain actions **accompanied by mixed or personal motives** and that a Convention nexus can be established if one of the grounds mentioned in the Convention is identified as amongst the motivations for conduct of a persecutory nature.
- Immutable – features such as physical appearance (in the case of race or nationality and such social grounds as gender)
- Discriminatory motivation of persecution or discriminatory failure of state protection: High Court in *Khawar* (2002)
- Imputed with a political opinion
 - E.g. you don't hold a political opinion but are associated with people that do
- **RACE**
 - Eg Hazara from Afghanistan
 - Art 1 of 1965 Convention on the Elimination of Racial Discrimination
 - 'race, colour, descent or national or ethnic origin' (**Qualification Directive Art 10(1)(a)**)
- **RELIGION**
 - The freedom to manifest religion or belief including ceremonial acts, observance of dietary regulations, wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life
 - Issues:
 - Practice v. belief
 - Not holding a particular belief.
 - UNHCR Guidelines on Religion:
 - Religion as belief
 - Religion as identity
 - Religion as a way of life.
 - *Wang* (2000): freedom of religion alone or in community with others, public or private; some manifestation or practice of personal faith in a like-minded community. See also W244 (2002)

- - can include persecution for not holding a religious belief (*Prashar v MIMA* [2001] FCA 57 per Madgwick J)
- Quizzing of app about religion :
 - *Nader v Minister* (2000) 101 FCR (Hill J) obiter comments
 - ‘. .. questioning was quite inappropriate.. . If a person in Iran professed to convert to Christianity, that person could well be open to persecution on religious grounds whether he or she understood fully, or even not at all, the tenets of the religion which they said they had adopted.
 - See also *WALT* (2004) Full Fed Ct – degrees of understanding of religious beliefs will differ from person to person so it is erroneous to ascribe a fundamental high standard of understanding to all adherence of a particular religion
- **NATIONALITY**
 - Not very much case law
 - Link to ‘race’
 - Hathaway: nationality encompasses linguistic groups and other culturally defined collectivities, thus overlapping to a significant extent with the concept of race
 - EU Qualification Directive Article 10(1)(c) – is not limited to citizenship
- **POLITICAL OPINION**
 - Actual and imputed political opinion recognised (but see behav modif provisions 5J)
 - Australia: *Chan* per Gaudron J
 - Authority for imputed political opinion
 - Proposition that you can be persecuted for perceived political opinion in addition to actual political opinion
 - E.g. if applicant does protest in Australia and this comes to the attention of Chinese government, will still suffice, even though applicant does not actually hold that political opinion and is only doing it to the bolster their claim, important thing is that they will be perceived by the Chinese government as having that political opinion
 - UK: *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 AC 958)
 - Article 10(2) EU Qualification Directive – conduct attributed to applicant
 - **Membership of political party required? Actions required?**
 - not necessary that person be member of political party
 - Canadian Refugee Board, *M85-1453* (1987)
 - Australian Fed Ct: *V v MIMIA* (1999) 92 FCR
 - Actions not required
 - Article 10(1)(d) EU Qualification Directive
 - No need to act on your political opinion
 - Freedom of expression is a core human right. It is therefore inappropriate to reject a claim for refugee status on the ground that the claimant could avoid detection by keeping silent – in other words to require the applicant’s opinion to remain unexpressed. In line with the general principles set out above, refugee status cannot be denied on the basis that an applicant could simply suppress or conceal a protected interest on return. Hence, the Australian Full Federal Court appropriately overturned the rejection of the claim of a Somali poet who would continue to write poetry “highly critical of the Somali clan system and the internecine fighting which it engendered,”:

observing that there is nothing fanciful about the idea of people with strong religious or political convictions having a present fear of persecution founded upon apprehensions of what they may do and what may happen to them if they come face to face with repression . . . The history of political persecution . . . provides examples in abundance of people who have felt compelled to speak out in the direct face of oppression (Omar 2000)

- Indeed, the court concluded that to require a person with strongly held views to act “reasonably” and compromise that belief in order to avoid persecution “would be quite contrary to the humanitarian objects of the Convention.”
- There is no requirement that an applicant actually possess a political opinion; rather it is sufficient if she is at risk of being persecuted because of a political opinion attributed to her (QD art 10(1)(e))
- In other words, it is clear that “persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.” (Chan 1989)
- Even where the applicant “has not formulated a specific political opinion in their own mind,” or explicitly disavows the views ascribed to her by the persecutor, refugee status may appropriately be recognized. Such attribution may be based, for example, on a person’s membership of a political party, organization, or entity perceived to hold or express political views, or simply on the basis of a person’s family connections, race, or ethnicity.
- Importantly, attribution of a political opinion may follow not only from membership of an entity, organization, or other group, but also from engagement in activities which imply an adverse political opinion, and which would elicit a negative response tantamount to persecution
- In determining whether an imputation of political opinion is likely to be made on return, the crucial issue is whether “certain behavior or actions on the part of the applicant are or have been perceived by the authorities as political opposition.”
- Where the evidence permits the inference that refusal to join, cooperate with, or carry out a task on behalf of a gang, guerrilla, or insurgent group, or even a government, is perceived or understood as the expression of a political opinion, nexus to a Convention ground is appropriately recognized
- In line with this approach, refugee status has been recognized in cases involving conscientious desertion from military service; where a doctor refused to kill a member of an opposition party; where an ethnic Fijian Major refused to “participate in the persecution of Indo-Fijians”; and where forced recruitment by guerrilla groups was resisted by an elite military and by members of a military family.
- Accordingly, claims on the political opinion ground have been recognized based on political opinion implicit in the unwillingness of an Iranian woman to wear the chador and attend Islamic functions; the refusal of an Iranian female schoolteacher to enforce Islamic dress codes in the kindergarten in which she worked; and the “attributed oppositional opinion . . . as a woman of ‘western’ upbringing.”
- **PARTICULAR SOCIAL GROUP**
 - Hence, it is well accepted that the size of the group should be irrelevant: a social group may be constituted by a very small group (family) or 5 a very large group (women) (Applicant A 1997)
 - The social perception test has been described as requiring the satisfaction of three factors:

- First, the group must be identifiable by a characteristic or attribute common to all members of the group.
- Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution.
- Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large (**Applicant S 2004**)
- The difficulty with this formulation is that the first criterion is arguably unnecessary since unless the group is identifiable, the potential for there to be a risk of being persecuted for reasons of membership in that group is non-existent, while the second criterion merely affirms what the group is not. Hence, the only meaningful criterion is the third: the notion that the group must be distinguished from “society at large.”
- But how does a decision-maker determine whether the relevant group is distinguished from society at large? It was initially assumed that the social perception test requires that the home society perceive the relevant group as a particular social group. However, in *Applicant S*, the Australian High Court was careful to emphasize that while “perceptions held by the community may amount to evidence that a social group is a cognizable group within the community” – indeed, such evidence is “usually compelling” in this inquiry– the “general principle is not that the group must be recognized or perceived within the society, but rather that the group must be distinguished from the rest of society.” The court did not provide clear guidance as to precisely how it is that a decision-maker assesses whether the relevant group is so distinguished, and in practice there is a lingering suggestion that a group must be subjectively perceived as a group, rather than merely objectively cognizable or set apart, in order to constitute a particular social group for Convention purposes.
- **Two main approaches in case law:**
 - **“Protected /Immutable characteristics’ group united by:**
 - (a) immutable characteristic or
 - (b) by characteristic so fundamental to human dignity that person should not be compelled to forsake it.
 - **Would someone’s occupation fall within this?**
 - Female teacher at a girl’s school in Afghanistan can constitute a particular social group but not under the US immutable approach
 - UNHCR say that occupation could be seen as a particular social group
 - **1 - Immutability approach/ejusden generis approach – USA (the better approach from what I read in the textbook)**
 - US Board of Immigration Appeals in *Acosta* 1989
 - ejusdem generis’ - principle of interpretation
 - must be interpreted in light of other provisions
 - other convention grounds deal with immutable characteristic – examples: sex, color, or kinship ties, or in some circumstances a shared past experience
 - Is characteristic that
 - cannot be changed or
 - should not be required to be changes because it is so fundamental to individual identity or conscience

- AG v Ward (1993)
 - Three possible categories of particular social group:
 - (i) those defined by an innate or unchangeable characteristic (eg gender, sexual identity)
 - (ii) those whose members voluntarily associate for reasons fundamental to human dignity (eg human rights activists); and
 - (iii) those associated by a former voluntary status, unalterable due to its historical permanence
- **2 - Social perception approach to PSG**
 - **Test – does a group share a common characteristic which makes them a cognizable group or sets them apart from society at large?**
 - Does not require that characteristic be ‘immutable.’
 - This text is more expansive
 - Australia used this test, but see merging of two from 2014 in Migration Act
 - Let's see how Aust approach developed, influences and current Migration Act provisions
 - **High Ct in *Applicant A* (1997)**
 - Group must be identifiable as a social unit. . . . some characteristic, attribute, activity, belief, interest or goal that unites them.
 - If group is perceived by people in relevant country as a particular social group, will usually but not always be the case that they are members of such a group.
 - Need some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals
 - Court explicitly disagreed with the ‘innate or unchangeable’ test
- **UNHCR Approach – Merge two tests**
 - 2002 Guidelines on PSG
 - single standard - incorporates both dominant approaches:
 - a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.
 - The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human
- **MA 5L – Membership of a particular social group other than family** – A person is to be treated as a member of a particular social group (other than person's family) if:
 - (a) characteristic is shared by each member of the group; and
 - (b) the person shares, or is perceived as sharing, the characteristic; and
 - (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;

- (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

- **Examples of PSG:**

- **Gender and sexual identity**

- A gender-based group is defined by an innate, immutable characteristic and hence within the ejusdem generis approach to social group.
 - Women in some societies have been held to comprise PSG
 - HCA in *Khawar* [2002]
 - Women constitute a PSG
 - Victim of serious domestic violence from husband and family. Police had refused to enforce laws against domestic violence and that refusal was part of a systematic discrimination against women which is tolerated by the state.
 - [32] per Gleeson J - size of group does not necessarily stand in the way of women being classed as PSG. It is power, not number that creates the conditions for persecution (i.e. the size of the group is not detrimental to the finding that there is a group)
 - House of Lords in *Islam and Shah* (1999)
 - Female citizens of Pakistan who suffered violence because suspected of adultery
 - Lawyers argued the following characteristics – (1) gender, (2) the fact that they were suspected of adultery and (3) their unprotected status
 - Court held that these could constitute PSG. Characterise it as women who defended social mores. Women in Pakistan constituted PSG because they were discriminated against in terms of fundamental human rights and they were perceived as not being entitled to the same human rights as men.
 - Sexual identity - gay, lesbian and transgender - may also be recognised as a particular social group (see eg HCA in *S395/2002* - recognised homosexuals in Bangladesh are a PSG)
 - Same sex couple in Bangladesh
 - HC recognized homosexuals constituted PSG
 - **Cite this case in exam**
 - **Women - UK: Shah and Islam (1999)**
 - Female citizens of Pakistan – domestic violence - adultery
 - Fear: ostracised and unprotected by authorities

- House of Lords:
 - PSG: 'women in Pakistan' or 'women who had offended social mores or against whom there were imputations of sexual misconduct'
 - Basis: discrimination, no protection, not same rights as men
- **Women as PSG**
 - UK Fornah (House of Lords 2006) – Women in Sierra Leone – common characteristic which is unchangeable – position of social inferiority to men
- **Women - Australia: *Khawar* (2000)**
 - Female citizen Pakistan; domestic violence, no state protection
 - High Court Australia:
 - App was being abused for personal reasons but her likely subjection to further abuse without state protection is by reason of her membership of PSG – women in Pakistan
 - Note: because of social perception approach in Australia, findings on PSG are contextual – eg women in other countries may not = PSG.
- **Sexual orientation**
 - **Australian High Court S395 (2003):**
 - 'homosexual men in Bangladesh'
 - **UK Supreme Ct in *HJ Iran* (2010)**
 - Common characteristic of sexual orientation, immutable characteristic
 - **EU Qualification Directive Article 10(1)(d)**
 - Depending on the circumstances, PSG may include group based on common characteristic of sexual orientation
- **Other examples**
 - Castes in India (NZ Refugee Appeals Authority; Canadian Refugee Board)
 - Past social status which gives historical permanence – industrialist under communism (Canadian Refugee Board)
 - **Disability**
 - **Mental illness (*Denissenko*, Fed Ct Australia)**
 - **Age** falls within the immutability criterion as it is not within one's ability to change – 'children', 'minors', 'youth', 'young people'
 - For reasons previously discussed, the fact that a social group defined simply as children or children in a particular society is potentially very large does not affect its formulation as a social group for Convention purposes; nor is it necessary that every child be at risk of being persecuted.
 - **Social class or status**

- Clans, tribes, castes
 - A third immutable form of class is that based on poverty or economic subordination, since the ability to dissociate from such a status must be a logically present option, not merely one that is possible on an abstract or theoretical level
- **Former status or association**
 - History or experience is not within a person's current power to change
 - Accordingly, claims have been appropriately recognized where a person is at risk due to her status as a former victim of trafficking a former child soldier, a former employee, including of the police or military a former bodyguard of the daughter of the president, and a KGB defector
- **Voluntary associations**
 - It is, however, widely accepted that application of the ejusdem generis approach to interpreting social group includes membership in a group defined by a characteristic that is "so fundamental to individual identity or conscience that it ought not be required to be changed." **(Ward)**
 - Some groups will uncontroversially fall within this category, for example, membership of an organization that is concerned with the realization of human rights, with groups such as trade unions and student organizations easily accommodated within the ejusdem generis approach, in part due to their grounding in "the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Students are frequently targeted in political campaigns and, in addition to recognition on the basis of actual or imputed political opinion, fall within the social group ground since the pursuit of education is a basic international human right.
 - **Two controversial groups:**
 - **Occupation** – Accordingly, occupational-based groups are properly understood to fall within the ejusdem generis approach to social group on the basis that they are groups defined by pursuit of a human right, and hence defined by a characteristic that is fundamental to individual identity or conscience.
 - **Wealth, economic or business interests**
 - Where wealth or economic status is associated with class and is, in the context of the person's country of origin, effectively immutable, a person may claim protection on the social group ground as discussed above. Alternatively, where land is essential to pursuing one's occupation, the claim may be

analogous to occupation-based social groups and hence assessed accordingly.

▪ **Family as particular social group – s 5K Migration Act**

- Refugee claims based on family affiliation is recognized within the scope of the ejusdem generis approach to social group
- As a rule, whenever there is an indication that the status or activity of a claimant's relative is the basis for an applicant's risk of being persecuted, a claim grounded in family background is properly receivable under the social group category
- Briefly said don't worry about this, I won't make this examinable
- *Sarrazola v MIMA [1999] FCA* repayment of brother's debt by sister; Federal Court held was persecuted for Convention reason - membership of PSG comprising her family
- **Government did not like this – legislated:**
 - S 91S – disregard non-Conv related persecution
 - Dec 2014 s 5K – similar provision to 91S – disregard non-Conv related persecution – **not examinable but be aware of it**

▪ **MA s 5K – Membership of a particular social group** – For the purposes of the application of this Act and the regulations to a particular person (the *first person*), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
- (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

- **If gender, use immutable approach**
- **If occupation, use social perception approach**
- **If other, characteristic distinguishes group from society**

SEE CASE STUDY + ANSWER ON MOODLE!

Class exercise

- Applicant worked as a translator for US troops in Iraq. Received hate mail in post box - threats to kill him b/c seen as traitor. Seeks refugee status in Australia – persecution due to past work for US troops

- Can applicant show persecution for a Convention ground? What further evidence will you need?
- **Answer:**
 - Could first argue actual or imputed political opinion – argue this first, then if this fails, argue they are a PSG
 - PSG = translators for US troops
 - Is it an immutable characteristic?
 - Does it distinguish the group from society in that particular country?

WELL-FOUNDED FEAR?

- **UNHCR** – 37. The phrase “well-founded fear of being persecuted” is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of “fear” for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.
- 38. To the element of fear – a state of mind and a subjective condition – is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.
- 42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.
- 43. These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is “well-founded”.
-
- **See MA s 5(3)**
- **Standard is do they face a real chance of persecution?**
- **Well-founded test**

- Subjective (applicant actually must fear persecution) and objective element
 - Atle Grahl-Madsen – one in ten; real chance
- Differing interpretations in US and UK
 - US: *Cardoza-Fonseca* (1987) -reasonable possibility.
 - UK: *Sivakumaran*, [1987] “a reasonable degree of likelihood” of persecution (Lord Keith) and a ‘real and substantial risk of persecution’ (Lord Goff).
- **Australian test**
 - ***Chan v Minister for Immigration and Ethnic Affairs* (1989)**
 - genuine fear founded on ‘a real chance’ of being persecuted for a Convention reason
 - substantial, as distinct from a remote chance
 - “notwithstanding that there is less than a fifty per cent chance of persecution occurring”
- **s 5(1) MA -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
 - in exam say the test and then put in brackets (**s 5(1) MA; Chan**)
- **Relevance of past prosecution**
 - Generally accepted that the refugee definition under Article 1A(2) involves an assessment of a prospective risk of persecution (See e.g. UK, *Adan v Secretary of State for the Home Department* [1999])
 - UNHCR Handbook: past persecution not conclusive
 - ***Minister Immigration v Guo* (1997) 191 CLR 559**
 - Past persecution - guide to real chance of persecution in future
 - Depends on:
 - Degree of probability that they have occurred,
 - Regularity with which and the condns under which they have or probably have occurred and
 - Likelihood that the introduction of new or other events may distort the cycle of regularity
 - Compare this to the US position
 - Chen, BIA – a ‘rebuttable presumption arises that an alien who has been persecuted in the past by his country’s government has reason to fear similar persecution in the future’.
- **‘Acting discreetly’ to avoid persecution**
 - ***Leading case: S395/2002 v Minister for Immigration* (2003)**
 - Apps – from Bangladesh; in a homosexual relship
 - RRT did not believe much of what apps said about past mistreatment
 - **Also found: Bangladeshi men can have homosexual affairs or relationships, provided they are discreet.**
 - They lived with only minor problems such as ostracisation with their families.
 - Are they keeping it discreet because it was a free choice or was a choice that was imposed on them?
 - ‘They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now.’

- Majority (McHugh, Kirby, Gummow, Hayne JJ (Callinan, Heydon, Gleeson CJ diss).
- Kirby and McHugh JJ:
 - Tribunal erred, incl:
 - failing to consider whether the need to act discreetly to avoid the threat of serious harm constituted persecution; and
 - failing to consider whether the appellants might suffer serious harm if members of the Bangladesh community discovered that they were homosexuals.
 - **[40] – the convention would give no protection from persecution if it was condition of protection that the person try to avoid the wishes of the persecutor.**
 - Useless to say – oh, just avoid having a religion or avoid acting on it
- Gummow and Hayne JJ:
 - If app holds pol/religious beliefs not favoured in country of nationality, chance of adverse consequences befalling that app on return would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief.
 - But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question
- Dissenting judgements
 - Reference to discreet conduct was not a requirement by Tribunal, part of fact finding (so this relates to Tribunal's fact finding role and limited role of HCt upon judicial review)
 - Acting discreetly was matter of free choice
- The principle in S395 has been judicially considered and applied in relation to:
 - religion (eg *VFAC* FCA 2004)
 - political opinion (eg *NAJO* FCA 2004)
 - ethnicity (*SZBQ* 2005 FMCA) and
 - particular social group (eg *NANU* FMCA 2004)
- **S395 and Imputed Political Opinion Australian High Court in *SZSCA* (2014)**
 - Application of S395 discretion prohibition to cases involving a change of occupation and imputed opinion
 - App: former jeweller, drove trucks Kabul-Jaghori, threatened by Taliban – imputed - worked for US – supporter USA/Afghan Government.
 - Applicant did not actually hold a pro US pol opinion but a politically opinion was imputed on him
 - RRT: Applicant could change occupations and work as jeweller. Applicant argued that you cannot expect me to modify my conduct because of s395
 - **Court said that this case can be distinguished from s395 because it involves an imputed political opinion not an actual held political opinion AND it can be reasonably required for people to change behaviour where it involves relocation**

- Majority: RRT decision did not contravene S395 principles – very little discussion of this though
- But RRT did not properly consider relocation issue (app limited to working in Kabul; did not consider the reasonableness of this) so error made
- *Implications:*
 - Suggests behaviour giving rise to imputed opinion will not breach S395 (unless reflective of an actually held opinion)
 - See also new S5J(3) Migration Act
- **New Section 5J Migration Act (Dec 2014)**
 - (3) A person does not have a *well-founded fear of persecution* if the 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
 - female teacher in Afghanistan – they would be doing their job out of a sense of conscience/identity
 - (b) conceal an innate or immutable characteristic of the person; or
 -
- New Section 5J Migration Act (Dec 2014)
 - (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.
- **Implications of Section 5J(3)**
 - Does not appear to apply to behaviour giving rise to imputed political opinion/religious belief
 - Does not refer to membership particular social group
 - Consider implications for occupations which may give rise to certain beliefs (eg SZSCA)
 - Example: teacher of girl's school in Afghanistan; imputed political belief; can be expected to change occupation?
- **Well-founded fear and 'sur place' claims**
 - 94. The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was

not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee “sur place”.

- 95. A person becomes a refugee “sur place” due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.
- 96. A person may become a refugee “sur place” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.
- Sur place = outside country of nationality eg demonstrations at embassy, change of religion
- Questions which arise in the case law:
 - Did the asylum seeker engage in the activities in order to claim refugee status?
- Even if applicant's actions are genuine, are the activities likely to come to the attention of the authorities in the home state?
- **UNHCR:**
 - even if application has created a claim to refugee status by resorting to opportunistic post-flight activities, would not be right to deprive him of international protection and return him/her to his/her country of origin if established that consequences of return may result in persecution for one of the reasons enumerated in 1951 Convention
 - **even if not genuine, that act may be found out by home country and give rise to persecution**
 - **we realise this might encourage the misuse of the asylum system by people who want to create a claim opportunistically. Decision makers can make a more stringent evaluation of the well-foundedness of the claim. Just because they protest doesn't necessarily lead to a risk profile – e.g. Chinese government may say that as large groups of people are doing it, we don't take much notice of it. You have to look at the country information**
- **Australian law - s 91R(3) (pre Dec 2014)**
 - For the purposes of the application of this Act and the regulations to a particular person:
 - (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; disregard any conduct engaged in by the person in Australia unless:
 - (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.
- **Only cite this provision in the exam - Section 5J(6)(post Dec 2014):**
 - In determining whether the person has a *well-founded fear of persecution* for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged

in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

- *Substantially the same as predecessor, S91R (removes ref to Ref Conv)
- Australian case law: *SZJZN* (2008) Fed court: re s91R(3) – applies only when the 'dominant' purpose of the impugned actions is to strengthen his/her claim to be a refugee
- **Comparison - EU – Art 5(3) Qualification Directive**
 - (1) A well-founded fear of being persecuted . . . may be based on events which have taken place since the applicant left the country of origin.
 - (2) A well-founded fear of being persecuted . . . may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.
 - (3) Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.
 - Article 4(3): An assessment of a protection application includes consideration of:
 - whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country
- **Whether activities will come to attention of home government**
 - ***YB (Eritrea)* (2008) UK Supreme Court:**
 - EU Qualification Directive: opportunistic activity *sur place* - not an automatic bar to asylum.
 - Activities different to motives
 - Activities other than bona fide political protest can create refugee status *sur place*.
 - Purpose of art. 4(3)(d): to assess whether authorities in country of origin likely to observe and record claimant's activity, and whether authorities will realise, or be able to be persuaded, that the activity was opportunistic and insincere
 - **Activities as different to motives – does not matter whether the motivation for the act is genuine or not**
 - **Activities other than bona fide political protest can still create a risk profile/sur place status**

SUMMARY

- Real chance – cite MA and relevant case law
- Significance of past persecution – influential but does not give rise to a presumption about real chance in the future in Australia (cite s395, s 5J MA re: acting discreetly)

- Acting discreetly – make sure you particularly cite that issue about acting against conscience and identity and immutable characteristics and have a look at the list they have given
- Sur place claims
- Also – in practice – country information will be key

CASE STUDY WELL-FOUNDED FEAR OF PERSECUTION

- **He is a citizen of Zimbabwe. He is outside of his country as he is in Australia. His home town is Harare (this is relevant for relocation).**
- **Persecution?**
 - Who is doing the persecuting? Government/state authorities or non-state actor (i.e. Taliban because Taliban is no longer the government)
 - S 5
 - S 422 for a legitimate object for nation? Appropriate and adapted?
 - Law of general application
 - Is law being discriminatory in its content and application
 - Is response disproportionate?
 - Purpose is to build a community centre for retired and wounded army officers - Something to suggest that it is in the national interest and therefore justified
 - On the face, this is an acceptable law of general application but note the contradictory information
 - Non-random act
 - He was the only one stopped at the bus station –it is unclear as to the context of this actual act, if he was targeted potentially following this demonstration it may indicate that he has some sort of profile, but in the absence of further information I will just flag that this is potentially persecutory
- **Convention ground** – political opinion/particular social group
 - He holds this opinion as opposed to him being imputed with it
- **Well-founded fear?**
 - Sur place claim – this means he has done something outside of home country and need to assess whether this creates a risk profile. He went to meetings.
 - S 5J(6) – if person engages in conduct in Australia it will be disregarded unless applicant can prove it was for a bona fide reason
 - Persecution in the past does not raise presumption of persecution in the future
 - Protest would come to attention of Zimbabwe government
- **State protection**
 - This is more relevant when non-state actors are persecuting
 - E.g. applicant has complained to government but there has been no action taken
- **THEN MOVE ON TO COMPLEMENTARY PROTECTION**

STATE PROTECTION – UNABLE OR UNWILLING?

- Not expecting perfection, it is about adequacy
- Non-state/private persecution – link to Convention
- Even if persecution for Convention reason, look at adequacy of state protection in country
- 98. Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such

protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.

- 99. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.
- 100. The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality.¹² It is qualified by the phrase “owing to such fear”. Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution”. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.
-
- Australian law on NON-STATE persecution
 - **Khawar (HC 2002):** High Court: where serious harm is inflicted by non-state actors for a personal reason (non-Convention reason), the nexus to the Refugees Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for a Convention ground
 - Women had fled Pakistan with three children to Australia after suffering escalated violence from husband and his family. This is private harm (not inflicted from the state), but things that happen in private are referable to the response/lack of response that the government/police have. Women is not expected to show that she has gone to the police as a general rule. She was not afforded protection because she was a woman. Persecution = domestic violence. Convention ground = PSG women in Pakistan. Talk about lack of government response under state protection. Police failed to protect as women are apart from society as they are seen as second-class citizens; they did not help not because of a lack of resources.
 - Discriminatory failure of state protection
- **Standard of STATE Protection - S152/2003**
 - Applicant assaulted as some people were affronted by his religious beliefs. Applicant argued that police condoned violence against jenova witnesses but tribunal said Ukraine authorities seemed able and willing to offer protection for religious violence.
 - Gleeson CJ, Hayne and Heydon JJ – ‘no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence’
 - (Kirby J: the Convention ‘posits a reasonable level of protection, not a perfect one’)
 - ‘reasonable measures’ to protect the lives and safety of its citizens, including ‘an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system’
 - ‘international standards’- by way of obiter tribunal said that applicant could have succeeded if he said Ukrainian authorities were not in accordance with international standards
- Section 5J and 5LA Migration Act – **this is what to cite for the exam**. This section codifies the case law
 - 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.

- Note: For effective protection measures, see section 5LA
- (1) effective protection measures are available in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - relevant State; or
 - a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) The relevant State, party or organisation in para (a) is willing and able to offer such protection.
 - (2) A relevant State, party or organisation mentioned in para (1)(a) is taken to be able to offer protection against persecution to a person if:
 - the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State - the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.
 - *Very similar to EU Qualification Directive
- Non-State actors as Actors of Protection
 - Can multinational troops/national troops be non-state actors under refugee law?
 - Is s5LA Migration Act consistent with the Refugee Convention?
 - Growing importance of non-state actors in international law
 - Return of persons to countries with fragile democracies and situations of conflict eg Iraq, Afghanistan
 - Does it matter that the entity providing the protection is not a State??
 - European Court of Justice 2010 - cessation case
- The Meaning of Protection and Refugeehood
 - My arguments:
 - Article 1A(2) - framework of state and nationality
 - Actors of persecution – yes, but persecution and protection - two diff concepts in refugee law
 - Protection – prov of physical security and safety, democratic infrastructure like courts – things only states can provide (?)
- Non-State actors under 1951 Convention
 - State practice:
 - France: entities created under certain UN powers
 - Canada: non-state entity must be acting as the ‘de facto govt agent of protection’ (undertakes powers and resps of a State)
 - UK – conflicting authorities: in *Dyli* – nature of body ‘irrelevant’; *Gardi* – non-state actors not accepted
 - So no clear line of authority

SUMMARY

- Country of nationality’ and ‘protection’ in Arts 1A(2) = state, not geographical territory
- only state can provide ‘protection’ (legal system, police force etc)
- Australian approach too wide – not consistent with RC