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# 11 APPLICATION OF THE REFUGEES CONVENTION IN PARTICULAR SITUATIONS

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# 11 APPLICATION OF THE REFUGEES CONVENTION IN PARTICULAR SITUATIONS<sup>1</sup>

## Introduction

The principles discussed in the previous chapters of this Guide must be applied to a wide range of circumstances and claims. Simply because conduct is characterised as being of a particular type - such as revenge, extortion, domestic violence, application of a generally applicable law, or breach of a human right - or in a particular context, such as civil war - this does not answer the question as to whether the conduct constitutes persecution in the relevant sense. The question to be asked is whether, in the circumstances of the particular case, the conduct in question is discriminatory and referable in the relevant sense to one or more of the refugee nexus grounds. If so, the further question that may arise is whether the discrimination, if official, is appropriate and adapted to achieving a legitimate object of the country concerned or, if perpetrated by private citizens, whether an appropriate level of state protection is available.

Further, the Federal Court has cautioned that decisions on the facts of one case do not really aid the determination of another case.<sup>2</sup> Whether the circumstances come within the refugee definition is largely a question of fact for the decision maker based upon all the available evidence. Each case must be determined on its individual merits. There can be no formulaic approach. Nevertheless, the approach of the courts in certain commonly arising fact situations can provide guidance. This chapter considers some of the cases involving claims relating to breaches of human rights standards, civil disturbances, laws and law enforcement, self-expression, personal and family relationships, criminal conduct, and vulnerability.

The focus of this chapter is primarily on the application of the law to particular situations in the context of the refugee definition in art 1A(2) of the 1951 *Convention relating to the Status of Refugees* (the Convention), as qualified by s 91R of the *Migration Act 1958* (Cth) (the Act), which are relevant to protection visa applications made before 16 December 2014. Applications made on or after that date are subject to the codified refugee definition in s 5H of the Act.<sup>3</sup> Section 5H draws on concepts from the Convention definition, but does not

<sup>1</sup> Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

<sup>2</sup> *Seneviratne v MIMA* [1999] FCA 944 at [29]–[30], referring to *Teubner v Humble* (1963) 108 CLR 491 at 503–4. See also *A v MIMA* [1999] FCA 116 at [39], and *Wang v MIMA* (2000) 105 FCR 548 at [108].

<sup>3</sup> The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth) (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. 'Refugee' is defined in s 5H, with related definitions and qualifications in ss 5(1) and 5J–5LA. These amendments commenced on 18 April 2015 and

replicate it, and is qualified by a number of different provisions. With some limited exceptions, this chapter does not purport to reconcile the case law with the codified refugee definition (or with the complementary protection provisions as discussed in [Chapter 10 – Complementary protection](#)). To the extent that the principles discussed in this chapter are derived from terminology used in the Convention definition which is similar to that in the codified definition, it may be expected that similar principles would apply. However, in the absence of judicial authority on point, decision-makers should exercise caution and pay close regard to the precise wording of the Act in applying these concepts to the codified provisions.

## Failure to adhere to basic standards of human rights

The Convention has been recognised in Australia and elsewhere as an instrument embodying principles for the protection of basic human rights and freedoms and it is uncontroversial that ‘persecution’ in the Convention sense can include serious violations of such rights and freedoms.<sup>4</sup> Nevertheless, the protection of the Convention will not normally be attracted where the harm feared, no matter how serious, amounts to an indiscriminate or non-selective infringement of human rights. In *Applicant A*, Brennan CJ held that:

...the object and purpose of the Convention is not simply the protection of those who suffer a denial of enjoyment of their fundamental rights and freedoms; they must suffer that denial by prescribed kinds of persecution, that is, persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.<sup>5</sup>

The general principle that persecution must involve discriminatory conduct, for one or more of the Convention reasons, is reflected in s 91R(1) of the Act. As the Full Federal Court has held, any failure to protect ‘core human rights’ would not amount to persecution unless the requirements of s 91R are satisfied.<sup>6</sup>

Nevertheless, international human rights standards are relevant in determining whether prosecution and penalties under the laws of a country are persecutory.<sup>7</sup>

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apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s 2 and item 28 of sch 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543).

<sup>4</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 231–232, 296–7; *Applicant NABD of 2002 v MIMIA* [2005] HCA 29 at [108]–[111].

<sup>5</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 232–233. In that case, the appellants had emphasised that the persecution of parents with one child by forcible sterilisation involved the infringement of fundamental human rights. Dawson J stated that he did not see how those considerations assisted the appellants, since they merely suggest that the persecution feared was serious and may infringe internationally recognised human rights, whereas the issue was whether that persecution was for one of the five Convention reasons: at 244. His Honour stated that although the Convention clearly is concerned with the protection of ‘fundamental rights and freedoms’, it would be wrong to depart from the language and context of the Convention definition by invoking its humanitarian objectives without appreciating the limits it places on the achievement of them: at 245–6.

<sup>6</sup> *NADO v MIMIA* [2003] FCAFC 169 at [26].

<sup>7</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [29]; *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [45]; *Applicant S v MIMA* (2004) 217 CLR 387 at [46]. This issue is discussed later in this chapter, under the heading [‘Laws and law Enforcement’](#).

## Civil disturbances

The Convention definition of ‘refugee’ does not encompass those fleeing generalised violence, internal turmoil or civil war.<sup>8</sup> However, it cannot be assumed that civil disturbances, or civil or clan warfare, which results in a general state of indiscriminate violence or general danger affecting a whole community, necessarily precludes the existence of Convention-based persecution in an individual case. Conversely, in a context of pervasive political violence in the applicant’s country, a finding that activities engaged in by an applicant carry a high risk of violence would not automatically lead to a refugee finding. It may be necessary to consider, for example, whether the violence has the necessary selective or discriminatory quality, whether the applicant’s activities are legitimate (such as participation in peaceful street processions that may attract violence from malicious political opponents) and if so, whether an appropriate level of state protection is available against such violence.<sup>9</sup>

Where persecution occurs in a context of widespread conflict, it would be wrong to require a claimant to establish a risk of persecution over and above the risks faced by others caught up in the conflict. The principle of ‘differential impact’ was espoused by the House of Lords in *Adan v SSHD*.<sup>10</sup> It held that, in circumstances of civil war such as inter-clan fighting in Somalia, the individual or group had to show a well-founded fear of persecution *over and above* the risk to life and liberty inherent in the civil war or a fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.<sup>11</sup> The High Court has however ruled that the ‘differential impact’ principle does not form part of Australian law and should not be used.<sup>12</sup> Justice McHugh explained:

It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification.<sup>13</sup>

The expression ‘differential operation’ may evoke some elements of the concept of ‘persecution’, and depending upon the factual issues raised, it may be helpful to consider whether treatment of a certain kind is discriminatory, or ‘differential’. However it is the language of the Convention as well as the requirements of s 91R(1) which must be applied.<sup>14</sup>

<sup>8</sup> *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [141].

<sup>9</sup> See *Rahman v MIMA* [1999] FCA 73 at [10]; *Haque v MIMA* [1999] FCA 1582 at [7]–[9]; *Rodrigo v MIMA* [2001] FCA 1027 at [18]; *S2192 of 2003 v MIMIA* [2005] FMCA 241 at [23]–[25]; and *SZBEU v MIMIA* [2005] FMCA 642 at [25].

<sup>10</sup> *Adan v SSHD* [1998] 2 WLR 702.

<sup>11</sup> *Adan v SSHD* [1998] 2 WLR 702 at 705 and 711.

<sup>12</sup> *MIMA v Haji Ibrahim* (2000) 204 CLR 1.

<sup>13</sup> *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [70]. Note that in the context of a civil war, while it is necessary to establish the motivation of the allegedly persecutory conduct: *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [102] and similarly under s 91R(1)(a) of the Act, the High Court in *Haji Ibrahim* rejected the proposition that a decision maker would be required, as a critical step in the process, to look to the objective of the war and determine whether it is directed against persons because of race, religion or group membership: at [102] per McHugh J, at [146] per Gummow J, Gleeson CJ and Hayne J agreeing. Gummow J observed at [146]–[147] that the reasons for a particular conflict might be virtually unfathomable and that ‘[t]he notions of “civil war”, “differential operation” and “object” or “motivation” of that “civil war” are distractions from applying the text of the Convention definition’.

<sup>14</sup> *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [5], [204]–[205].

In sum, whether the relevant test is satisfied will depend on the totality of the circumstances, and not on the context in which the allegedly persecutory conduct occurs.

The observations of the High Court on the concept of ‘differential impact’ reinforce the principle that, apart from any requirements imposed by statute, no extra gloss should be placed on the words of the Convention definition.

## Laws and law enforcement

Laws and their enforcement give rise to a wide variety of situations that often require close scrutiny in the Convention context. In particular, consideration needs to be given to whether the law in question is discriminatory, or is applied in a discriminatory way towards a person or group for one or more of the Convention reasons, and if so, whether the discriminatory treatment is appropriate and adapted to achieving some legitimate object of the country concerned. Although the following principles apply in the Convention context, there has been some implicit acceptance by the courts that these principles also apply in relation to the codified refugee definition. However, this question is yet to be squarely considered.<sup>15</sup>

## Laws of general application

It is well established that enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention, for the reason that enforcement of such a law does not ordinarily constitute discrimination.<sup>16</sup> As Brennan CJ stated in *Applicant A*:

... the feared persecution must be discriminatory. ... [It] must be “for reasons of” one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of “refugee”.<sup>17</sup>

Consistently with Australian law, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (UNHCR Handbook) states:

56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim - or potential victim - of injustice, not a fugitive from justice.<sup>18</sup>

Examples of circumstances which have been found to involve non-discriminatory enforcement of generally applicable laws outside the scope of the Convention include enforcement of China’s former ‘one child policy’ as applied to parents who ‘having only one

<sup>15</sup> See *AJZ17 v MHA* [2019] FCA 1485 and *EOC20 v MICMSMA* [2021] FedCFamC2G 297.

<sup>16</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467; *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [20].

<sup>17</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 233.

<sup>18</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, re-issued February 2019) (*Handbook*) at [56].

child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised',<sup>19</sup> application of Sri Lanka's *Prevention of Terrorism Act* for pro-LTTE activities,<sup>20</sup> temporary detention pursuant to Sri Lanka's *Immigrants and Emigrants Act* based upon unlawful departure,<sup>21</sup> punishment for avoiding military service obligations,<sup>22</sup> punishment for breach of China's migration controls by way of illegal departure,<sup>23</sup> punishment under a general law outlawing flag-burning,<sup>24</sup> punishment for killing a cow under a Nepalese law against 'bovicide',<sup>25</sup> failure of a state to give legal significance to marriage ceremonies conducted by Sikh Priests,<sup>26</sup> potential separation of a family by reason of application of the Nationality Law of China,<sup>27</sup> arrest for engaging in violent demonstrations with damage to property and loss of life,<sup>28</sup> enforcement of laws about Islamic dress code and tattooing in Iran,<sup>29</sup> punishment for desertion from the *Sepah*, for sexual relations between unmarried Muslims, and for having left Iran illegally,<sup>30</sup> and laws concerning alcohol consumption and production in Bangladesh.<sup>31</sup>

The principle that, ordinarily, non-discriminatory application of generally applicable laws does not constitute persecution applies whether or not a particular law is oppressive or repugnant to the values of our society.<sup>32</sup> In *Applicant A Dawson J* agreed with the observations of the Full Federal Court in *MIEA v Respondent A and B* that:

Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without

<sup>19</sup> *Applicant A v MIEA* (1997) 190 CLR 225; see also *Lin v MIMA* [1999] FCA 573 at [20].

<sup>20</sup> *MZQAP v MIMIA* [2005] FCAFC 35.

<sup>21</sup> *MZAPO v MIBP* [2015] FCCA 96. The Court held that, on its face, the character of the law was one that appeared appropriate and adapted to a legitimate object for the benefit of the people of the State, and it did not purport to apply for a Convention reason: at [28]. See also *SZWAW v MIBP* [2015] FCCA 199 at [26], [31].

<sup>22</sup> For example, *MIMA v Israeli*, heard with and reported as *MIMA v Yusuf* (2001) 206 CLR 323 at [55], [97].

<sup>23</sup> *Wu Guo Xiong v MIEA* (Federal Court of Australia, Tamberlin J, 9 August 1995), upheld by the Full Federal Court: *Wu v MIMA* (1997) 72 FCR 524. Similarly, in *MIEA v Guo* (1996) 191 CLR 559 the High Court found no error in the Tribunal's finding on the facts of that case that the applicant would not face persecution because of his illegal departure; rather, if he were charged it would be the application of a generally applicable law.

<sup>24</sup> *Sidhu v Holmes* [2000] FCA 776. The Court agreed with the Tribunal that a general law outlawing flag burning would appear to have a 'perfectly legitimate purpose, namely, the prevention of defacing national symbols' at [19], upheld on appeal: *Sidhu v Holmes* [2000] FCA 1653.

<sup>25</sup> *Lama v MIMA* [1999] FCA 918, upheld on appeal in *Lama v MIMA* [1999] FCA 1620.

<sup>26</sup> *Singh v MIEA* (1996) 67 FCR 433. In finding that this did not amount to persecution, the Court recognised that there are matters which are appropriately determined by a State, independent of any religious significance. The Court stated at 439: 'Freedom of religion can exist when there is regulation by the state of matters as part of the proper government of a community ... In so far as laws might be made concerning marriage, it is ordinarily a matter for the state to determine how marriages are to take place that are legally effective at least for the purposes of domestic law.'

<sup>27</sup> *SZAON v MIMIA* [2004] FMCA 216.

<sup>28</sup> *WADL v MIMA* [2002] FCAFC 276.

<sup>29</sup> *MZZHY v MIBP* [2013] FCCA 1246 at [28]–[34]; *MZZTW v MIBP* [2014] FCCA 2083 at [47], [62] (judgment upheld on appeal in *MZZTW v MIBP* [2015] FCA 475).

<sup>30</sup> *Tahavoori v MIMA* [2001] FCA 1245 at [41]–[44]. The decision was set aside on appeal, but not on this issue. See also *MZYSL v MIAC* [2012] FMCA 582 at [17]–[19] where the Court found no error in the Reviewer's findings that Sharia law in Iran prohibiting premarital sex was non-discriminatory in its application and implementation. The Court also commented that it could not be said that the law was not for a real social purpose, and the fact that the strictures of the law are far greater than those in Australia does not make it a law for an improper purpose or a law to effect persecution.

<sup>31</sup> *SZVYD v MIBP* [2019] FCA 648. In *SZVYD*, the Tribunal found that the Bangladeshi *Intoxicant Control Act 1990*, a law that dealt with alcohol production and consumption, applying to all in society but having provisions prohibiting consumption by Muslims, in an overwhelmingly Muslim country, was one of general application. The Federal Court held that this finding was open and could not be said to be irrational, illogical or sufficiently defective to reflect a jurisdictional error: at [12] and [15].

<sup>32</sup> See e.g., *Zheng Jia Cai v MIMA* (Federal Court of Australia, French J, 13 June 1997) at 16; *Lama v MIMA* [1999] FCA 918 at [30], upheld on appeal in *Lama v MIMA* [1999] FCA 1620; *Alamdard v MIMA* [2001] FCA 1244; and *SZVYD v MIBP* [2019] FCA 648 at [14]. See further discussion below under '[Value-laden laws](#)'.

more it would not be persecution for one of the reasons stated in the Convention.<sup>33</sup>

Whether a law is properly characterised as a law of general application turns on identifying those members of the population to whom it applies.<sup>34</sup> In some circumstances, it may be necessary to look behind a law that is generally expressed, to establish whether the law itself is in truth discriminatory in its intent or whether it has a discriminatory impact on members of a group recognised by the Convention.

The High Court in *Chen Shi Hai v MIMA* confirmed that laws or policies which target, or only apply to, or impact adversely upon, a particular section of the population are not properly described as laws or policies of general application:

Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, "black children", as distinct from children generally - cannot properly be described in that way. ... To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory.<sup>35</sup>

Thus, for example, notwithstanding that China's 'two child policy' may be reflected in laws of general application which limit the number of children that a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy, as distinct from children generally, are laws or practices of general application.<sup>36</sup> Similarly, depending upon the circumstances, the imposition of severe penalties on 'parents of black children' may amount to persecution for reasons of membership of a particular social group.<sup>37</sup>

In *MMM v MIMA* Madgwick J considered the application to homosexuals of a general law against 'unnatural acts'. His Honour held that enforcement of a law of that kind could constitute persecution of homosexuals:

In some circumstances, the existence of the law, provided it seems likely to be enforced, even though the actual enforcement may not be selective, may indicate that the legislature as well as the executive of the country in question, was intending serious harm to a particular social group.

A law of the kind in question here, although generally expressed to apply to anyone who commits certain

<sup>33</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 245 citing with apparent approval *MIEA v Respondent A and B* (1995) 57 FCR 309 at 319. Note that the description of harsh punishment under a generally applicable law as 'persecution' is inconsistent with High Court authority which holds that persecution necessarily involves discrimination, as do the requirements of persecution in ss 91R(1)(a) and (c).

<sup>34</sup> See *Weheliye v MIMA* [2001] FCA 1222 at [50].

<sup>35</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [19]–[21], [72]; *Wang v MIMA* (2000) 105 FCR 548 at [50]–[68] where Merkel J (Wilcox and Gray JJ agreeing) discussed what the High Court and courts in other jurisdictions have said about 'laws of general application'.

<sup>36</sup> See *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [18]–[19] concerning China's previous 'one child policy'.

<sup>37</sup> *VTAO v MIMIA* [2004] FCA 927. The Court in that case emphasized that *Applicant A* did not decide whether parents who have breached China's family planning laws can constitute a particular social group. Referring to *Applicant S v MIMA* (2004) 217 CLR 387, the Court stated that whether 'parents of a "black child" can constitute a particular social group depends on a combination of legal and social factors, rather than on whether the harm the parents fear, and are likely to suffer, arises as a result of their breach of laws of general application. However it would still be necessary to establish that the laws operate in a discriminatory way. The Court referred to country information which in his view suggested that the (previous) one-child laws operated or impacted discriminatorily on certain groups (at [38]–[39]), however it is not apparent how this information could establish a Convention nexus.



acts considered to be “against the order of nature”... is *in reality targeted at homosexuals* ... Ordinarily, homosexuals would constitute a social group and the law is targeted at them as such ... Such a law, although in form one of general application, is in substance one of selective harassment. ... *If a criminal law, though generally expressed, is in the judgment of a competent Australian tribunal, in reality, nevertheless targeted at a “particular social group”, that may, depending on the general character of the law, its severity and the actual prospects of enforcement of it, suffice.*<sup>38</sup> (emphasis added)

Whether something amounts to a law of general application is a finding of fact for the decision-maker, based on the evidence.<sup>39</sup> While the amount of evidence necessary to support the finding will vary depending on the nature of the law in question, the absence of a clear evidentiary basis for a finding that a law is a ‘law of general application’ may give rise to an error.<sup>40</sup> For example, in *Applicant S v MIMA* the Tribunal had found that the Taliban practised ad hoc, random, forcible recruitment of young men for military service in Afghanistan, where the only apparent criterion for recruitment was that the young men be able-bodied. A majority of the High Court rejected the Minister’s submission that the facts revealed a ‘law of general application’. In their joint judgment, Gleeson CJ, Gummow and Kirby JJ held that there was no evidence before the Tribunal that the actions of the Taliban amounted to a law of general application; rather, the policy of conscription was ad hoc and random.<sup>41</sup>

How far a decision-maker must go in determining whether a generally applicable law has a persecutory purpose (such that it is not properly described as a law of general application) will depend upon the circumstances of each case. In *AA v MIMA* the Court noted that there had been no evidence before the Tribunal to suggest that an Iranian anti-pornography law, while expressing Islamic values, was intended to impose the Islamic religion upon non-Muslims. It held that it was not incumbent upon the Tribunal to address the question whether motivation for making anti-pornography laws was persecutory within the Convention sense when there was nothing before it to suggest it was.<sup>42</sup>

### *Selective enforcement of a law of general application*

While the implementation of laws of general application does not ordinarily constitute persecution, there is no rule that the implementation of such laws can *never* amount to

<sup>38</sup> *MMM v MIMA* (1998) 90 FCR 324 at 330–331. See also *WAFZ of 2002 v MIMA* [2002] FCAFC 292, where the Tribunal had considered that the rules in Iran about music were rules of general application and therefore punishment pursuant to such rules would not be persecution for a Convention reason. The Court observed that at some times and in some places, music has been part of the language of political dissent, and stated that it may be too broad a generalisation to assert that the playing of Western music at a wedding in Islamic Iran is necessarily outside the scope of the Convention.

<sup>39</sup> The interpretation of a foreign law is a question of fact and a finding based on an incorrect interpretation of such law would amount to an error of fact, rather than an error of law: *Applicants in V 722 of 2000 v MIMA* [2002] FCA 1059 at [32]; *SZR DW v MIAC* [2012] FMCA 545 at [36], and on appeal, *SZR DW v MIAC* [2012] FCA 1262 at [62]; *DZACW v MIAC* [2013] FMCA 46 at [24].

<sup>40</sup> See *Aala v MIMA* [2002] FCAFC 204, *WAEZ of 2002 v MIMA* [2002] FCAFC 341. In *SXJB v MIMA* [2005] FMCA 1536 at [16]–[42], Lindsay FM stated that one need not know the precise terms of any relevant penal provision to make an assumption that such an activity [theft of military documents] would contravene the law of the land, but held that further findings, including that a person would not face a real chance of Convention related harm in this context, required evidence.

<sup>41</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [41]. McHugh J stated at [83] that given the Tribunal’s findings, and if the Tribunal had found that ‘able-bodied men’ were a particular social group, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution. Military conscription is considered in more detail below.

<sup>42</sup> *AA v MIMA* [2000] FCA 13 at [65]. See also *Alamdard v MIMA* [2001] FCA 1244, which involved an Iranian applicant who claimed to have acted in, produced and distributed pornographic films in Iran and who feared punishment, including the death penalty, under a law which prohibited such activity. The Court found no error in the Tribunal’s findings on the evidence before it that it was a law of general application.

persecution. A law of general application is capable of being implemented or enforced in a discriminatory manner.<sup>43</sup>

Where laws of general application are selectively enforced, in that the motivation for prosecution or punishment for an ordinary offence can be found in a Convention ground, or the punishment is unduly harsh for a Convention reason, then Convention protection may be attracted.

Noting that the Full Federal Court in *Applicant A* did not identify the additional features which would render enforcement by a country of one of its generally applicable criminal laws persecution for a Convention reason, Katz J in '*Z' v MIMA* inferred that:

what they had in mind was either selective prosecutions under the relevant law, the criterion of selection of persons for prosecution being those persons' race, religion, nationality, membership of a particular social group or political opinion, or the imposition of punishments on persons convicted under the relevant law, such punishments being greater than they would otherwise have been by reason of the convicted persons' race, religion, nationality, membership of a particular social group or political opinion.<sup>44</sup>

For example, it may be wrong to assume that acquisition of land under Zimbabwe's Land Acquisition Act would be simply the imposition of a law of general application if there is evidence that there had been targeted attacks upon the farms owned by non-Africans and that the Land Acquisition Act had been applied in a racially and politically discriminatory way.<sup>45</sup>

In sum, questions that may need to be considered in claims arising from enforcement of laws are whether or not the law in question is in truth discriminatory (such that it is not properly described as a law of general application) or whether there is a real chance that a generally applicable law is going to be enforced against an applicant in a discriminatory manner. If a law of general application is enacted for a selective purpose, or enforced selectively, and such selectivity can be attributed to a Convention ground then this may come within the scope of the Convention.

### *General laws that impact adversely upon a particular group*

The High Court in *Chen Shi Hai* stated that laws or policies which '... impact adversely upon a particular class or group' could not properly be described as laws of general application and '[t]o say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily.'<sup>46</sup> This has been treated as supporting the view that the enforcement of a law that is general in its terms and not intended to target a particular group, but which impacts adversely upon a person with a Convention-related

<sup>43</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [21], *Applicant S v MIMA* (2004) 217 CLR 387 at [42].

<sup>44</sup> '*Z' v MIMA* (1998) 90 FCR 51 at 58; and see *MIMA v Darboy* [1998] FCA 931; *Lama v MIMA* [1999] FCA 1620; *AA v MIMA* [2000] FCA 13. See also UNHCR, *Handbook*, above n 18 at [81], [84], [85] and [86] on the potential for 'criminal laws' to be applied for reasons of political opinion.

<sup>45</sup> *SZALM v MIMIA* [2004] FMCA 262 at [21]. See also *SZDOS v MIMIA* [2005] FMCA 121 at [30]–[48].

<sup>46</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [19]–[21].

attribute, may amount to persecution. This approach has been relied upon even where there is no evidence of selective or discriminatory enforcement of the law.<sup>47</sup>

However, this approach is difficult to reconcile with the requirements of persecution under the Convention as qualified by s 91R(1) of the Act; in particular, the requirements that the persecution involves systematic and discriminatory *conduct* and the essential and significant reason for such conduct is one or more of the Convention grounds.<sup>48</sup>

Where the law is discriminatory in its terms (e.g. banning a particular religious group) or, is general on its face but has a discriminatory intent (e.g. laws prohibiting sodomy), it is clear that the making of the law and its enforcement constitutes the relevant discriminatory conduct and is evidence of the relevant Convention-related motivation. Where the law is general in its terms, but is enforced in a selective and discriminatory manner for a Convention reason (e.g. large public gatherings without approval are illegal, but only opposition political groups are prosecuted) the law itself may not be persecutory, but the way it is enforced would constitute the discriminatory conduct and is evidence of the authorities having the relevant Convention-related motivation. However, where the law is general in its terms and its intent and there is no evidence of selective or discriminatory enforcement, but the law adversely impacts on a person with a Convention-related attribute (e.g. conscription laws and a person with pacifist religious beliefs) it is difficult to identify the relevant discriminatory conduct that is occurring for the essential and significant reason of one or more of the Convention grounds.<sup>49</sup>

The focus on adverse impact upon a particular group is also difficult to reconcile with cases considering ‘value-laden’ laws (i.e. laws that are general in terms but which reflect some religious value). Such laws have, in the absence of evidence of selective or discriminatory enforcement, been accepted as laws of general application that were not persecutory, although they affected or impacted upon people differently.<sup>50</sup>

<sup>47</sup> See *AJZ17 v MHA* [2019] FCA 1485 at [44]–[46], where the Federal Court held that in the case of a criminal law of general application, the law may be implemented or enforced in a discriminatory way if it does not recognise and therefore does not take account of a relevant difference. It held that the Tribunal had erred in failing to give proper consideration to whether Kenyan criminal laws would be implemented or enforced in a discriminatory manner with respect to people with a mental illness (at [46]). See also *Erduran v MIMA* (2002) 122 FCR 150, where the Court, referring to *Wang v MIMA* (2000) 105 FCR 548 at [65], stated ‘even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason’: at [28]. The judgment in *Erduran* was subsequently set aside on appeal. However, in allowing the Minister’s appeal, the Full Federal Court did not directly deal with the Court’s discussion of Convention nexus at first instance: *MIMIA v VFAI of 2002* [2002] FCAFC 374. The ‘test’ in *Erduran* has also been followed in other cases involving conscription laws. For further discussion see below under [‘Conscription laws’](#).

<sup>48</sup> The Tribunal decision considered in *Chen Shi Hai* was made prior to the introduction of s 91R by the *Migration Legislation Amendment Act (No 6) 2001* (No 131 of 2001), which applied to Tribunal decisions finalised on or after 1 October 2001. The Tribunal decision considered in *Erduran* was also made prior to the introduction of s 91R. The guiding jurisprudence on persecution and laws of general application predates the introduction of s 91R. In *AJZ17 v MHA* [2019] FCA 1485 the Federal Court relied upon judicial authorities that predated the introduction of s 91R(1) (now s 5J(4) for post 16 December 2014 applications), and did not appear to have considered the potential impact of the statutory qualifications, in finding that the Tribunal erred in failing to properly consider whether Kenyan criminal laws would be implemented or enforced in a discriminatory manner. Various judgments concerning conscription laws have also applied the principle from *Erduran* without considering the effect of the legislative changes to the concept of ‘persecution’ (either s 91R(1) or s 5J(4)) that did not apply to the Tribunal decision in *Erduran*. For further discussion see below under [‘Conscription laws’](#).

<sup>49</sup> For detailed discussion of Convention nexus, see [Chapter 5 – Refugee grounds and nexus](#).

<sup>50</sup> *Zheng Jia Cai v MIMA* (Federal Court of Australia, French J, 13 June 1997) at 16; *Lama v MIMA* [1999] FCA 918 at [30], upheld on appeal in *Lama v MIMA* [1999] FCA 1620; *Alamdar v MIMA* [2001] FCA 1244. See further discussion below under [‘Value-laden laws’](#).

If mere discriminatory impact of a law is sufficient to amount to relevant discriminatory treatment such that the law is not a law of general application, or the law is otherwise discriminatory in its terms or application, the next question is whether the law is appropriate and adapted to achieving a legitimate state object. However, if the law is found not to contain the necessary discriminatory quality, that question does not arise.<sup>51</sup>

### *The legitimacy threshold*

Even if a law or its application results in discriminatory treatment, such treatment will not necessarily constitute persecution. It is settled law in Australia that where a law or policy results in discriminatory treatment of persons of a particular race, religion, nationality or political opinion or who are members of a particular social group, the question of whether the discriminatory treatment constitutes persecution for that reason ultimately depends on whether that treatment is ‘appropriate and adapted to achieving some legitimate object of the country [concerned]’.<sup>52</sup>

Whether a law or its enforcement is ‘appropriate and adapted’ to achieving a legitimate object involves consideration of proportionality of the means used to achieve that object.<sup>53</sup> A legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens. Thus, enforcement of a generally applicable criminal law, or the enforcement of laws designed to protect the general welfare of the state, would not ordinarily constitute persecution.<sup>54</sup> While the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.<sup>55</sup>

However, a law or its purported enforcement will be persecutory if its real object is not the protection of the state but the oppression of the members of a race, religion, nationality etc. Generally, sanctions aimed at persons for reasons of race, religion or nationality will not be an appropriate means for achieving a legitimate government object and are likely to amount to persecution. Where political opinion or particular social group are involved, the issue of legitimacy and proportionality may be more complex. In *Applicant A*, McHugh J explained:

... where a racial, religious, national group or the holder of a particular political opinion is the subject of

<sup>51</sup> *SZTFR v MIBP* [2015] FCA 545 at [53].

<sup>52</sup> *Applicant A v MIEA* (1997) 190 CLR 225, at 258; *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [28]; *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [45]. In *Applicant S v MIMA* (2004) 217 CLR 387, Gleeson CJ, with Gummow and Kirby JJ held that as a matter of law to be applied in Australia, these criteria are to be taken as settled. See also discussion and general summary of cases in *SZDTM v MIAC* [2008] FCA 1258 at [62].

<sup>53</sup> See *Applicant S v MIMA* (2004) 217 CLR 387 at [44], [48]. In *MZQAP v MIMIA* [2005] FCAFC 35, the Full Federal Court held the test of ‘appropriate and adapted’ involves the nature and reach of the law itself and the actual manner of its application: at [20]. *MZQAP* was applied in *SZNWC v MIAC* [2010] FMCA 266 where the Federal Magistrates Court held that the Tribunal erred by overlooking the need to assess the proportionality of the means adopted in Bangladesh to discourage ship desertions. On appeal, the Full Federal Court upheld the judgment at first instance, noting that while the Tribunal had concluded the penalties in question were ‘harsh’, that ‘was only half of the inquiry; the other half was whether that harshness was a proportionate solution to the problems identified’: *MIAC v SZNWC* (2010) 190 FCR 23 at [55]. See also *SZVYD v MIBP* [2019] FCA 648, where the Court accepted that the Tribunal had considered whether the Bangladeshi *Intoxicant Control Act 1990* was reasonably appropriate and adapted to the object of religious prohibition identified, despite not directing itself to the matter explicitly in terms of the inquiry stated in *SZNWC*: at [12].

<sup>54</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 258.

sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. ... Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.

In cases concerned with political opinion and the membership of particular social groups, the issue of persecution may often be difficult to resolve when the sanctions arise from the proper application of enacted laws. Punishment for expressing ordinary political opinions or being a member of a political association or trade union is *prima facie* persecution for a Convention reason. Nevertheless, 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. Nevertheless, even in these cases, punishment of the holders of the opinions may amount to persecution. It will certainly do so when the government in question is so repressive that, by the standards of the civilised world, it has so little legitimacy that its overthrow even by violent means is justified. One who fled from the regime of Hitler or Pol Pot could not be denied the status of refugee even if his or her only claim to that status relied on a fear of persecution for advocating the violent overthrow of that regime.<sup>56</sup>

In determining whether prosecution and penalty under a national law can properly be regarded as appropriate and adapted to achieving a legitimate object of the country, international human rights standards as well as the laws and culture of the country are relevant matters.<sup>57</sup> In *Chen Shi Hai v MIMA*, it was stated that:

[w]hether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.<sup>58</sup>

Applying those general principles to the Taliban's conscription policy, the High Court in *Applicant S* explained that while the objective of a conscription policy to protect the nation is generally speaking a legitimate national objective, the position of the Taliban as an authority which was apparently considered by international standards a ruthless and despotic political body founded on extremist religious tenets would affect the *legitimacy* of that policy. Further, even if the Taliban's object of conscription was a legitimate national objective, as it was implemented in a manner that would not be condoned internationally, it could not be considered *appropriate and adapted* to achieving that objective.<sup>59</sup>

<sup>55</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [44], referring to *Applicant A v MIEA* (1997) 190 CLR 225 at 258.

<sup>56</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 259. See *obiter* comments in *SZMAP v MIAC* [2008] FMCA 838 at [23] in relation to measures restricting political activity.

<sup>57</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [45]. See also *SZVYD v MIBP* [2019] FCA 648 where the Federal Court held '[h]ow one society controls or regulates the use of one drug or another, or regulates social behaviour (unless striking at fundamental human rights), is a matter for it': at [14].

<sup>58</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [29], cited with approval in *Applicant S v MIMA* (2004) 217 CLR 387 at [45]. *Chen's* case concerned China's former one child policy as it applied to 'black children'. See also *VTAO v MIMIA* [2004] FCA 927, where the Court considered the general principle as it applied to parents who had contravened the policy. Referring to *Chen*, at [41] the Court criticised the Tribunal's approach for failing to enquire whether the harm feared by the applicant parents was appropriate and adapted to achieving the legitimate object of population control, and added that a law of general application mandating the imposition of severe penalties on the mother irrespective of her personal circumstances may be regarded as a measure that, according to the standards of civil societies, is not appropriately adapted to achieving a legitimate object.

<sup>59</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [47]–[49]. See also the discussion of McHugh J at [83]. This would give support to the UNHCR view that in a case involving punishment for desertion or draft evasion, where the type of military action, with which an individual does not wish to be associated, is 'condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in

In *Applicant A101/2003 v MIMIA* the Federal Court considered a claim of fear of arrest under Pakistan's Criminal Procedure Code for demonstrating against the government. The Court stated that when it is alleged that the enforcement or manner of enforcement of a generally applicable law is discriminatory by reference to political opinion, a complex inquiry may need to be engaged in:

Where such a law is, or is said to be, one having the purpose of protecting a State or its institutions (i.e. it has a "political" purpose), the nature and reach of the law itself and the actual manner of its application will require consideration for the reason that its reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies ... It is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.

The less such a law has an overtly political character (as where for example, its concern is with ordinary criminal acts in a society), the more attention will turn on the integrity of the enforcement process itself and on the risks to which a person might be exposed, e.g. ill-treatment or torture, in the course of that process. Is that process used selectively against critics of the State or against the advocates of particular political views? Is it fraudulently invoked for punitive purposes? Does its improper use expose a person to adverse consequences, e.g. torture in detention, even if that person is not later charged or tried with an offence?<sup>60</sup>

In *NAVZ v MIMIA* the Tribunal had recognised that Russia's 'Law on Religion' discriminated against certain religious groups including Scientologists, but was satisfied that it was appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens. The Federal Court held that the Tribunal had seriously misunderstood the nature of the relevant interest, namely a human right not to be subjected to seriously discriminatory harm in relation to certain matters vital to human dignity, which the Convention seeks to protect. The Court indicated that great care needs to be taken in characterising any law, let alone its alleged enforcement, as non-discriminatory when it is, in terms, aimed at some religions but not others.<sup>61</sup>

These cases indicate that laws that are aimed at persons for one of the Convention reasons will require particularly close scrutiny before it can safely be concluded that either the law or its enforcement is appropriate and adapted to achieving some legitimate object of the country concerned and there must be material before the decision-maker to support such a conclusion.<sup>62</sup>

### *Discriminatory laws that are not enforced*

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itself be regarded as persecution': UNHCR, *Handbook*, above n 18 at [171]. However, neither *Applicant S* nor UNHCR's discussion suggests that this by itself is enough. There is still a requirement of *different treatment*, for a Convention reason.

<sup>60</sup> *Applicant A101/2003 v MIMIA* [2004] FCA 556 at [24]–[25]. The Court held that the Tribunal's failure to address these issues constituted a constructive failure to exercise jurisdiction.

<sup>61</sup> *NAVZ v MIMIA* [2005] FCA 13 at [53], [56]. On the importance of religion as a fundamental human right, see also *Applicant NABD of 2002 v MIMIA* [2005] HCA 29 at [108]–[132].

<sup>62</sup> For example, see *SZKUG v MIAC* [2008] FMCA 1 at [28]–[36] where the Tribunal concluded that Israeli security law was a law of general application, but, even if the law was applied selectively against Palestinian males it was a legitimate and proportionate response to a serious security concern. The Court held the finding was open on the material before the Tribunal. See also *SZDTM v MIAC* [2008] FCA 1258 at [74]. The Court upheld the Tribunal decision on the information before it that Indonesia's laws restricting proselytisation, which the appellant claimed would prevent her from completely practising her Christian religion, were general laws appropriate and adapted to a legitimate purpose. See also *SZNCK v MIAC* [2009] FMCA 399 at [47].

On the other hand, the mere existence of a law that might in truth be discriminatory may not constitute persecution if there is no real chance that it would be enforced. In *MMM v MIMA*, the Federal Court held that a criminal law which penalises homosexual acts could amount to persecution. However, in that case, all that was shown was the existence of the law. There was no evidence as to its enforcement, nor any indication that there was a real chance that it would be enforced in the future.<sup>63</sup> That is not to say that the mere existence of a criminal law could never constitute persecution. For example, the Full Federal Court has held that living under the shadow of the mere possibility of a death sentence for apostasy in Iran, regardless of how remote that possibility might be, could itself constitute persecution.<sup>64</sup> Further, as members of the High Court have pointed out in relation to laws against homosexual conduct in Bangladesh, the existence of such a law, even if not enforced, may give rise to a real chance that a homosexual person will suffer serious harm – for example bashings or blackmail – that the government of the country will not or cannot adequately suppress.<sup>65</sup>

### Detention and mistreatment in detention

Detention of itself does not necessarily constitute persecution, even where it is targeted towards certain members of the society. Consistently with High Court authority,<sup>66</sup> the Full Federal Court in *Nagaratnam v MIMA* held that the detention of members of a particular race engaged in a civil war for the purposes of interrogation was not persecution where it was designed to protect the general welfare of the state.<sup>67</sup>

Nevertheless, such action may lose its legitimacy where the detainees are subsequently subjected to mistreatment. When those who detain such persons in accordance with a law or government policy are aware that the probable consequence of detention will be physical mistreatment in custody, even where that physical mistreatment is applied indiscriminately to all detainees, the act of detention may amount to persecution for a Convention reason.

This issue arose for consideration by the Full Federal Court in *Paramanathan v MIMA*.<sup>68</sup> While there were obvious differences in emphasis between the three judgments in that case, the Full Court in *Nagaratnam v MIMA* held that *Paramanathan* stood for the following proposition:

When, in accordance with some law or government policy, persons are selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons may or may not amount to persecution for a Convention reason, depending upon the circumstances in which the law or government policy is being implemented. It may be implemented, for instance, in circumstances of war, whether foreign or domestic. If so and the criterion of selection of persons for detention is seen as appropriate and adapted to the successful prosecution of that war, then the act of detention will not be persecution for a Convention reason. However, when those who detain such persons in accordance with such law or government policy are aware that the probable consequence of such detention will be the

<sup>63</sup> *MMM v MIMA* (1998) 90 FCR 324. See also *F v MIMA* [1999] FCA 947.

<sup>64</sup> *SGKB v MIMIA* [2003] FCAFC 44 at [21], endorsed by Kirby J in *Applicant NABD of 2002 v MIMIA* [2005] HCA 29 at [94]. This point was not argued in *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 and the question was left open in that case: see per Gleeson CJ at [13], McHugh and Kirby JJ at [46], and Callinan and Heydon JJ at [109].

<sup>65</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [47]; see also [12].

<sup>66</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 258, *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [28], *Applicant S v MIMA* (2004) 217 CLR 387 at [43]–[45].

<sup>67</sup> *Nagaratnam v MIMA* (1999) 84 FCR 569. See also *Paramanathan v MIMA* (1998) 94 FCR 28.

<sup>68</sup> *Paramanathan v MIMA* (1998) 94 FCR 28.

physical mistreatment of those detained, even though those detained will not be selected for such physical mistreatment by those who administer that physical mistreatment upon a ground which equates to one of the Convention reasons and even though those selecting the detainees are unwilling that such physical mistreatment should occur, then those who detain such persons will be taken to have caused such physical mistreatment. As such persons have been selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons will amount to persecution for a Convention reason.<sup>69</sup>

The principles in these cases are clearly applicable *where the authorities are aware* that the probable consequence of detention will be physical mistreatment. Where this is not the case, close scrutiny may need to be given to whether the mistreatment itself is inflicted for a Convention reason.

The principle in *Paramanathan* was applied and taken further by Burchett J in *El Merhabi v MIMA*.<sup>70</sup> His Honour held that the Tribunal's finding that the bashing by Syrian officer(s) of a Lebanese applicant while detained for questioning was 'the random callous act by an individual' rather than systematic motivated harm involved the same error which was exposed in *Paramanathan* and other cases. He also made it clear that the principle set out in that case should not be 'narrowly confined' to interrogation situations. The Tribunal had found that the rape of the applicant's wife by a Syrian soldier, in the company of other Syrian soldiers who stood guard, was not Convention related. The Court held that had the applicant's wife been raped during interrogation the judgment in *Paramanathan* made it clear that it would have been an act of persecution, and that the Tribunal had erred in law by 'quarantining' the rape from the whole suppression by the Syrian forces:

If, for reasons of nationality, political opinion or religion, or (as in this case) all three, an official policy of suppression is pursued, whether by means of arrest and interrogation of individuals, or by the stationing of troops to control a civilian population, or by some similar means, and those who execute the policy commit persecutory acts in the course of doing so, persecution may generally be shown. The policy colours what is done by its agents, although they may behave wantonly. For a causal connection will be likely to exist, to adopt the reasoning of Wilcox J in *Paramanathan* ..., between the cruelty suffered and the nationality, political opinion or religion; and official toleration of that cruelty, or inability to control it, may be found. To adapt what Burchett and Lee JJ said in *Perampalam*..., abuse by an occupying soldier of his position, or his personal cruelty or lust, cannot quarantine his particular act from the whole activity of suppression of which it forms part. In the present case, the uniformed and armed Syrian soldiers whose presence made resistance impossible were not divorced, by their actions or [the assailant's], from the role in which they had been sent to Lebanon.<sup>71</sup>

## Conscription laws

In Australian law, enforcement of laws providing for compulsory military service, and for punishment for desertion or avoidance of such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention.<sup>72</sup> This is primarily because it lacks the necessary selective quality.<sup>73</sup>

<sup>69</sup> *Nagaratnam v MIMA* (1999) 84 FCR 569 at 579.

<sup>70</sup> *El Merhabi v MIMA* (2000) 96 FCR 375.

<sup>71</sup> *El Merhabi v MIMA* (2000) 96 FCR 375 at [24].

<sup>72</sup> See e.g. *Mijoljevic v MIMA* [1999] FCA 834 at [23], referring to *Murillo-Nunez v MIEA* (1995) 63 FCR 150; *Timic v MIMA* [1998] FCA 1750. Claims based on objection to undertaking military service have also been raised by asylum claimants in other jurisdictions. In *Davidov v SSHD* [2005] ScotCS CSIH 51 (Scottish Court of Session, 23 June 2005) Lord Hamilton,



Without evidence of selectivity in its enforcement, conscription will generally amount to no more than a non-discriminatory law of general application. Whether this is the proper conclusion, however, will depend on the evidence in the particular case.<sup>74</sup> Considering guidance in the UNHCR Handbook, the Court in *Mehenni v MIMA* noted that the Handbook does not suggest that the mere requirement that a person serve, in opposition to genuine religious convictions, in itself necessarily amounts to persecution for a Convention reason.<sup>75</sup> What must be demonstrated is that the punishment feared be imposed discriminatorily for a Convention reason, such as religion or political opinion, or membership of a particular social group such as 'conscientious objectors'. As was stated in *Mohamed v MIMA*:

Persecution for failure to be conscripted is not necessarily persecution for a Convention reason. ... Imprisonment for resistance may be motivated by punishment for failing to comply with a lawful obligation to join not for a political view or arising from membership of a group. But it does not follow from this ... that in all circumstances persecution for failure to accept conscription might not amount to persecution for a Convention reason. All the facts must be considered.<sup>76</sup>

Whether or not an applicant is a conscientious objector, the enquiry must be directed to whether the applicant's refusal to serve will mean that there is a real chance of discriminatory treatment for a Convention reason. Circumstances *may* arise where this will be the case, for instance where those imposing the punishment do so on the basis that the individuals concerned were being punished as conscientious objectors to compulsory military service; that is, on the basis of their political or religious opinion, or their membership of a particular social group.<sup>77</sup>

Similarly, *selection for recruitment* may be discriminatory for a Convention reason. In *Applicant S*, for example, the Tribunal had accepted that the Taliban had practised ad hoc, random, forcible recruitment of young men, the only apparent criterion for recruitment being that the young men be able bodied. The High Court held that the Tribunal had erred in failing to consider whether 'able-bodied young men' comprised a particular social group.<sup>78</sup>

However, the mere holding of a political opinion or membership of a particular social group by an applicant facing the prospect of harm (including serious harm) is not sufficient to bring that person within the Convention definition. The Federal Court has fairly consistently held that liability for conscription - even of conscientious objectors - will not of itself found a

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delivering the opinion of the Court, observed that the significance (for Convention purposes) of an objection to undertaking compulsory military service had been the subject of legal treatment in the United Kingdom in the recent years preceding that judgment: at [5].

<sup>73</sup> See for example *Mpelo v MIMA* [2000] FCA 608 at [33]; *MIMA v Shaibo* [2000] FCA 600 at [28]; *Trpeski v MIMA* [2000] FCA 841 at [27]; and *Aksahin v MIMA* [2000] FCA 1570.

<sup>74</sup> There must be evidence to support such a conclusion: see *MIMIA v WALU* [2006] FCA 657.

<sup>75</sup> *Mehenni v MIMA* [1999] FCA 789 at [19]. Note that the status of the Handbook in Australian law is generally as a practical guide to determining refugee status, rather than as authority as to the correct interpretation of the Convention: see Mason CJ in *Chan v MIEA* (1989) 169 CLR 379 at 392. However, the Handbook may still be given weight as extrinsic material in interpreting the Convention, per Kirby J *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [76]. For discussion on interpretation of the Convention in Australia see [Chapter 1 – Protection visas](#).

<sup>76</sup> *Mohamed v MIMA* (1998) 83 FCR 234 at 247. See *Mpelo v MIMA* [2000] FCA 608 at [33] in which the Court commented that ordinarily conscription and its consequences 'does not constitute persecution for a Convention reason'. See also *Murillo-Nunez v MIEA* (1995) 63 FCR 150; *Timic v MIMA* [1998] FCA 1750; and *Mijoljevic v MIMA* [1999] FCA 834.

<sup>77</sup> See *NAEU of 2002 v MIMIA* [2002] FCAFC 259 at [18], referring to *Erduran v MIMA* (2002) 122 FCR 150. The Court's characterization of *Erduran* here seems to be at odds with Gray J's elaboration of his own decision in that case in *Applicant VEAZ of 2002 v MIMIA* [2003] FCA 1033. *Erduran* is discussed further below.

<sup>78</sup> *Applicant S v MIMA* (2004) 217 CLR 387.

Convention claim.<sup>79</sup> Consistently with that view, the Court in *Mehenni* firmly rejected the approach taken in some United States cases where it was held that it is enough if a person suffers disproportionately when forced to serve under a conscription law because of his or her religious principles.<sup>80</sup> As French J stated in *Aksahin v MIMA*, referring to the High Court's decision in *Chen Shi Hai*:

The [High] Court expressly approved the proposition that the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted (par 34). The accident that the particular political or ethnic sympathies of a person may cause him or her to disobey a law of general application, does not render the sanction for non-compliance persecution for a Convention reason.<sup>81</sup>

In other words, it is not sufficient that there be a nexus between feared persecution and a Convention ground, such as political opinion, if there is no relevant 'motivation' on the part of the alleged persecutors.<sup>82</sup> Nevertheless, a line of cases has emerged that reflects the broader approach that was rejected by the Court in *Mehenni*. The following cases are illustrative of the differing approaches to this issue.

In *Mijoljevic v MIMA* the Tribunal had found that the obligation to perform military service was universal upon all males in the applicant's country, and that the relevant laws punishing those who avoided military service were laws of general application. The Tribunal concluded on this basis that the applicant's pacifist views did not provide a basis upon which it could be satisfied that he was a person to whom Australia owes protection obligations under the Refugees Convention. Justice Branson held that the Tribunal's conclusion was open to it on the evidence and material before it and that there was no error in the Tribunal's approach.<sup>83</sup>

In *Israeli's* case,<sup>84</sup> the Tribunal had found that if, on his return to Armenia, Mr Israeli was punished for not meeting his obligation to give military service it would be 'the application of a law of common application, imposed by the authorities regardless of ... any political opinion'. It was contended that the Tribunal had failed to consider whether the applicant was a member of a particular social group comprised of deserters and/or draft evaders. The High Court held that on the facts of the case, it was open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was not capable of resulting in discriminatory treatment. Justice Gaudron stated:

The Tribunal's conclusion that the punishment Mr Israeli would face "for avoiding his call-up notice ... would be the application of a law of common application" necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution. In that context, the question of Mr Israeli's membership of a particular social group comprised of deserters and/or draft resisters became irrelevant.<sup>85</sup>

<sup>79</sup> See *Mijoljevic v MIMA* [1999] FCA 834 and cases there cited, cited with approval by Callinan J in his dissenting judgment in *Applicant S v MIMA* (2004) 217 CLR 387 at [103].

<sup>80</sup> *Mehenni v MIMA* [1999] FCA 789 at [20]–[21], referring to *Canas-Segovia v INS* 902 F 2d 717 (9th Cir 1990). The Court observed that that view was based partly on a different view of the Handbook from his own, and also on particular principles of United States constitutional law.

<sup>81</sup> *Aksahin v MIMA* [2000] FCA 1570 at [25] referring to *Chen Shi Hai v MIMA* (2000) 201 CLR 293.

<sup>82</sup> *Shaibo v MIMA* [2002] FCA 158.

<sup>83</sup> *Mijoljevic v MIMA* [1999] FCA 834.

<sup>84</sup> Heard together with *MIMA v Yusuf* and reported as *MIMA v Yusuf* (2001) 206 CLR 323.

<sup>85</sup> *MIMA v Yusuf* (2001) 206 CLR 323 at [55], referring to *Chan v MIEA* (1989) 169 CLR 379 at 388 and 429–430 and *MIEA v Guo* (1997) 191 CLR 559 at 570. See also *MIMA v Yusuf* (2001) 206 CLR 323 at [94]–[97].

A similar conclusion was reached by Jarrett FM in *SZAOG v MIMIA*, where the Tribunal had found that the applicant genuinely objected to the Chechen conflict and the Russian military methods of dealing with that conflict. It found, however, that while the applicant had those beliefs, there was no independent evidence to suggest that persons who objected to the conflict were treated any differently or that any punishment imposed upon such objectors was enforced in a discriminatory manner. Having regard to the case law, the Court held that those findings were open to the Tribunal and that on that basis the applicant could not succeed.<sup>86</sup>

In *MIMA v Applicant M*, the Full Federal Court held that the Tribunal was not obliged to consider whether the applicant would be 'singled out from other objectors to conscription on the basis that he was a conscientious objector and thus held a political opinion for which he would be persecuted' when the applicant had never suggested that he articulated or demonstrated any principled opposition to conscription so that a political opinion might be imputed to him, and there was no evidence that the applicant would have a political opinion attributed to him.<sup>87</sup>

In *NAEU of 2002 v MIMIA*, the Full Federal Court agreed with the primary judge that lawful punishment for desertion from the Sri Lankan police force, where the applicant's desertion was subjectively motivated, in part, by his political opinion, did not establish refugee status where there was no evidence that the desertion was or would be objectively considered by the Sri Lankan authorities as an expression of political opinion.<sup>88</sup> The Court held that the applicant must establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion:

[I]t is not sufficient ... that the appellant need only establish that there was a fear of harm and a Convention reason (in this case, his political opinion) for that harm to qualify for protection under the Convention. The appellant was also required to establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion. ...

Counsel for the appellant, correctly in my view, conceded that the act of desertion per se is politically neutral, that is, no inference of any particular political opinion should be drawn from it. Thus, to establish that the appellant was a person to whom Australia owed protection obligations, it was necessary for the appellant to point to evidence that would establish that any punishment for his desertion would be exacted, in part or in whole, because of his political opinion. This required that there be material showing that the Sri Lankan authorities (the alleged persecutors) were aware of the applicant's claimed political opinion or had imputed such an opinion to him. There simply is no evidence to support the existence of such knowledge or imputation. ...<sup>89</sup>

<sup>86</sup> *SZAOG v MIMIA* [2004] FMCA 125. This decision was the subject of appeal in *SZAOG v MIMIA* [2004] FCAFC 316. While the majority dismissed the appeal, the Full Court seems to have taken a broader view than that taken by Jarrett FM at first instance of the circumstances in which punishment for conscientious objection might constitute persecution. The Full Court's decision is discussed briefly below.

<sup>87</sup> *MIMA v Applicant M* [2002] FCAFC 253. Note that the Court's reasoning on membership of a particular social group is no longer good law in light of the High Court's decision in *Applicant S v MIMA* (2004) 217 CLR 387.

<sup>88</sup> *NAEU of 2002 v MIMIA* [2002] FCAFC 259.

<sup>89</sup> *NAEU of 2002 v MIMIA* [2002] FCAFC 259 at [14]–[15]. See also *SZAHQ v MIMIA* [2004] FCA 953 at [23] and *VCAI and VCAJ v MIMIA* [2004] FMCA 443. In *NACM of 2002 v MIMIA* (2003) 134 FCR 550 Madgwick J doubted the correctness of his decision in *NAEU of 2002 v MIMIA* on this issue, suggesting that rather than asking whether the motivation of the persecutor is the applicant's actual or perceived political opinion, the relevant question should be whether the applicant's actual or perceived political opinion accounts for the feared persecution. However his Honour declined, as a single judge, to give effect to his doubts.

Nevertheless, there are cases that lend some support to a broader approach which emphasises the motivation of the conscientious objector rather than the claimed persecutor, and the differential *impact* of the application of generally applicable laws. This approach was first expressed in *Applicant N403 of 2000 v MIMA*, where Hill J stated:

The draft laws as implemented in Australia during the Vietnam War permitted those with real conscientious objections to serve, not in the military forces, but rather in non-combatant roles. Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the conscientious belief, which could be political opinion, not merely the failure to comply with a law of general application. It is, however, essential that an applicant have a real, not a simulated belief.<sup>90</sup>

Similarly, in *Erduran v MIMA*, Gray J held that when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application:

It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, *even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason.*<sup>91</sup> (emphasis added)

His Honour adopted a similar approach in *Applicant VEAZ of 2002 v MIMIA*, concluding in that case that the Tribunal erred in treating Turkish laws relating to national service as laws of general application. His Honour stated:

The Tribunal seems to have assumed that, because a law of general application applied to all Turkish citizens, regardless of their ethnic origins, it could not result in persecution of any such citizen for a Convention-related reason. It was made clear in *Wang v Minister for Immigration and Multicultural Affairs*

<sup>90</sup> *Applicant N403 of 2000 v MIMA* [2000] FCA 1088 at [23].

<sup>91</sup> *Erduran v MIMA* (2002) 122 FCR 150 at [28] referring to *Wang v MIMA* (2000) 105 FCR 548 at [65]. The judgment was subsequently set aside on appeal. However, in allowing the Minister's appeal, the Full Federal Court did not directly deal with his Honour's discussion of Convention nexus: *MIMIA v VFAI of 2002* [2002] FCAFC 374. In *EOC20 v MICMSMA* [2021] FedCFamC2G 297, a case which concerned the codified refugee definition (applicable to post 16 December 2014 applications), the Court's findings at [43]–[46] reflect a continuing application of what it referred to as the '*Erduran* principle' in circumstances where an applicant claims to have refused to undergo compulsory military service because of a particular belief or opinion, and to fear serious harm because of the refusal to undergo service. In *EOC20*, the reviewer accepted there was a real chance the applicant would be punished with a term of imprisonment for military desertion but found this would not be for one or more of the reasons in s 5J(1)(a) which requires that a person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The Court held that the reviewer should have considered if the reason the applicant deserted the Iranian army could constitute a 'Convention' reason and, if so, whether punishment under laws governing desertion would constitute serious harm within the meaning of s 5J(4). However, as with other judgments applying *Erduran*, the Court did not consider the effect of legislative changes since *Erduran*, including the introduction of the qualifications to persecution in s 5J(4) (or s 91R(1) for pre 16 December 2014 applications). See further discussion [below](#).

[2000] FCA 1599 (2000) 105 FCR 548 at [63] and [65] per Merkel J, that the equal application of the law to all persons may impact differently on some of those persons. The result of the different impact might be such as to amount to persecution for a Convention reason.<sup>92</sup>

In *VCAD v MIMIA*, Gray J's analysis in *Erduran* was accepted by both parties as correct, and accepted by the Court in the absence of argument to the contrary. Accordingly, the Court held that the Tribunal had proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. Justice Kenny held that this was 'plainly erroneous', adding that there may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason.<sup>93</sup>

In *SZAOG v MIMIA*, Emmett J (Beaumont J agreeing) expressed the opinion, consistently with Gray J's opinion in *Erduran*, that:

[w]hile it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or a religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason.<sup>94</sup>

Referring to *Erduran* and *Israeli's case*, Gordon J in *MZYTT v MIAC*, concluded that consideration of whether a refusal to do military service gives rise to protection obligations requires a two-step inquiry, namely:

1. what is the applicant's reason for his or her refusal to do military service (ie, is the applicant a "conscientious objector" or a member of some other group holding beliefs against compulsory military service)?; and
2. what are the consequences for a failure or refusal to complete military service (ie, can the applicant demonstrate a well founded fear of persecution by reason of his or her membership of that group)?<sup>95</sup>

While the law on this issue remains somewhat unsettled,<sup>96</sup> the approach identified in *N403*,<sup>97</sup> *Erduran*<sup>98</sup> and subsequent cases appears to be contrary to High Court authority on the

<sup>92</sup> *Applicant VEAZ of 2002 v MIMIA* [2003] FCA 1033 at [26]. See also *Okere v MIMA* (1999) 87 FCR 112. In relation to *Wang v MIMA*, as Madgwick J pointed out in *NAEU of 2002 v MIMIA* [2002] FCAFC 259 at [18], that case involved a law that was itself persecutory (the law made practising in an unregistered church in China a crime).

<sup>93</sup> *VCAD v MIMIA* [2004] FCA 1005 at [31]–[35]. On appeal in *VCAD v MIMIA* [2005] FCAFC 1, Gray J followed his earlier decision in *Erduran*, finding that Kenny J in *VCAD* was correct in this approach: at [25]; Sundberg and North JJ did not address the issue. Justice Kenny's approach was followed and the same error identified in *VWPZ v MIMIA* [2005] FMCA 1552; see also *SZMFJ v MIAC (No 2)* [2009] FCA 95. In *SZMFJ v MIAC* [2009] FMCA 771 at [188] it was held that the 'test' in *Erduran* was not relevant where the Tribunal had rejected the applicant's claims to be a conscientious objector; see also *AZAAB v MIAC* [2008] FMCA 1380.

<sup>94</sup> *SZAOG v MIMIA* [2004] FCAFC 316 at [46]. The majority of the Full Federal Court held that there was no error in the Tribunal's failure to address this issue, as it had not been part of the applicant's case. Justice North, dissenting, held that the applicant had made a conscientious objection claim on the basis that he objected to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses, and that the Tribunal erred in failing to deal with the issue.

<sup>95</sup> *MZYTT v MIAC* [2013] FCA 76 at [25]. Note that the Court's acceptance of the decision-maker's finding that the consequences faced by the appellant would be the result of the operation of a "law of general application", and therefore not persecutory (at [28]) suggest that consistently with *Israeli's case*, the Court nevertheless considered the motivation of the persecutor to be paramount.

<sup>96</sup> As North J observed in *SZAOG v MIMIA* [2004] FCAFC 316 at [19], declining to express an opinion on the issue.

meaning of ‘for reasons of’ in the Convention definition.<sup>99</sup> While the reason for the claimant avoiding military service may be relevant to determining whether punishment is attributable to a Convention reason (such as religion or political opinion), it would be contrary to established authority for it to be the sole determining factor, irrespective of whether the law is enforced in a discriminatory manner for a Convention reason.

Further, a test that focuses on discriminatory *impact* would appear to be inapplicable in the context of s 91R(1)(c) of the Act for pre 16 December 2014 applications, and s 5J(4)(c) for post 16 December 2014 applications, which require that the persecution involve systematic and discriminatory *conduct*.<sup>100</sup>

In any event, assuming that the discriminatory (and severity) element is made out in the context of generally applicable conscription laws, it will still be necessary to consider whether the discriminatory treatment involved is ‘appropriate and adapted to achieving some legitimate object of the country [concerned]’.<sup>101</sup> As was stated in *Applicant S v MIMA*, the objective of a conscription policy is, generally speaking, an entirely legitimate national objective. However, where the type of military action in which an applicant does not wish to be involved is contrary to international law, discriminatory punishment for desertion or draft evasion could be regarded as persecution, for the reason that enforcement of the law in those circumstances may not be appropriate and adapted to achieving a legitimate national objective.<sup>102</sup>

A more difficult question arises where under the non-discriminatory application of a law of general application, a person is obliged to render military service in a conflict in which they will or might be forced to engage in human rights abuses or breaches of international humanitarian law, such as reflected in the Geneva Conventions or Nuremberg Principles.

The House of Lords judgment of *Sepet v SSHD* stated in *obiter dicta* that:

There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community...<sup>103</sup>

<sup>97</sup> *Applicant N403 of 2000 v MIMA* [2000] FCA 1088.

<sup>98</sup> *Erduran v MIMA* (2002) 122 FCR 150.

<sup>99</sup> In particular, *Applicant A v MIEA* (1997) 190 CLR 225 at 240–242, 258, 284; see *SZDJQ and SZDJR v MIMIA* [2006] FCA 533 at [40]. In *Sepet v SSHD* [2003] 1 WLR 856, Lord Bingham of Cornhill mentioned *Erduran v MIMA* (2002) 122 FCR 150, commenting that that case did not sit altogether comfortably with the decision of the majority of the High Court in *MIMA v Yusuf* (2001) 206 CLR 323: at [17]. Consistently with High Court authority, his Lordship emphasised at [21]–[23] that the reason must be the reason which operates in the mind of the persecutor. For detailed discussion of Convention nexus, see [Chapter 5 – Refugee grounds and nexus](#).

<sup>100</sup> The Tribunal decisions considered in *Erduran v MIMA* (2002) 122 FCR 150 and *Applicant N403 of 2000 v MIMA* [2000] FCA 1088 were not subject to s 91R of the Act, introduced by *Migration Legislation Amendment Act (No 6) 2001* (Cth), which commenced 1 October 2001. The Tribunal decisions considered in *NAEU of 2002 v MIMIA* [2002] FCAFC 259, *Applicant VEAZ of 2002 v MIMIA* [2003] FCA 1033, *VCAD v MIMIA* [2004] FCA 1005, *SZAOG v MIMIA* [2004] FCAFC 316, *VWPZ v MIMIA* [2005] FMCA 1552 and *SZMFJ v MIAC (No 2)* [2009] FCA 95 were subject to s 91R, and in *EOC20 v MICMSMA* [2021] FedCFamC2G 297 the decision was subject to s 5J (as part of the codified refugee definition in ss 5H and 5J–5LA), but the effect of those provisions on this issue was not considered.

<sup>101</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [27]–[28]. On the ‘legitimacy’ threshold, see [above](#).

<sup>102</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [47]–[48]. See *SZAIC v MIMIA* [2004] FMCA 103.

<sup>103</sup> *Sepet v SSHD* [2003] 1 WLR 856 at [8], referring to *Zolfagharkhani v Canada* (MEI) [1993] FC 540; *Ciric v Canada* (MEI) [1994] 2 FC 65; *Canas-Segovia v INS* (1990) 902 F 2d 717, and the UNHCR *Handbook*, above n 18 at [169], [171]. Lord Bingham’s judgment elsewhere emphasises the Convention nexus requirement, but appears to consider the circumstances set out in the passage quoted as arguably falling within a separate category. The issue was not considered further, as the

This passage has been referred to in two Australian cases involving claims relating to the Chechen war. In both cases the Tribunal had rejected the claims on the basis that military service in Russia resulted from a law of general application, and there was no evidence that the law was applied in a discriminatory way against the applicant. In *SZAIC v MIMIA* Raphael FM held that punishment for refusing to be conscripted into a military force that is likely to require the applicant to breach the Nuremberg Principles *could* constitute persecution for a Convention reason and that this was a matter the Tribunal was required to consider.<sup>104</sup> A similar conclusion was reached by North J in his dissenting judgment in *SZAOG v MIMIA*.<sup>105</sup> His Honour held that the Tribunal had erred by failing to address the applicant's conscientious objection claim on the basis that he objected to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses.

The concept of objection to a particular war as a basis for recognition as a Convention refugee has been considered in several Canadian cases.<sup>106</sup> In those cases it has been referred to as 'partial' objection. While acknowledging that conscientious objection of itself will not bring a person within the Convention and that there is no internationally recognised right to object to a particular war, the Canadian cases recognise an exception to this in the circumstances identified in paragraph 171 of the UNHCR Handbook. The exception is that where an applicant objects to the military service because of political, religious or moral convictions or for sincere reasons of conscience *and* there is objective evidence that the military action with which the person does not wish to be associated is condemned by the international community as contrary to the basic rules of human conduct, the applicant could be considered a Convention refugee.<sup>107</sup>

While the approach taken in Canadian cases and the view expressed in *Sepet* would seem to be consistent with the purpose and overall framework of the Convention, including in particular the exclusion clauses in art 1F,<sup>108</sup> the circumstances in which non-discriminatory application of conscription laws could constitute persecution within the meaning of art 1A(2) as qualified by s 91R of the Act remain unclear.<sup>109</sup>

The joint judgment in *Applicant S* suggests that, given the nature of the Convention, the notion of a 'law of general application' may involve consideration as to whether a law that

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applicants could not, on the facts as found, bring themselves within that category.

<sup>104</sup> *SZAIC v MIMIA* [2004] FMCA 103.

<sup>105</sup> *SZAOG v MIMIA* [2004] FCAFC 316.

<sup>106</sup> *Zolfagharkhani v Canada* (MEI) [1993] 3 FC 540 (Court of Appeal); *Hinzman v Canada (Minister of Citizenship and Immigration)* 2006 FC 420; *Lebedev v Canada (Minister of Citizenship and Immigration)* 2007 FC 728. In *Lebedev*, Justice de Montigny reviewed jurisprudence in Canada and other countries, including *Sepet*, on military service evasion as a ground for refugee protection.

<sup>107</sup> *Lebedev v Canada (Minister of Citizenship and Immigration)* 2007 FC 728 at [51]–[82]. It includes discussion of what would be necessary to constitute international condemnation of the relevant kind. The analysis in *Lebedev* and *Hinzman* relies heavily on interpretation of paragraphs 170 and 171 of the UNHCR *Handbook*, above n 18, in conjunction with the views of academic scholars and the interaction between arts 1A(2) and 1F, rather than deriving from the language of the Convention definition itself. The consideration of the issue also occurs in the context of the relevant legislation, the Immigration and Refugee Protection Act, SC 2001.

<sup>108</sup> See *Krotov v SSHD* [2004] 1 WLR 1825. Article 1F is discussed in [Chapter 7 – Exclusion and cessation](#).

<sup>109</sup> Note that regardless of the position under the Convention, persecution under s 91R(1)(c) necessarily involves discriminatory conduct. Unfortunately, while the Tribunal decisions in *SZAIC* and *SZAOG* were both made after the introduction of s 91R, in neither case did their Honours discuss the question of Convention nexus in relation to the issue as to whether the non-discriminatory application of a law of general application could constitute persecution in certain circumstances.

offends the standards of civil societies may not be deserving of recognition as a law at all.<sup>110</sup> On that view, conscription laws that offend the standards of civil societies by, for example, requiring a person to commit gross human rights abuses may fall outside the concept of 'laws of general application' in the relevant sense. If so, claims relating to military conscription in cases of this kind may require a different kind of analysis.

### 'Value-laden' laws

In a number of cases relating to religion it has been held that the mere fact that a law of general application may reflect some religious value does not necessarily mean it is persecutory within the meaning of the Convention. To come within the Convention it still needs to be shown that the law, no matter how harsh, discriminates for a Convention reason.

In *MIMA v Darboy* the applicant had claimed that the enforcement of an Iranian law which criminalised adultery amounted to persecution for reasons of religion because the law had its origins in Islamic law. The Federal Court referred to the following passage from the High Court's judgment in *The Church of the New Faith*:

The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. ... Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.<sup>111</sup>

The Federal Court held that if the harm feared arose out of the application of a law of general application then, notwithstanding that the law may have its origin in religious tenets, the Tribunal must ascertain whether the law is applied in a discriminatory manner so as to constitute persecution. The Court stated:

It appears the Tribunal was proceeding on the basis that [the law whose operation the applicant would be exposed to if he was to return to Iran] was a law of general application notwithstanding its genesis in Islamic law and even if it was given effect to by judges who were also clerics. Given that it was a law of general application it was necessary for the Tribunal to inquire whether sanctions arising from the operation of the law applied generally and not in a way that was discriminatory. That is, in a way that would constitute persecution.<sup>112</sup>

The reasoning in *Darboy* was applied in *Lama v MIMA*, where the applicant had claimed to fear persecution for his religion in Nepal because he had contravened a Hindu-based law against killing cows. Justice Tamberlin held that it was open to the Tribunal to find that the law did not selectively punish the applicant as a non-Hindu. His Honour stated:

... it is apparent that the laws of a nation, both legislative and judicial, to a large extent reflect the values of

<sup>110</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [46], referring to *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 954, *Oppenheimer v Cattermole* [1976] AC 249 at 282–283 and *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1101–1102.

<sup>111</sup> *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1982-1983) 154 CLR 120 at 135–136.

<sup>112</sup> *MIMA v Darboy* (1998) 52 ALD 44 at 52.



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.<sup>113</sup>

Similarly, Lindgren J in *AA v MIMA* found there was no suggestion an anti-pornography law in Iran, despite expressing Islamic values, was intended to impose the religion of Islam itself on non-Muslims.<sup>114</sup> His Honour stated:

The law in question, like the anti-bovicide law in *Lama*, was directed against acts inconsistent with the religion of that theocratic society. It would apply indiscriminately to, for example, a Christian within the territorial boundaries of Iran, but not because that person was a Christian, and there would be no attempt to proselytise that person, whether or not he or she complied with the law.<sup>115</sup>

Likewise, in *MZZHY v MIBP*, the Court found no error in the Reviewer's findings that even though laws about tattooing and Islamic dress code in Iran sought to promulgate Islamic values, they were generally applicable laws governing the act of offending a moral or religious value in public, and were not enforced in a discriminatory manner in that instance.<sup>116</sup>

In *SZVYD v MIBP* it was argued that the Tribunal had misdirected itself regarding the object of a Bangladeshi law prohibiting alcohol consumption by Muslims, as it was one which essentially effected Sharia law and therefore was not legitimate. In rejecting this argument, the Federal Court held that:

The values informing the law in question are not to be dismissed as illegitimate because they may not reflect values in Australia...How one society controls or regulates the use of one drug or another, or regulates social behaviour (unless striking at fundamental human rights), is a matter for it.<sup>117</sup>

## Positive discrimination

It is unlikely that positive discrimination in favour of one group will amount to persecution of another group. In *Gunaseelan v MIMA*, French J expressed the opinion that:

... the establishment of a state policy of positive discrimination in favour of a particular ethnic group will not necessarily amount to persecution of other groups not the beneficiaries of that policy. The resolution of that question may depend, in each case, upon the nature and extent of the adverse or detrimental impact

<sup>113</sup> *Lama v MIMA* [1999] FCA 918 at [29]. See also *SZDNE v MIMIA* [2004] FMCA 717.

<sup>114</sup> *AA v MIMA* [2000] FCA 13.

<sup>115</sup> *AA v MIMA* [2000] FCA 13 at [64].

<sup>116</sup> *MZZHY v MIBP* [2013] FCCA 1246 at [18]–[22], [28]–[34]. See also *MZZTW v MIBP* [2014] FCCA 2083, where the Court accepted a submission that a law with respect to Islamic dress that patently sought to promulgate Islamic value in Iranian society applied to all Iranians and did not constitute persecution: at [62] (judgment upheld on appeal in *MZZTW v MIBP* [2015] FCA 475).

<sup>117</sup> *SZVYD v MIBP* [2019] FCA 648 at [14].

of the policy upon the non-advantaged groups.<sup>118</sup>

In light of *Applicant S v MIMA*,<sup>119</sup> the resolution of the question as to whether positive discrimination in favour of a group amounts to persecution of another group will also depend upon whether the discrimination is appropriate and adapted to achieving a legitimate government objective.

## Denial of the right to return / expulsion

In some circumstances expulsion from, or the denial of a right to return to, a country may amount to persecution. This issue may need to be considered if an applicant claims refugee status on this basis, or if the issue fairly arises on the facts. Questions of degree and fact will be involved in considering the question. Whether or not the asylum seeker is a national of the country in question will also be relevant to whether any expulsion or denial of a right to return can be considered persecutory.

There is little case law on this issue and what exists is of limited assistance. In *Diatlov v MIMA* the Federal Court indicated a stateless person's inability to return to a country of former habitual residence will not amount to persecution, Sackville J stating that:

on the authorities, whatever significance the applicant's possible inability to return to [the country of former habitual residence] may have for the application of the *Stateless Persons Convention*, it does not enable him to satisfy the definition of "refugee" in article 1A(2) of the *Refugees Convention*.<sup>120</sup>

In *DZABG v MIAC*, applying *Diatlov*, the Federal Magistrate observed:

it would be erroneous for an individual's subsequently arising statelessness to be regarded as adding to his disadvantageous circumstances such that he or she could be regarded as a refugee rather than as a stateless person.<sup>121</sup>

Different considerations arise, however, where the relevant fear is of expulsion from, or denial of a right to return to, the applicant's country of nationality. That issue arose in *Tesfamichael v MIMA*, where the Federal Court held that expulsion of a person from his or her country of nationality would 'fall within the category of harm sufficient to constitute persecution'.<sup>122</sup>

Disabilities such as expulsion from or the loss or lack of a right to return to a country should be considered according to the usual criteria for determining persecution, that is, whether or not in the particular case it amounts to serious harm imposed for a Convention reason, and whether or not it is appropriate and adapted to achieving a legitimate government object.

<sup>118</sup> *Gunaseelan v MIMA* (1997) 49 ALD 594 at 601.

<sup>119</sup> *Applicant S v MIMA* (2004) 217 CLR 387.

<sup>120</sup> *Diatlov v MIMA* [1999] FCA 468 at [40]. Following *Diatlov*, the Federal Circuit Court stated in *BZADW v MIAC* [2013] FCCA 1229 that 'the inability to re-enter a country where a person was habitually resident because that person has no right of entry does not, without more, constitute persecution': at [71]; upheld on appeal in *BZADW v MIBP* [2014] FCA 541.

<sup>121</sup> *DZABG v MIAC* [2012] FMCA 36 at [132] (undisturbed on appeal: *DZABG v MIAC* [2012] FCA 827). The Court further commented at [137] that it is unnecessary to consider the circumstances an individual may face because of his or her statelessness which might arise upon his or her return as a consequence of the absence of any necessary documents such as a passport. The Court also observed at [135] that, although statelessness may be a significant disadvantage, the absence of nationality per se is insufficient to satisfy the requirements for protection.

<sup>122</sup> *Tesfamichael v MIMA* [1999] FCA 1661 at [54].

It may be noted, however, that cases where an applicant has a well-founded fear of expulsion from his or her country of nationality, or even claims to have such a fear, are likely to be rare. Conversely, it will rarely be the case that inability to return to a country of former habitual residence will be persecution for a Convention reason, as distinct from application of non-discriminatory and generally applicable migration laws. As with all claims, a Convention reason will need to be established to bring the expulsion and/or lack of right to return to a country within the Convention.

## Self expression and suppression of opinions, beliefs and identity

Frequently, when considering whether a fear of persecution is well-founded, questions may arise as to the consequences of activity that an applicant claims he or she will pursue in the future (for example religious or political activity, or publically acknowledging their sexuality). Resolution of such questions will usually require a finding as to whether the applicant will in fact engage in the activity in question.<sup>123</sup> In considering this factual question, it is important to bear in mind that asylum seekers are not required, and cannot be expected, to take reasonable steps to avoid persecutory harm, or to live 'discreetly' to avoid such harm.<sup>124</sup> If, when considering what the applicant will do in the future, the decision-maker finds that an applicant has lived or would in fact live discreetly, it will generally be necessary to consider why, and in particular, whether the 'discreet' behaviour was or would be the result of fear of harm. If the decision-maker finds that an applicant has acted or will act discreetly in order to avoid harm, then it will be necessary to consider whether the fear is well-founded and is a fear of persecution. This in turn would require consideration of what might happen to the applicant if he or she does not act discreetly.

In *Appellant S395/2002 v MIMA* the Tribunal had found that the applicants were homosexuals, that homosexual men in Bangladesh were a particular social group, and that such people could not live openly without facing a range of problems including, for example, the possibility of being bashed by the police. However, it found that the applicants had lived discreetly without experiencing any more than minor problems with anyone outside their own families and that they would live discreetly in the future if returned to Bangladesh. Consequently, they would not suffer serious harm and therefore did not have a well-founded fear of persecution. By majority,<sup>125</sup> the Court held that the Tribunal had erred by failing to consider whether the need to act discreetly to avoid the threat of serious harm constituted persecution, and further, by failing to consider whether the appellants might suffer serious harm if members of the Bangladesh community discovered that they were homosexuals. Justices McHugh and Kirby explained the error in this way:

In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of

<sup>123</sup> For example, in *ADZ16 v MIBP* [2016] FCCA 3246 the Court held that the Tribunal erred in considering what the applicant should, rather than would, do upon return to their home country (at [19]–[21]). In that case, the Tribunal had found there was no particular reason why the applicant should not comply with a law of Iran rather than consider what would happen if he did or did not.

<sup>124</sup> In *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, McHugh and Kirby JJ held that in so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed: at [50].

<sup>125</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh, Kirby, Gummow and Hayne JJ, with Gleeson CJ, Callinan and Heydon JJ dissenting essentially because of their different view of the case the appellants had sought to make.

fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.<sup>126</sup>

Their Honours held that the Tribunal had failed to give proper attention to what might happen to the appellants if they lived openly in the same way as heterosexual people in Bangladesh live. If the Tribunal had found that their fear of discrimination had caused them to be discreet in the past, it would have been necessary then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants if they lived openly as homosexuals.<sup>127</sup>

According to Gummow and Hayne JJ:

The Tribunal did not ask *why* the appellants would live “discreetly”. It did not ask whether the appellants would live “discreetly” because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. ... It did not consider whether the adverse consequences to which it referred sufficed to make the appellants’ fears well founded. All that was said was that they would live discreetly.<sup>128</sup>

Although there are subtle differences in the analyses in the two joint majority judgments in S395, the unifying principle underlying those judgments is that asylum seekers are not required, nor can they be expected, to take reasonable steps to avoid persecutory harm.<sup>129</sup>

While that case involved membership of a particular social group, it is clear that the principle is equally applicable to each of the Convention grounds. Justices McHugh and Kirby explained that:

[t]he Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a “particular social group” if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.<sup>130</sup>

<sup>126</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [43].

<sup>127</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [51]–[53]. For discussion of the assessment of claims relating to sexual identity, see UNHCR, *Guidelines on International Protection No 9, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (UNHCR, 23 October 2012). Note, however, that the Guidelines are non-binding and should not be taken to be determinative of any question of interpretation of the Refugees Convention.

<sup>128</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [88].

<sup>129</sup> *VFAC v MIMIA* [2004] FCA 367 at [32]. The discreet or modified behaviour to which the principle in S395 applies is that of the visa applicant, and not of someone else: *MZAJR v MIBP* [2016] FCCA 1787 at [143].

<sup>130</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [40], [80].

The Federal Court has emphasised that, on the reasoning of the High Court in *S395*, the harm in question is the *threat* of persecution, rather than the impact of repressed behaviour.<sup>131</sup> The principle in *S395* has been judicially considered and applied in relation to religion,<sup>132</sup> political opinion,<sup>133</sup> ethnicity,<sup>134</sup> and membership of a particular social group.<sup>135</sup> The fear of persecution for a Convention reason need not be the sole reason for the discreet behaviour.<sup>136</sup>

The cases make it clear that the outcome will depend upon the factual findings in relation to all the circumstances, including the applicant's particular circumstances in light of conditions in his or her country.

For example, in *SZACV v MIMIA* the Tribunal found that the applicant was probably a Falun Gong practitioner and may have been picked up by the police, but that he was of no adverse interest to the Public Security Bureau in China. It then relied on country information to conclude that 'there is nothing prohibiting the applicant from returning to China and practising his beliefs on a private basis'. The Court held that that was the answer to the question 'Could the applicant live in that country without attracting adverse consequences?' which was identified as the wrong question by Gummow and Hayne JJ in *S395*.<sup>137</sup>

On the other hand, in *SZASI v MIMIA* the Court found that the Tribunal did not err in finding that, if the applicant continued as a Falun Gong practitioner in China, he would continue to act in the same 'low and discreet' manner as before, and would not come to the adverse attention of the Chinese authorities. The Court held that this did not involve the kind of error identified in *S395*, as the Tribunal's conclusion was based on its finding that the applicant's

<sup>131</sup> *SZTFI v MIBP* (2015) 231 FCR 222 at [72].

<sup>132</sup> See for example *VFAC v MIMIA* [2004] FCA 367; *NASJ v MIMIA* [2005] FMCA 124; and *SZRG v MIAC* [2012] FMCA 1222 at [66], [71], in which Nicholls FM held that following *S395/2002 v MIMA*, the Tribunal was required to consider: whether charitable acts undertaken by the applicant were expressions of his Alevi faith, as claimed; whether the reduction of such activities upon return to Turkey was because of the persecution faced; and what may happen to the applicant on return if he resumed the same level of charitable activities. In *SZTML v MIBP* [2014] FCCA 2664, the Court held that in light of the applicant's claim that as a Mormon he was required to preach, the Tribunal was required to consider whether he intended to proselytise and if so, whether there was a real chance he would suffer serious harm for doing so. The Tribunal instead assumed that the applicant would not or could not proselytise because of an agreement between the Mormon Church and Chinese government, and assessed the harm he might suffer as an inability to proselytise, not what the Chinese government might do to him if he proselytised: at [18]–[24].

<sup>133</sup> See for example *NAJO v MIMIA* [2004] FCA 356; *SZBQV v MIMIA* [2004] FMCA 366 and on appeal *SZBQV v MIMIA* [2004] FCA 1242; *VJAD v MIMIA* [2004] FCA 468, *NAHW v MIMIA* [2004] FCA 399, *NALZ v MIMIA* (2004) 140 FCR 270, *SZDRB v MIMIA* [2005] FMCA 10, *SZBEU v MIMIA* [2005] FMCA 642 at [24], *S1292 of 2003 v MIMIA* [2005] FMCA 241 and *VWSR v MIMIA* [2005] FMCA 977.

<sup>134</sup> *SZBKQ v MIMIA (No 2)* [2005] FMCA 717. In that case the Tribunal was held to have erred in dealing with the issue of relocation, by expecting the applicant to conceal her (Roma) ethnicity through relocation.

<sup>135</sup> See for example homosexuals: *SZAHV v MIMIA* [2004] FMCA 28 and *SZAOD v MIMIA* [2004] FMCA 89; people with HIV: *SZQUP v MIAC* [2012] FMCA 276; and Falun Gong practitioners in China: *NANU v MIMIA* [2004] FMCA 25; *SZASI v MIMIA* [2004] FMCA 339; *SZACV v MIMIA* [2004] FCA 469; and *NAEB v MIMIA* [2004] FCAFC 79. Falun Gong is also sometimes considered under the Convention grounds of religion and political opinion.

<sup>136</sup> In *MZZMA v MIBP* [2015] FCCA 125, the Court held that the assessor applied the wrong test in finding that the applicant would not 'necessarily' be politically active in future because of his political resentment, and that his inactivity would not be 'solely' because of a fear of persecution: at [22]–[30]. The reasoning suggests that there is no requirement when applying the principle in *S395* that the fear of persecution must be the sole reason for the discreet conduct. It also suggests that it is important to bear in mind the 'real chance' test for a well-founded fear, which does not require certainty about the future conduct.

<sup>137</sup> *SZACV v MIMIA* [2004] FCA 469. Other cases in which errors of the kind identified in *S395* have occurred include *VFAC v MIMIA* [2004] FCA 367, *SZAHV v MIMIA* [2004] FMCA 28, *NAHW v MIMIA* [2004] FCA 399; *VWSR v MIMIA* [2005] FMCA 977; *SZAPC v MIMIA* [2005] FCA 995; *SZCCS v MIMIA* [2005] FMCA 1120; and *SZQUP v MIAC* [2012] FMCA 276 (although the Tribunal's decision was upheld on an independent basis).

discreet behaviour was not due to a threat of persecution but rather a lack of greater commitment.<sup>138</sup>

In *NASJ v MIMIA* the applicant had been harassed in Russia for handing out Scientology leaflets. The Tribunal recognised that restrictions on the right to proselytise may amount to persecution where proselytising is an integral part of practising a religion, but found that proselytising was not an integral part of the practice of Scientology. It found that the applicant could openly practise her religion in Russia and that if she did not hand out leaflets in the future the chance of any further harm would be remote. The Court found no error in the Tribunal's approach. There was no suggestion that the applicant was being required to modify her religious beliefs or opinions, or hide her membership of the Church of Scientology. Thus, the Court regarded it as implicit in the Tribunal findings that if the applicant were to be prosecuted for proselytising this would not be persecution because of her religion.<sup>139</sup>

### Modification of conduct not arising from a Convention-protected attribute

There is a divergence in the case law over whether or not the principles in S395 are engaged where an applicant's claims involve modification of behaviour that is not related to a Convention attribute, where such modification would not of itself be persecutory, or where the harm to be avoided is not persecutory in any event.

A number of judgments of the Federal Court and Federal Circuit Court have held that S395 is not engaged in such circumstances. For example, in *MZYUV v MIAC* the Federal Court held that:

the [Reviewer's] conclusion that the appellant might have to modify his behaviour in order to protect himself, not for a Refugee Convention reason but generally, does not impose a requirement that the appellant is required, or expected, to take reasonable steps to avoid *persecutory* harm. Rather, it is a requirement, or expectation, that the appellant will take reasonable steps to avoid harm generally, which does not offend S395.<sup>140</sup>

Similarly, in *SZSML v MIMAC* the Federal Circuit Court, referring to *MZYUV*, found that the Tribunal will only commit an error of the type identified in S395 where the behavioural

<sup>138</sup> *SZASI v MIMIA* [2004] FMCA 339. See also *SZDRB v MIMIA* [2005] FMCA 10 where the decision maker had accepted that the applicant may have been a member of the Awami League in Bangladesh but found that he was not in danger of being persecuted for that reason alone. While the Court had some concerns regarding the delegate's reasoning that the applicant could remain committed to his political beliefs without resorting to violent activities or being involved in actions which may provoke violence, and avoid being harmed by rival groups by not resorting to provocative acts, the Court held that the delegate did not fall into error, distinguishing S395 on the facts. Importantly, the applicant had not claimed that he had personally engaged in any violent political activities or that he had encouraged anyone else to do so. It may be that in different circumstances, reliance on an applicant avoiding violent activities or activities which may provoke violence could give rise to error of the kind established in S395.

<sup>139</sup> *NASJ v MIMIA* [2005] FMCA 124 at [19]. Similarly, in *MIMIA v VWBA* [2005] FCAFC 175 the majority found no error in the Tribunal finding that the 'restriction' of practising Falun Gong privately did not amount to persecution in the circumstances of the case.

<sup>140</sup> *MZYUV v MIAC* [2013] FCA 498 at [45]. Other cases in which the S395 error has *not* been established include *NANU v MIMIA* [2004] FMCA 25, *NAEB v MIMIA* [2004] FCAFC 79, *SZAOD v MIMIA* [2004] FMCA 89, *NAJO v MIMIA* [2004] FCA 356, *SZBQV v MIMIA* [2004] FMCA 366, upheld on appeal *SZBQV v MIMIA* [2004] FCA 1242, *NAOI v MIMIA* [2003] FMCA 582, not disturbed on appeal *NAOI v MIMIA* [2004] FCA 383, and *VJAD v MIMIA* [2004] FCA 468, *NALZ v MIMIA* (2004) 140 FCR 270 ; *SZDRB v MIMIA* [2005] FMCA 10; *Applicant NABD of 2002 v MIMIA* [2005] HCA 29; *MIMIA v VWBA* [2005] FCAFC 175 and *MZYLY v MIAC* [2011] FMCA 781, upheld on appeal in *MZYLY v MIAC* [2012] FCA 357; *SZTEO v MIBP* [2015] FCCA 2228 (upheld on appeal: *SZTEO v MIBP* (2016) 239 FCR 1).

modification concerns a Convention attribute or otherwise results in Convention persecution.<sup>141</sup> The finding that the applicant may need to modify or change his business practices to avoid particular dangers he feared outside Kabul did not amount to an impermissible behaviour modification as it did not concern any Convention characteristic and there was no suggestion that the modification of business practices would be considered persecutory.<sup>142</sup>

In *SZSZM v MIBP*, the Federal Court accepted the Minister's submission that the principles in S395 only apply to modifications or suggested modifications which involve the surrender of the rights protected by the Convention.<sup>143</sup> The Court referred to the judgment in *NALZ v MIMIA*, which concerned an applicant who claimed that his activities in selling electrical goods to Sri Lankan nationals had brought him to the adverse attention of Indian authorities due to suspected LTTE connections. A majority of the Full Federal Court in that case held that the Tribunal's finding that he could avoid further arrests by not selling electrical goods to Sri Lankans, and that it would not be unreasonable for him to avoid arrest by so doing, was not inconsistent with the principles in S395.<sup>144</sup>

In *SZTEO v MIBP*, the Full Federal Court rejected the appellant's argument that it is not a pre-condition that 'concealment' relates to a Convention reason for the principles in S395 to be engaged, observing that those principles require consideration of whether it is a fear of harm (which must be for a Convention reason) that will influence an asylum seeker to live in a different manner upon return.<sup>145</sup>

<sup>141</sup> *SZSML v MIMAC* [2013] FCCA 1253 at [36]. Similarly, in *SZQKB v MIAC* [2011] FMCA 1000 (undisturbed on appeal: *MIAC v SZQKB* [2012] FCA 1189) at [25] the Court found that the decision-maker's finding that the applicant could avoid persecution by using an alternate but safer route from one town to another, where no claim was made that the more dangerous route would normally be taken for lifestyle reasons, did not amount to 'modification of lifestyle' in the S395 sense. Although the Court's use of the expression 'lifestyle' is ambiguous, its emphasis on the fact that no claim had been made that the more dangerous route would be taken 'for lifestyle reasons' suggests that the Court's reasoning was that it would amount to error of the type identified in S395 to require a person to modify an attribute or behaviour which is related to one of the Convention grounds, but not in respect of modifying their behaviour in a more general sense. See also *MZYOI v MIAC* [2012] FCA 868 at [135]–[136] where the Court rejected a similar argument.

<sup>142</sup> *SZSML v MIMAC* [2013] FCCA 1253 at [34].

<sup>143</sup> *SZSZM v MIBP* [2014] FCA 984.

<sup>144</sup> *NALZ v MIMIA* (2004) 140 FCR 270. Justice Emmett observed that requiring an applicant to relocate to avoid harm did not offend the principle in S395 as it did not involve modifying beliefs or opinions or hiding membership of a particular social group, and noted that in this case the applicant was not expected to cease behaviour that caused the authorities to impute a political opinion to him or to identify him as a member of a particular social group – at most, he was expected to cease behaviour that caused the authorities to impute illegal conduct to him: at [46], [50]. Justice Downes held that a proper claim for protection was not made out as the applicant was not a member of any protected class but was wrongly suspected of being a member, particularly where the applicant could take steps to avoid that perception by choosing not to trade unlawfully: at [58]. Justice Madgwick in dissent expressed the view that the approach taken in S395 cannot be confined to cases of actual as distinct from imputed membership of a Convention class: at [12]. Note, however, that the Full Federal Court has since distinguished *NALZ* on the basis that the reasoning in that case turned on the fact that the activities in which the applicant had engaged were illegal: *MIBP v SZSCA* (2013) 222 FCR 192 at [62]–[91]; though this judgment was overturned on appeal in *MIBP v SZSCA* (2014) 254 CLR 317.

<sup>145</sup> *SZTEO v MIBP* (2016) 239 FCR 1 at [31], though the Court did not need to decide this question because of the Tribunal's findings that the appellant would not be subject to persecution in any case, and any difficulties potentially faced did not relate to a choice to live differently from any fear of harm of any kind: at [24]–[32]. The Court accepted the primary judge's analysis to the effect that if a person with a well-founded fear of being persecuted because of Convention characteristics can take steps to conceal those characteristics, they still have a well-founded fear if the reason for concealing Convention characteristics is the desire to avoid persecution because of those characteristics: at [33]. See also the primary judgment in *SZTEO v MIBP* [2015] FCCA 2228, where the Court rejected the proposition that the S395 principles require the Tribunal to ignore a person's ability to avoid persecution *in general*, finding no error in the Tribunal's finding that the applicant would act in a way to avoid harm on account of his being a documented stateless Faili Kurd, as the activity would not involve concealing that characteristic: at [17]–[18]. The Court held that the S395 principles only apply when a person has the ability to or intends to take action that will conceal their Convention characteristics, for the purpose of avoiding persecution because of those characteristics: at [21].

In *AGU16 v MIBP*, the Federal Court found no error in the Tribunal's finding that the appellant could avoid persecution as a returnee from a Western country by taking steps to conceal his association with Australia, on the basis that the need to take such precautions did not itself amount to persecution.<sup>146</sup>

Aspects of McHugh and Kirby JJ's reasoning in *S395* also suggest that the principle in that case is directed at situations where, in order to avoid harm, a person would be required to modify or conceal an attribute or characteristic that is related to one of the Convention grounds.<sup>147</sup> In *SZATV v MIAC*, Kirby J again emphasised the purpose of the Convention in protecting certain attributes, describing the Convention as denying 'as unreasonable, an "adjustment" that would involve undermining the central purpose of the Refugees Convention of protecting the important, but limited, grounds of "persecution" specified in the Refugees Convention'.<sup>148</sup> Other cases also suggest that not all instances of modifying behaviour to avoid harm will offend the principle in *S395*.<sup>149</sup>

It is apparent from these cases that expecting an applicant to modify their behaviour to avoid being imputed with a Convention attribute will not offend the principle in *S395*, unless it involves the surrender of Convention-protected rights.

In contrast, in *MIBP v SZSCA*, a majority of the Full Federal Court held that there was an *S395*-type error in the Tribunal's reasoning that a truck driver who had been imputed with a political opinion by the Taliban due to his work driving trucks could avoid persecution by changing his occupation.<sup>150</sup> While an appeal by the Minister to the High Court was dismissed,<sup>151</sup> and the majority of the High Court did not address the *S395* principle in detail (finding instead that there was no *S395*-type error), Gageler J held that:

The *S395* principle... directs attention to why the person would or could be expected to hide or change behaviour that is the manifestation of a Convention characteristic. The principle has no application to a person who would or could be expected to hide or change such behaviour in any event for some reason other than a fear of persecution.

The *S395* principle similarly has no application to a person who would or could be expected to hide or change behaviour that is not the manifestation of a Convention characteristic. That is so even if the person would or could be expected to change that behaviour in order to avoid a real chance of

<sup>146</sup> *AGU16 v MIBP* [2017] FCA 441.

<sup>147</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [40]–[43].

<sup>148</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [94]. In that case, the Tribunal had found that the applicant could reasonably relocate to a different area and cease working as a journalist, thereby ceasing publically voicing his political opinions which had led to his persecution. The appellant argued before the High Court that this was in effect requiring him to live 'discreetly', contrary to *S395*. The Court held that the Tribunal had erred, although their Honours' reasoning differed between the judgments.

<sup>149</sup> For example, in *MZZDC v MIMAC* [2013] FCCA 1395 at [20] the Court held that imposing an expectation that the applicant not travel outside of Kabul in order to avoid harm would not amount to modification of the applicant's political or religious beliefs or membership of a social group, and so *S395* would have no application. The Court found that the Tribunal had made a finding as to what the applicant would do in the future, rather than expecting the applicant to modify his behaviour, but that even if the Tribunal had imposed such an expectation, travel outside a city would not offend *S395* as it would not engage the Convention: at [18]–[19]. In *SZSZM v MIAC* [2014] FCCA 741 the Court held any discretion in disclosure of the applicant's criminal record or history of drug abuse would not involve a surrender of fundamental rights of the kind protected by the Refugees Convention categories: at [76]–[77]; upheld on appeal: *SZSZM v MIBP* [2014] FCA 984. See also *AHE18 v MICMA* [2023] FedCFamC2G 239, where the Court held that there was nothing to suggest that the applicant refraining from reclaiming land that was taken from him in Afghanistan was a manifestation of any Convention based characteristic such as to engage the principle in *S395*: at [27].

<sup>150</sup> *MIBP v SZSCA* (2013) 222 FCR 192 at [62]–[91], distinguishing this case from *NALZ v MIMIA* (2004) 140 FCR 270.

<sup>151</sup> The appeal was dismissed, *per curiam*, on the ground that the Tribunal was required to address, but did not, whether it would be reasonable to expect the respondent to remain in, and not drive trucks outside of, Kabul.



persecution by reason of the perpetrators of persecution wrongly imputing a Convention characteristic to the person.<sup>152</sup>

As the majority of the High Court in *SZSCA* decided the matter on a different basis, the judgment of the Full Federal Court does not appear to have been disturbed on appeal, making the law around this point unsettled.<sup>153</sup> Decision-makers should therefore exercise caution in determining that an applicant may avoid persecution by changing their behaviour in a way that does not require modification of a Convention-related attribute. Particular caution should be exercised in cases involving particular social groups, as requiring an applicant to modify an attribute which is central to the characterisation of the group may offend the principle arising from *S395*.<sup>154</sup>

## Claims arising from personal and family relationships

While the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state.<sup>155</sup> However, discrimination that is aimed at a person as an individual *and not for a Convention reason* will not, of itself, bring a person within the Convention definition of a refugee.<sup>156</sup> Further, Australia's protection obligations will not be engaged if the country of nationality has taken 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 system of justice.<sup>157</sup> This does not mean that, simply because the claimant may be the only person subject to the discriminatory conduct, they do not meet the

<sup>152</sup> *MIBP v SZSCA* (2014) 254 CLR 317 at [37]–[38]. This statement was later endorsed by the High Court in *DQU16 v MHA* [2021] HCA 10 at [25], however as that judgment concerned a different question – namely whether the principle in *S395* applies to the complimentary protection criterion – it does not provide clear authority that the *S395* principle does not apply in the context of an applicant who may be imputed with a Convention characteristic.

<sup>153</sup> In *SZTUP v MIBP* [2015] FCCA 963 at [28] and [30], the Court considered whether the judgment of the High Court in *SZSCA* had overturned the reasoning of the Full Federal Court in that case in relation to the *S395* principle. The Court concluded that having decided the case on a different basis, the majority had not overturned that reasoning and nor had Gageler J (given that his Honour departed from the majority on a different basis). The Court therefore concluded, in *obiter*, that it would be an error for the Tribunal to determine that an applicant in that case would be able to sustain himself economically through legal employment without needing to engage in his former business of installing satellite dishes (an illegal activity said to result in an imputed political opinion): at [31].

<sup>154</sup> In *SZATV v MIAC* (2007) 233 CLR 18, Callinan J expressed the view that it is 'too categorical to hold that discretion with respect to membership, or an attribute of a social group, properly defined is a necessarily unreasonable requirement or expectation, or, if it has to be exercised to avoid persecution, will mean in all circumstances that the member is a persecuted person': at [107]. In *DZADC v MIAC (No 2)* [2012] FMCA 778 the Court found that the Reviewer erred by expecting the claimant to take reasonable steps to avoid persecution by changing his profession of hairdresser. The Court held that, having accepted the applicant was a member of the particular social group of Iraqis performing 'un-Islamic' behaviour and following and encouraging Western culture, the Reviewer could not require him to cease to do the very thing that places him within that group so as to avoid persecution. See also *MZXML v MIAC* [2007] FMCA 392, where the *S395* error was identified as not considering whether maintaining secrecy about being an informer in the past in order to avoid serious harm in the future was harm amounting to persecution. No consideration was given as to whether this was suppression of the kind of Convention-related characteristic envisaged by the High Court in *S395*.

<sup>155</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [18].

<sup>156</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 257. For example, in *Kaur v MIMA* [2001] FCA 719 the Tribunal had found that harm experienced by the applicant at the hand of her de facto husband's legal wife and her brothers was due to personal animosity, as distinct from being the result of her caste or for any other Convention reason. The Court stated at [14] that in light of those findings and the observations of McHugh J in *Applicant A*, 'it is readily apparent that where a situation involves conduct that leads to the harm of another, and such conduct is motivated by personal animosity arising from the perceived or alleged victims of an extramarital relationship as distinct from persons who are persecuted for supposed or perceived characteristics, namely their race, religion, political opinion or social group, such conduct does not constitute persecution in the Convention sense'.

<sup>157</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [21], [22], [25]–[29], [110], [115].

Convention definition.<sup>158</sup> Furthermore, there is no special test where the authors of persecution are members of the asylum seeker's family.<sup>159</sup> In each case, all the elements of the Convention definition must be established.

Where claims involve personal relationships, an issue will often arise as to whether there are any Convention related motivating factors for the harm feared or whether an applicant is being targeted as an individual and not for a Convention reason. If there *are* Convention related motivating factors, it will usually be necessary to consider whether the authorities provide a reasonable level of protection against the harm feared.<sup>160</sup> Conversely, if there are *no* Convention related motivating factors, it may be necessary to consider whether there is a failure to protect for a Convention reason.<sup>161</sup>

### Familial rejection and familial pressure to marry

Rejection or ostracism by one's own family would not of itself usually constitute persecution. In *MMM v MIMA* the applicant claimed that his family would disown him if they discovered his homosexuality. The Court held that such treatment could not be regarded as persecution within the meaning of the Convention as it is a purely private matter, and the general standards of civilised countries do not suggest that adults not under a disability have a right to protection when, for private reasons, their families reject them:

Persecution for the purposes of the Convention connotes some official approbation of the feared conduct, or at least official failure or inability to do something about it, when the general standards of civilised countries would entitle the putative refugee to the protection of the State ... There is nothing in such general standards to suggest that adults not under a disability have such an entitlement when, for private reasons, their families reject them.<sup>162</sup>

Clearly, a family's 'private reasons' in a 'purely private matter' may well relate to one or more of the Convention grounds. The point is that familial rejection, for any reason, is not the kind of detriment against which the state can be expected to provide protection. As Madgwick J observed, it is unlikely that any state would accept the responsibility of affording any person in the applicant's shoes either civil redress against his family or other amelioration of such a personal rift.<sup>163</sup>

The applicant in *MMM* also claimed his family would force him to marry and have children in accordance with Bangladeshi society and tradition. The Court held that while the impact of

<sup>158</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 258.

<sup>159</sup> In *Brahmbhatt v MIMA* [2000] FCA 1686 the applicant's case was based on her homosexuality. The Tribunal had found that even if her fears of being killed by her family were well-founded, 'such fear arises not because of an element of motivation on the part of her family members to harm homosexuals, but due to some private reason relating to her family not wishing the applicant to be a homosexual. Consequently there is no, or insufficient, nexus between the harm and the Convention ground'. Referring to *MIMA v Haji Ibrahim* (2000) 204 CLR 1, the Court said that no such gloss on the element of motivation was warranted and that there is no special test where the authors of persecution are members of the asylum claimant's family: 'Whatever may be the scope offered by the Refugees Convention for the protection of the type of human rights asserted by the applicants in this case, any such notion of "private reason" would seem to represent a distraction from applying the text of the Convention definition': at [8].

<sup>160</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1.

<sup>161</sup> *MIMA v Khawar* (2002) 210 CLR 1.

<sup>162</sup> *MMM v MIMA* (1998) 90 FCR 324 at 327 referring to *Applicant A v MIMA* (1997) 190 CLR 225 per Brennan CJ. The Court's reasoning is broadly consistent with the discussion of 'protection' and 'persecution' in the joint judgment of Gleeson CJ with Hayne and Heydon JJ in *MIMA v Respondents S152/2003* (2004) 222 CLR 1.

<sup>163</sup> *MMM v MIMA* (1998) 90 FCR 324 at 327.

familial pressure to marry would be likely to fall harder on an unwilling homosexual man than on an unwilling heterosexual man, it appeared to be correct, as the Tribunal found, that the pressure was nevertheless not exerted for reasons of membership of the social group of homosexuals. In that case it did not appear that the pressure to marry was applied differently as between heterosexuals and homosexuals.<sup>164</sup>

While that case did not involve consideration of the statutory test for persecution as set out in s 91R(1) of the Act, his Honour's reasoning would suggest that familial rejection and familial pressure to marry would be likely to fall well short of the statutory requirements.

### Violence arising from personal relationships

A number of cases have come before the courts involving claims of domestic violence. In these cases, putting aside the question whether there is an appropriate level of state protection from such violence, the primary issue will often be whether the motivation of the aggressor can be attributed to a Convention reason.

For example, in *Basa v MIMA* the applicant feared violence from her former lover. The Tribunal found the harm feared was not for a Convention reason but arose from the applicant's former relationship. Sackville J held that the Tribunal's finding was justified, perhaps inevitable, on the material before it, adding:

The applicant did not face persecution because she was a Filipino woman, but because of the unfortunate circumstances of her relationship with [her former lover] and his apparent propensity for violence.<sup>165</sup>

While providing useful illustrations, this and similar cases dealing with family violence depended on their own facts and are not authority for the proposition that domestic violence can never amount to persecution within the Convention.

In *A v MIMA* the applicant's husband had converted to religion B and wanted the applicant and her children to convert to religion B. He became violent and followed her to another country where he and his co-religionists continued to threaten her. The Full Federal Court upheld a decision of the Tribunal which was based, in part, on a finding that the harm the applicant feared from her husband and his associates was for reasons of religion.<sup>166</sup> A's case illustrates that where domestic violence is motivated by a Convention reason there is no reason in principle why the Convention definition might not be met.

Further, even if the domestic violence was not motivated by a Convention reason, where a state withholds protection for a Convention reason the claim may still be brought within the Convention. In the case of *MIMA v Khawar* the applicant feared harm from her violent husband. The Tribunal found that he was not motivated to harm her for a Convention reason; rather, his reasons for being violent towards her were personal. The applicant had also claimed that the police refused to provide her with protection against her husband's

<sup>164</sup> *MMM v MIMA* (1998) 90 FCR 324 at 327. See also *SZAOD v MIMIA* [2004] FMCA 89 at [15]–[16] and *MIMIA v SZANS* (2005) 141 FCR 586.

<sup>165</sup> *Basa v MIMA* (Federal Court of Australia, Sackville J, 17 July 1998) at 9. See also *Jayawardene v MIMA* [1999] FCA 1577; and *Milosevska v MIMA* [1999] FCA 1414 at [8].

<sup>166</sup> *A v MIMA* [1999] FCA 116.

violence. A majority of the High Court agreed with the primary judge<sup>167</sup> and Full Federal Court<sup>168</sup> that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related.<sup>169</sup>

The members of the High Court gave slightly differing analyses of the relationship between persecution and state protection;<sup>170</sup> however, it is clear that in cases involving serious harm that is not itself Convention related, a decision-maker should consider whether the circumstances of the case give rise to an issue of the discriminatory and systematic withholding of state protection for a Convention reason. Comments by members of the High Court provide some guidance as to the circumstances in which a failure to protect might constitute persecution within the meaning of the Convention. For example, Gleeson CJ considered that it would not be sufficient to show maladministration, incompetence, or ineptitude by local police; but if an applicant could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then the Convention test may be satisfied.<sup>171</sup>

## Criminal conduct

In claims involving fear of criminal conduct, proper consideration should be given to the question as to whether motivation for the conduct involves a Convention ground. The difficulties of such claims are often compounded in circumstances where, for instance, the harm feared is from persons who themselves have some link to a Convention ground, e.g. political guerrilla groups. Claims involving revenge, extortion and corruption often include issues of selectivity that need to be assessed for the requisite Convention nexus. Importantly, there is no dichotomy between criminal activity and persecution on account of political opinion (or another Convention reason). That is, the fact that the harm feared amounts to criminal conduct does not, of itself, prevent such harm being categorised as persecution for reasons of political opinion.<sup>172</sup> Whether it is or not is a matter of fact for the decision maker. But it should not be assumed that characterising conduct as (for example) 'revenge', 'extortion' or 'crime' automatically equates to a finding that the conduct was not for a Convention reason.<sup>173</sup> Further, even if there is no Convention nexus to the criminal conduct feared, a nexus will nonetheless be established where the state withholds protection for a Convention reason.<sup>174</sup>

<sup>167</sup> *Khawar v MIMA* [1999] FCA 1529.

<sup>168</sup> *MIMA v Khawar* (2000) 101 FCR 501.

<sup>169</sup> *MIMA v Khawar* (2002) 210 CLR 1. The majority found that the Tribunal had failed to make the necessary findings with respect to the applicant's membership of a particular social group, the state's failure to protect her, and the reason for that failure. See also the House of Lords decision in *R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 AC 629 which is generally consistent with the High Court's approach.

<sup>170</sup> See [Chapter 4 - Persecution](#).

<sup>171</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [26]; see also Callinan J's comment at [155] that inactivity or inertia of itself does not constitute persecution. The discriminatory withholding of state protection in the context of Convention nexus is discussed further in [Chapter 4 - Persecution](#).

<sup>172</sup> *V v MIMA* (1999) 92 FCR 355 at [17]; *SZEWB v MIAC* [2005] FMCA 1145 at [30]–[31].

<sup>173</sup> Findings as to motivation for persecution should be made in accordance with s 91R(1)(a), i.e. 'essential and significant reason', which is discussed in detail in [Chapter 5 – Refugee grounds and nexus](#).

<sup>174</sup> As per the principle in *MIMA v Khawar* (2002) 210 CLR 1. See for example *SZBZJ v MIMIA* [2005] FCA 771, where the applicant feared that members of a criminal family / gang would seek revenge on him for exposing their criminal drug activities to the authorities. The Court held that the Tribunal erred by failing to consider the claim that he would be denied

## Revenge

Fear of revenge does not come within the scope of the Convention unless it can be shown that the retaliation is linked with a racial, religious or other Convention reason.

For example, in *Magyari v MIMA* the applicant was a passenger in a motor vehicle that was involved in an accident in which a young gypsy boy suffered serious injuries. The applicant feared revenge from the gypsies. The Federal Court held:

[The applicant] has been hounded by the gypsies because of what he, in their perception, has done. They see him as the party, or one of the parties, responsible for the injuries that the child has suffered. The applicant's alleged fear derives from these circumstances which have nothing whatsoever to do with any of the five convention reasons. The gypsies are not concerned with his race, religion or nationality, or with his membership of any social group or with his political opinion. Rather they are concerned to exact some form of retribution from him for what has happened to the child. ... If the applicant has a well founded fear of being persecuted by the gypsies ... the Tribunal was correct in concluding that the fear has no connection with any one of the convention reasons.<sup>175</sup>

*Magyari* is a useful illustration but does not represent authority for the proposition that revenge can never come within the Convention.<sup>176</sup> As the Full Federal Court stated in *MIMA v Abdi*:

Fear of revenge, without more, will normally not be sufficient to amount to persecution for a Convention reason. For example, a fear of revenge for the killing of a member of another group will usually not be sufficient unless it can be shown that the retaliation is linked with a racial, religious or other Convention reason. Of course, if it can be shown to be related to such a purpose then the fear of revenge may well come within the definition.<sup>177</sup>

In *MIMA v Singh*, a case involving the application of art 1F of the Convention, the Tribunal had found that the crime committed by the applicant was an act of revenge for the torture of a member of his group by police, and that there was no direct causal connection between the crime and the political objectives of the group. A majority of the High Court upheld the decision of the Full Federal Court that the Tribunal had erred in drawing the conclusions it did solely from the characterisation of the applicant's crime as 'an act of revenge'.<sup>178</sup> Justice Kirby said:

By accepting an erroneous dichotomy between crimes of revenge and "political crimes", the Tribunal misunderstood the legal criterion which it was obliged to apply. The misunderstanding was highly material to the respondent's case because it excluded from consideration, erroneously, acts which might be *both* political *and* motivated by an element of vengeance.<sup>179</sup> (original emphasis)

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state protection for reasons of his political opinion, being his non pro-Syrian attitude.

<sup>175</sup> *Magyari v MIMA* (Federal Court of Australia, O'Loughlin J, 22 May 1997) at 16–17. *Velmurugu v MIEA* [1996] FCA 1499 provides another example of revenge which was found to be unrelated to a Convention ground.

<sup>176</sup> See for example *Daljit Singh v MIMA* [1999] FCA 1599, where the Court held that revenge may be personal or it may be political: at [35].

<sup>177</sup> *MIMA v Abdi* (1999) 87 FCR 280 at [44].

<sup>178</sup> *MIMA v Singh* (2002) 209 CLR 533 per Gleeson CJ, Gaudron and Kirby JJ (McHugh and Callinan JJ dissenting), upholding the Full Federal Court's judgment in *Singh v MIMA* (2000) 102 FCR 51. Despite his dissenting judgment, Callinan J also agreed with the Full Court that he would not necessarily hold a crime to be non-political simply because it may have been motivated in part by a desire for revenge at [167].

<sup>179</sup> *MIMA v Singh* (2002) 209 CLR 533 at [136]. While that case involved consideration of the concept of 'non-political crime' in art 1F of the Convention, the discussion of 'revenge' is equally relevant to the questions of motivation that arise under art 1A(2).

Again, in *SHKB v MIMIA*, the Federal Court held that the Tribunal had erroneously drawn a dichotomy between Convention grounds and acts of retribution. The applicant had claimed a fear of persecution from Zulus who were angry that coloured families, such as his own, had taken their land from them. The Tribunal found that the reason why persons wished to injure him was to seek retribution for a person who had been killed at the applicant's farm. The Court held that even if the threat was personal to the applicant and even if those making it were motivated by the desire for retribution, that did not preclude a conclusion that the threat was 'for reason of race', as the applicant had claimed.<sup>180</sup>

Similarly, in *SZFZN v MIAC* the Federal Magistrates Court held that the Tribunal erred by failing to explain its paradoxical findings that the applicant's friend's father was not motivated by the applicant's membership of a particular social group (homosexuals), but rather by a desire for personal revenge, despite appearing to accept that the father was compelled by society's hostility to homosexuality when procuring persecution of the applicant.<sup>181</sup>

The issue of revenge often arises in relation to claims involving Albanian 'blood feuds'. The essence of these claims is fear of revenge because a member of the applicant's family killed a member of another family. As such, in cases of this kind it may be difficult to avoid the effect of s 91S of the Act.<sup>182</sup>

In sum, care should be taken when categorising harm as acts of revenge. It is insufficient for decision makers to reject a claim for refugee status simply by classifying the alleged persecutory conduct as revenge. Decision makers will also be required to consider whether those acts of revenge are Convention related, bearing in mind the requirement of s 91R(1)(a) that the 'essential and significant reason ... for the persecution' be found in one or more of the Convention grounds, and the boundaries of s 91S where the claim relates to membership of a family.

## Extortion

Similarly, the mere fact that conduct can be characterised as extortion does not mean that it cannot come with the Convention definition of persecution. Again, the motivation of the persecutor must be considered in determining the 'essential and significant reason' for the persecution.

<sup>180</sup> *SHKB v MIMIA* [2004] FCA 545; not disturbed on appeal: *SHKB v MIMIA* [2005] FCAFC 11. See also *MIMA v Sarrazola* (1999) 95 FCR 517 where the Full Federal Court found that the Tribunal erred by finding that criminals who were motivated by a desire to recover money owing to them by the applicant's deceased brother was inconsistent with a Convention related motive.

<sup>181</sup> *SZFZN v MIAC* [2006] FMCA 1153 at [17].

<sup>182</sup> Under s 91S, a person who is pursued because he or she is a member of the family of a person who is targeted for a non-Convention reason (such as criminal pursuit for repayment of debts) does not fall within the grounds for persecution covered in the Convention. See [Chapter 5 – Refugee grounds and nexus](#) for discussion of s 91S. In most of the Albanian 'blood feud' cases the Tribunal has found, without legal error, that the only Convention nexus is membership of a particular social group constituted by the applicant's family and that s 91S of the Act applied to preclude the claim. See for example *SDAR v MIMIA* (2002) 124 FCR 436, *SCAL v MIMIA* [2003] FCA 548, *STXB v MIMIA* (2004) 139 FCR 1, *SVXB v MIMIA* [2004] FCA 923, *MIMIA v SVBB* [2005] FCAFC 12. Although there may be other ways of characterising the reason for the applicant's fear apart from family membership (such as 'persons subject to the traditional laws of the *Kanuni*', 'persons subject to blood feuds', 'men in Albania', or 'Albanian women without male protection'), it may be difficult to establish the necessary elements of the Convention definition and s 91R: see for example, *SCAL v MIMIA* [2003] FCAFC 301, *STYB v MIMIA* [2004] FCA 705 (upheld on appeal: *STYB v MIMIA* [2004] FCAFC 295), *STXB v MIMIA* (2004) 139 FCR 1, and *SVJB v MIMIA* [2004] FCA 932.

In *Ram v MIEA* the applicant claimed that he was being extorted on the basis that he was a member of a particular social group - namely villagers who had gone abroad and returned with money, or other wealthy Sikhs. The Full Federal Court rejected this contention. Justice Burchett stated:

In the present case, quite apart from the difficulty of seeing wealthy Punjabis living in circumstances which make them vulnerable to extortion as a sufficient group, it is the greater difficulty of saying that the attacks feared by the appellant would be *for reasons of* his membership of that group which, it seems to me, he cannot overcome. Plainly, extortionists are not implementing a policy, they are simply extracting money from a suitable victim. Their forays are disinterestedly individual. ... [The appellant] does not fear persecution for reasons of membership of a particular social group, but extortion based on a perception of his personal wealth and aimed at him individually.<sup>183</sup> (original emphasis)

In *Chenafa v MIMA* the Federal Court observed that:

There are a considerable number of authorities in this court to the effect that extortion of funds from victims is not necessarily evidence of persecution for a Convention reason, in view of the consideration that there may be many other grounds on which money is sought to be extracted in a criminal way from citizens of a country.<sup>184</sup>

However, this is not to say that the possession of wealth is incapable of forming the basis of a particular social group, or that extortion can never amount to persecution for a Convention reason.<sup>185</sup> In *Perampalam v MIMA*, in considering the issue of extortion of Tamils by the LTTE, a majority of the Full Federal Court held that:

Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and *Ram* does not suggest it can. .... The words "persecuted for reasons of" look to the motives and attitudes of the persecutors ... and if the LTTE practices extortion, with violence and threats of violence, against Tamils, the government being unable to provide protection, because the LTTE holds that Tamils must be coerced into supporting it, the terms of the Convention are satisfied.<sup>186</sup>

This judgment illustrates that, if a Convention purpose can be identified in conduct of an ordinarily criminal nature, then harm feared arising out of such conduct can come within the Convention. In that case the majority (Moore J dissenting) found there may be a purposive approach in the LTTE's criminal conduct arising out of the belief that Tamils should support the LTTE. In *Jayawardene v MIMA*, on the other hand, the Federal Court found that it was open to the Tribunal to find on the facts of that case that the applicants were being extorted, not for any Convention reason, but because they were comparatively well off.<sup>187</sup>

<sup>183</sup> *Ram v MIEA* (1995) 57 FCR 565 at 569.

<sup>184</sup> *Chenafa v MIMA* [1999] FCA 1432 at [12].

<sup>185</sup> See *Ram v MIEA* (1995) 57 FCR 565 at 570. See also *SZLAN v MIAC* (2008) 171 FCR 145 at [76]–[77], *SZMVK v MIAC* [2009] FMCA 304 at [12]–[14]; and *MZYPJ v MIAC* [2012] FMCA 98 at [51].

<sup>186</sup> *Perampalam v MIMA* (1999) 84 FCR 274 per Burchett and Lee JJ at 283 (Moore J, dissenting, held that it was open to the Tribunal to find that the LTTE was simply extorting money from a suitable victim and was not motivated by the applicant's Tamil ethnicity). See also *SZQII v MIAC* [2012] FCA 402 at [22], where the Court held that the Reviewer's finding that the motivation of a Sinhalese gang whom the appellant feared was to obtain money failed to address the claim that the appellant was a suitable target for extortion because he was a young Tamil male. See also *Kathiravelu v MIMA* [2000] FCA 1279 where the Court upheld the Tribunal's finding that the applicant would not be targeted and persecuted by pro-government Tamil groups and police on the basis of her Tamil ethnicity but instead because they perceived her to be wealthy.

<sup>187</sup> *Jayawardene v MIMA* [1999] FCA 1577 at [36]–[37]. See also *Santhikumar v MIMA* [1999] FCA 1777 and *SZROR v MIAC* [2012] FMCA 888 at [33], in which the Tribunal was found to have correctly understood and addressed a claim that an extortion threat was made because of the perceived wealth of the applicant's family and not because of any other

These cases, as well as the Full Federal Court decision of *Rajaratnam v MIMA*, highlight the potentially multi-faceted nature of extortion. The majority in that case stated:

In a particular setting ... extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.<sup>188</sup>

More recently, in the context of the codified refugee definition (applicable to applications made on or after 16 December 2014), the Federal Court found the Tribunal had erred by failing to consider whether an 'essential and significant reason' for extortion demands on a business owned by the applicants was their membership of a particular social group.<sup>189</sup>

The existence of a Convention related purpose is a factual matter for the decision-maker to determine having regard to the particular circumstances of each case.<sup>190</sup> While most of the cases referred to above were decided before the introduction of the 'essential and significant reason' requirement in s 91R(1)(a) (or s 5J(4)(a)), they still provide useful guidance in relation to the issue of motivation for persecution. The Full Court's decision in *Rajaratnam* demonstrates the importance of making clear findings on this issue, bearing in mind that extortion may arise from multiple motivations.<sup>191</sup> A finding that the motivation for extortion is personal will not necessarily exhaust an inquiry into whether there is the requisite nexus between the extortion feared and a Convention ground.<sup>192</sup>

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Convention related attribute.

<sup>188</sup> *Rajaratnam v MIMA* [2000] FCA 1111 at [48]. Justice Moore also acknowledged that the existence of personal or business attributes of the victim did not remove the possibility that other Convention-related issues might be factors which influenced the conduct or motivation of those engaging in extortion (at [10]). See also *SZLAN v MIAC* (2008) 171 FCR 145 at [79]–[80]; and *SZMVK v MIAC* [2009] FMCA 304 at [12]–[13].

<sup>189</sup> In *COY19 v MICMSMA* [2022] FCA 352, the appellants were a mother and daughter from Karachi, Pakistan who claimed that their business was destroyed following extortion threats. The Tribunal accepted this claim, but found that the extortion attempts were directed to the business, and not to the appellants themselves. The Federal Court held that the Tribunal erred by failing to analyse whether the extortion attempts and destruction of the business was connected with or by reason of the appellants' membership of a particular social group, being women or single women living alone and without protection: at [64]–[69].

<sup>190</sup> In *SZQXS v MIAC* [2012] FMCA 210 (upheld on appeal: *SZQXS v MIAC* [2012] FCA 616) the Court confirmed at [13] that, where a decision-maker has turned its mind to the possibility of persecutory intent, but finds upon sufficient evidence that the extortion lacked a persecutory element, that is a factual finding for the decision-maker.

<sup>191</sup> Examples of other cases concerning this question include *Ahmed v MIMA* [2000] FCA 1571, where the Court found that the Tribunal erred by treating its affirmative finding that a particular clan in Somalia were victims of extortion as denoting that there was no Convention reason for harming them. See also *MIAC v MZYRI* [2012] FCA 1107 in which it was claimed that local villagers had killed the claimant's father and taken his land, which continued to be occupied by a local commander. The Court found that the Reviewer had operated on the basis of an impermissible dichotomy between the self-interested motives of the commander, and the underlying religious reasons motivating the villagers to continue to persecute the family and enable the oppressive conduct of the commander. However, see *DZACC v MIAC* [2012] FMCA 314 as an example of circumstances where it was open for the Reviewer to consider multiple motivations but conclude that the harm was motivated by a non-Convention reason. The claimant had alleged he would be persecuted by his girlfriend's family and the Reviewer found that although his religion and caste may be reasons that the family found him unsuitable, he was targeted because her family objected to the relationship. The Court held that the Reviewer had not applied a false dichotomy or failed to take into account multiple motivations and that the finding was open to make.

<sup>192</sup> *Rajaratnam v MIMA* [2000] FCA 1111 at [50]. Compare with *Ramirez v MIMA* [2000] FCA 1000 (Hill, Mathews and Lindgren JJ, 2 August 2000) at [38]–[43] in which the Full Federal Court found the Tribunal's finding that the ELN were 'motivated by profit' and their actions were 'criminal and not political in nature' precluded the conclusion that mere acts of resistance to the organisation's actions might be taken to manifest a contrary political opinion and consequently there was no error. See also *SZRAJ v MIAC* [2012] FMCA 484 at [24]–[25] (upheld on appeal: *SZRAJ v MIAC* [2012] FCA 1237; application for special leave subsequently refused: *SZRAJ v MIAC* [2013] HCASL 30, where the Court noted an apparent conflict between the Tribunal's finding that the essential and significant reason for the extortion was not the applicant's political affiliations



Aside from the issue of whether there is the requisite Convention nexus, decision makers should also be mindful that the underlying *threat* of harm that underpins an extortion demand may constitute serious harm for the purposes of the Act, as per the modification of behaviour principle arising from the High Court judgment of *S395* (see [above](#)). Accordingly, consideration may need to be had to whether an applicant would only be complying with such demands in order to avoid persecutory harm.<sup>193</sup>

### Harm resulting from exposing corruption

In certain circumstances, harm arising from the exposure of corruption can give rise to persecution for reasons of political opinion.

In *MIMA v Y* the Tribunal found that the applicant's stance against criminal activity of police officers led to the harm which he suffered, and that stance was effectively the expression of a political opinion against corruption, a pervasive aspect of the Brazilian state. In holding that the Tribunal had approached the questions before it with a proper appreciation of the law to be applied, the Federal Court stated:

The Tribunal was seeking to determine whether Y would be looked upon merely as a campaigner against corruption who was at risk of retribution by individual corrupt officials, or whether corruption was so much a part of government and of the exercise of State power in Brazil that opposition to it could be regarded as opposition to authority as it was organised and operated in Brazil. The Tribunal concluded that the views and actions of Y would have been likely to be regarded as contrary to the best interests of the State and particularly of its Police Force. Supportive of this finding was the fact that complaints to appropriate authorities served not to activate an inquiry but to bring down harm upon Y and his wife. The coercive power of the authorities appeared to be exercised against them, not against the corrupt officials.<sup>194</sup>

Similar views were expressed by the Full Federal Court in *V v MIMA*, where Wilcox J held that an attitude of resistance to systematic corruption of, and criminality by, government officers can fall within the description 'political opinion', however this is a question of fact.<sup>195</sup> In the same case, Whitlam J stated that:

... a person who publicly campaigns against official corruption in a country, where such corruption is endemic and apparently tolerated by the government authorities, may well be thought to evince a "political opinion" within the meaning of that phrase in the Convention definition.<sup>196</sup>

Hill J held that:

The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those

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with the Bangladesh National Party and its acceptance that a reason for the demands was that the applicant was not in political favour at the time. The Court found that the Tribunal's reasoning was explicable on the basis that, while the applicant's political affiliation was a factor in the extortion, the dominant factors were his apparent success as a businessman, and personal animosity.

<sup>193</sup> See for example *CRG17 v MICMA* [2022] FCA 1567, where the Court accepted the appellant's submission that the serious harm feared by an applicant who is subject to extortion demands may lie in the *threat* that they will be harmed if they did not modify their behaviour by complying with the extortionate demands: at [65]. See also *SZTAP v MIBP* [2015] FCAFC 175 and *SZVRQ v MIBP* [2020] FCA 375 (discussed in *CRG17* at [54]–[56] and [63]–[64] respectively).

<sup>194</sup> *MIMA v Y* (Federal Court of Australia, Davies J, 15 May 1998) at 4–6.

<sup>195</sup> *V v MIMA* (1999) 92 FCR 355 at 363. See *MZYLJ v MIAC* [2011] FMCA 505 at [22]–[25] in which the Court distinguished the applicant's circumstances in refusing to participate in police corruption from those in *Zheng v MIMA* [2000] FCA 670.

consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion.<sup>197</sup>

These views were echoed by the Federal Court in *Zheng v MIMA*:

... exposure of corruption can, in a wide range of circumstances, lead to political persecution. Thus, 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. Also, ... exposure of systemic corruption may be an expression of "political opinion" even if the state is against corruption but is unable to protect the applicant from persecution on this account. In such a case, however, it may be difficult to establish that the exposure of corruption is a manifestation of a political act such as defiance of, or opposition to, the machinery, authority or governance of the state.<sup>198</sup>

The Court also emphasised that where individual, rather than systemic, corruption is exposed it is less likely that the act of exposure will be one in which a political opinion will be seen to have been manifested. This was so because the exposure would be more likely to be seen as the reporting of criminal conduct rather than as any form of opposition to, or defiance of, state authority or governance.<sup>199</sup>

In *W68/01A v MIMA* the Tribunal found that the corrupt behaviour exposed by the applicant did not permeate the government and concluded that his act would therefore not be regarded by the Iranian authorities as an expression of political opinion. In setting the Tribunal decision aside, the Federal Court reiterated the views set out in *V v MIMA*:

... The question that had to be answered was whether the exposure of corruption of an organ of State could be perceived by those exercising broad powers as a challenge to State authority and as an act inspired by political opinion.

That, of course, was a question of fact involving consideration of the position of the State organ in the hierarchy of State power, the degree of immunity from scrutiny or control and the extent of the powers exercisable without accountability. The fact that harmful conduct by officers of a State authority, carried out in an attempt to silence the applicant, may be criminal, would not mean that such conduct could not, at the same time, be conduct designed to maintain the political "status quo". As Wilcox J stated in *V* at [17], there is no dichotomy between criminal activity and persecution.<sup>200</sup>

As in the judgments relating to revenge and extortion, these cases demonstrate the importance of recognising that harm in response to exposure of corruption may have multiple motivations. It will be for the decision-maker to consider whether an essential and significant reason for the feared harm is one or more of the Convention grounds.

<sup>196</sup> *V v MIMA* (1999) 92 FCR 355 at 368.

<sup>197</sup> *V v MIMA* (1999) 92 FCR 355 at 367.

<sup>198</sup> *Zheng v MIMA* [2000] FCA 670 at [32].

<sup>199</sup> *Zheng v MIMA* [2000] FCA 670 at [33].

<sup>200</sup> *W68/01A v MIMA* [2002] FCA 148 at [53]–[54]. Examples of other cases concerning persecution arising from exposure of corruption include *MIMA v Z* [1998] FCA 516 and *C v MIMA* (1999) 94 FCR 366 at 375. See also *MZWAO v MIMIA* [2005] FMCA 407 where it was held that the Tribunal had erred in failing to consider whether the applicant's refusal to participate in the corrupt practices of his superiors in the Ukraine's State Price Control Inspectorate could be a manifestation of a political opinion.

## Land dispossession

A limited line of authority has developed that, at least in certain circumstances, forced and continued dispossession of land, where the dispossession itself occurred in the past, is capable of amounting to persecution. In *SZALM v MIMIA*, the Court commented that where land that provided a person's livelihood is unjustly or unlawfully seized by a government or its agents (or the government approves of seizure by individuals using threats of violence), and the seizure was part of a pattern of seizures based upon a Convention characteristic, all the elements needed to satisfy the test of persecution under the Convention and s 91R are present.<sup>201</sup> *SZALM* was followed in *S2012 of 2003 v MIAC*, in which the Court found error in the Tribunal's assumption that a person forcibly dispossessed of their land must accept the victory of their persecutors and live their lives differently elsewhere.<sup>202</sup> That the applicants were resigned to that course, having already relocated and changed employment, did not mean that the permanent deprivation of their land as a means of earning a livelihood was not a continuing act of persecution which the applicants could be expected to accept.

In *SZSRQ v MIBP* however, the Court expressed doubt that the dispossession claims identified in *SZALM* and *S2012 of 2013* amounted to a valid claim for refugee status under the Convention, noting that the incorporation of the relocation principle within the Convention implied that a person who had been persecuted by dispossession of their land in one part of their country and fled to another part of their country which was able and willing to afford them protection could not, at that point, be a refugee within the meaning of the Convention.<sup>203</sup>

It remains a question of fact and degree for the decision-maker whether the forced and continued dispossession of land amounts to persecution within the meaning of the Act and Convention. As suggested in *SZSRQ*, these kinds of claims might give rise to issues concerning the relocation principle, which is based on the requirement that an applicant be outside their country owing to a well-founded fear. It raises the question of whether an applicant is entitled to international protection in another country (which necessarily involves moving away from the land of which they have been dispossessed), in circumstances where they can move safely to another part of their country of origin.

## Vulnerability

Being in a position of vulnerability or defencelessness will not of itself bring the harm feared within the Convention. In *Omar Mohamud Mohamad v MIMA* the applicant contended that he was subjected to selective harassment in the context of the clan warfare in Somalia

<sup>201</sup> *SZALM v MIMIA* [2004] FMCA 262 at [17]–[21]. The Tribunal accepted that the applicants had been forcibly dispossessed of their farm land but found that they could relocate to Harare and had already done so. Although the Court observed that the act of dispossession probably effectively removed the risk of physical harm, the Tribunal erred in failing to consider whether the continuing dispossession was persecution. The Court observed that it was erroneous to treat the applicants as having withdrawn from a particular social group of landowners upon dispossession, as their move was not voluntary and this approach assumed that it was reasonable to expect to them to accept their dispossession and live their lives differently (contrary to *S395/2002 v MIMA* (2003) 216 CLR 473).

<sup>202</sup> *S2012 of 2003 v MIAC* [2008] FMCA 954 at [22]–[23].

<sup>203</sup> *SZSRQ v MIBP* [2014] FCCA 2205 in *obiter* at [70]–[74]. The Court commented that the harm a person feared brought about at the time and as a result of dispossession did not remain with the person in the new location.

because he was a member of a weak clan.<sup>204</sup> The Full Federal Court upheld Emmett J's reasoning at first instance<sup>205</sup> that persecution of small or weak groups was not, of itself, persecution for a Convention reason. Emmett J had stated:

Harm arising out of such a war may be disproportionately directed to those unable to defend themselves, whether they be individuals or smaller weak groups. A defenceless person in such circumstances, however, is not at risk by reason of membership of such a group but simply because he or she occupies the territory or has the resource which is sought by the persecutors. The fact that such a person is defenceless to resist the claim by the more powerful group and is unable to defend it does not render the conflict that might arise conflict for a Convention reason. It is a most unfortunate circumstance of human life that that be so. However, I do not consider that persecution of weak people in order to obtain what they have, because it is easier to recover what they have from them than from a stronger group, is persecution for a Convention reason.<sup>206</sup>

In *MIMIA v VFAY* the Tribunal acknowledged that the young applicant could face danger if he were to return to Afghanistan and that he was particularly vulnerable because of his age but found that there was no longer any real chance that he would face persecution by the Taliban.<sup>207</sup> It found that even if children or unaccompanied young people could be said to be particular social groups, the difficulty he would encounter would not be for a Convention reason but 'because of his youth and inexperience and so limited capacity to manage in a difficult environment and the generalised insecurity and hardship which prevails in his country'. In setting aside the decision of the Federal Magistrate,<sup>208</sup> the Full Federal Court held that the Tribunal correctly appreciated the questions that it had to ask. While the Tribunal recognised that, as an unaccompanied child in Afghanistan, VFAY would be 'vulnerable' to harm, its reasons showed that what it had in mind was that certain groups, such as children, the sick and the elderly, would be less able to cope with the 'generalised insecurity and hardship'. The Court stated that the fact that the general conditions in Afghanistan might have a differential impact on some groups does not show that the members of those groups will be subject to persecution because of their membership of a particular social group.<sup>209</sup>

Nevertheless, the general proposition that differential impact of generally harsh conditions on some groups does not show that the members of those groups will be subject to persecution because of their membership of a particular social group needs to be treated with some care, and should not be taken to mean that differential impact might not point to persecution. For example, as the High Court held in *Chen Shi Hai v MIMA*, enforcement of a general law which targets or impacts differently upon a particular class or group (such as "black children" as distinct from children generally) and thus operates discriminatorily may constitute persecution.<sup>210</sup> Further, decision-makers should bear in mind that in assessing whether future ill-treatment may reach the necessary threshold of serious harm amounting to

<sup>204</sup> *Omar Mohamud Mohamad v MIMA* [2000] FCA 109.

<sup>205</sup> *Omar Mohamud Mohamad v MIMA* [1999] FCA 688.

<sup>206</sup> *Omar Mohamud Mohamad v MIMA* [1999] FCA 688 at [31].

<sup>207</sup> *MIMIA v VFAY* [2003] FCAFC 191.

<sup>208</sup> *VFAY v MIMIA* [2003] FMCA 35.

<sup>209</sup> *MIMIA v VFAY* [2003] FCAFC 191 at [60].

<sup>210</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293.

persecution, the impact of that treatment may be much greater on a child than on an adult due to the vulnerabilities of that child.<sup>211</sup>

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<sup>211</sup> See for example the Department of Home Affairs' 'Policy: Refugee and Humanitarian – Refugee Law Guidelines', sections 3.11.7 and 3.11.9, as re-issued 27 November 2022. For further discussion of differential impact see [Chapter 4 - Persecution](#) and the discussion above under '[General laws that impact adversely upon a particular group](#)' and '[Conscription laws](#)'.