

## 5 REFUGEE GROUNDS AND NEXUS

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### INTRODUCTION

An applicant for a protection visa who has established a fear of persecution must also show that the persecution which he or she fears is for one or more of five specified reasons. This means that there will be persons who, despite having a well-founded fear of ‘persecution’, will not be able to gain asylum as refugees.<sup>1</sup>

For protection visa applications lodged prior to 16 December 2014, the reasons are those enumerated in Article 1A(2) of the *Convention relating to the Status of Refugees* (the

<sup>1</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 248, per Dawson J.

Convention).<sup>2</sup> Following codification of the refugee definition for applications lodged on or after 16 December 2014, the reasons are those set out in s.5J(1)(a) of the *Migration Act 1958* (the Act).<sup>3</sup> There is no material difference between these grounds – for both definitions, the persecution must be for reasons of race, religion, nationality, particular social group or political opinion – although for post 16 December 2014 applications, one of these grounds has been further defined in the Act.<sup>4</sup>

Moreover, to satisfy either definition, such a reason or reasons must constitute at least the essential and significant reason or reasons for the persecution.

This chapter considers the meaning of the phrase “for reasons of” as interpreted by Australian Courts and individually examines the five grounds.<sup>5</sup> The case law discussed below has developed in consideration of Article 1A(2) of the Convention, but appears equally applicable to the Act-based definition, with the exception of the law pertaining to ‘particular social group’ which is now further defined in the Act. While the Convention and Act-based refugee definitions refer to the same grounds, the de-linking of the Convention definition from the legislative definition means that for post 16 December applications, these are no longer properly referred to as ‘Convention grounds’, ‘Convention reasons’ or having a ‘Convention nexus’. This Guide will use the phrases ‘refugee grounds’, ‘refugee reasons’ or ‘refugee nexus’, other than when referring directly to the Refugees Convention context.

It is somewhat artificial to separate the concept of persecution from that of refugee nexus because the element of ‘motivation’ is an essential part of both ‘persecution’ and ‘refugee nexus’, however, this has been done in the Guide for ease of discussion. Some of the issues discussed in this chapter overlap with those in Chapter 4. Issues that commonly arise when considering this aspect of the definitions are discussed in Chapter 11 of this Guide.

## ‘FOR REASONS OF...’

### Causal connection between the harm feared and a refugee ground

The composite term ‘being persecuted for reasons of...’, found in both Article 1A(2) of the Convention (for applications made prior to 16 December 2014) and s.5J(1)(a) of the Act (for those made on or after that date), involves two concepts, that of persecution and that of

<sup>2</sup> *MIEA v Guo* (1997) 191 CLR 559 at 570.

<sup>3</sup> The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135) 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 apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s.2 and item 28 of Schedule 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543).

<sup>4</sup> The Explanatory Memorandum to the Bill states that the grounds in s.5J(1)(a) are consistent with and codify those listed in the Convention: Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014*, (p.10 and 171).

<sup>5</sup> Because the phrase ‘being persecuted for reasons of...’ is a compound conception, the material in this Chapter overlaps to some extent with the discussion of persecution in Chapter 4 of this Guide.

causal connection to the relevant characteristic of the person being persecuted.<sup>6</sup> Determining the relevant causal connection can be a difficult task, and may involve the assessment of a number of factors. However, it is well established that a bare causal connection between the harm feared and a refugee ground is not enough.<sup>7</sup> Further, it is not correct to rely solely upon a ‘but for’<sup>8</sup> test in determining whether or not the refugee nexus is made out:

Questions of causal connection in the law have been described as ultimately a matter of commonsense not susceptible of reduction to a satisfactory formula...Mere application of a ‘but for’ test to satisfy the connection could take the scope of the Convention protection well beyond that which it was intended to secure.<sup>9</sup>

Justice Kirby observed in *Chen Shi Hai v MIMA*<sup>10</sup> that the phrase ‘for reasons of’ in the Convention definition obviously imports certain notions of causation<sup>11</sup> and that the meaning of any statutory notion of causation depends upon the precise context in which the issue is presented. He noted for example that in the field of torts, the ‘but for’ test, formerly favoured by the common law, needs to be tempered by ‘the infusion of policy considerations’.<sup>12</sup> However:

In the context of the expression “for reasons of” in the Convention, it is neither practicable nor desirable to attempt to formulate “rules” or “principles” which can be substituted for the Convention language.

In the end it is necessary for the decision-maker to return to the broad expression of the Convention, avoiding the siren song of those who would offer suggested verbal equivalents. The decision-maker must evaluate the postulated connexion between the asserted fear of persecution and the ground suggested to give rise to that fear. The decision-maker must keep in mind the broad policy of the Convention and the inescapable fact that he or she is obliged to perform a task of classification.<sup>13</sup>

Courts in other cases have commented on the relevance or otherwise of common law tests of causation. In *Okere v MIMA*,<sup>14</sup> for example, Branson J referred to the common law test discussed in *March v Stramare Pty Ltd*,<sup>15</sup> concluding that the ordinary meaning of Article 1A(2), considered in the light of the context, object and purpose of the Convention, invites the identification of the ‘true reason’ for the persecution which is feared, by the application of ‘common sense to the facts of each case’.<sup>16</sup>

<sup>6</sup> *Chen Shi Hai by his next friend Chen Ren Bing v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998) at 9.

<sup>7</sup> *Chen Shi Hai by his next friend Chen Ren Bing v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998) at 8-10. See also, eg, *Jahazi v MIEA* (1995) 61 FCR 293, where French J held at 299-300 that the question whether a particular causal connection between persecution and membership of a group attracts Convention protection will be resolved not merely by the logic of causality but as a matter of evaluation which has regard to the policy of the Convention.

<sup>8</sup> The ‘but for’ test is a test of causation developed in torts law in negligence matters to help identify responsibility. In very basic terms it represents the question: ‘but for Event A occurring would Event B have occurred?’.

<sup>9</sup> *Chen Shi Hai by his next friend Chen Ren Bing v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998) at 9. See also *MIMA v Chen Shi Hai* (1999) 92 FCR 333 at 342.

<sup>10</sup> (2000) 201 CLR 293.

<sup>11</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [67].

<sup>12</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [68], referring to *March v Stramare Pty Ltd* (1991) 171 CLR 506 at 515-517.

<sup>13</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [68]-[69], per Kirby J.

<sup>14</sup> (1998) 87 FCR 112.

<sup>15</sup> (1991) 171 CLR 506 at 515.

<sup>16</sup> (1998) 87 FCR 112 at 117-8. See also, for example, *Gersten v MIMA* [1999] FCA 1768 (Katz J, 17 December 1999), *Peiris v MIMA* [1999] FCA 880 (Hill J, 6 August 1999), *Hellman v MIMA* [2000] FCA 645 (Branson J, 17 May 2000), *MIMA v Khawar* (2000) 101 FCR 501, and *Applicant N 403 of 2000 v MIMA* [2000] FCA 1088 (Hill J, 23 August 2000).

The weight of authority supports the view that there is no precise test for causation; it remains for the decision-maker to determine whether there is a relevant causal connection between the harm feared by an applicant and a ground in the Convention, given the specific circumstances of each case. In performing this task, the decision-maker should focus on the words of the Convention definition<sup>17</sup> and preferably use the language of the Convention itself.<sup>18</sup> The same principles would appear to apply in considering the Act-based definition.

Although there is no precise test for causation in the context of either definition, it is nevertheless clear that in Australian law, the phrase ‘for reasons of’ involves consideration of the motivation and perception of the persecutor/s.

### The motivational requirement

There is an abundance of authority for the proposition that persecution involves an element of motivation for the infliction of harm. In *Ram v MIEA* Burchett J said:

Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. ... Consistently with the use of the word “persecuted”, the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is “membership of a particular social group”. ... The link between the key word “persecuted” and the phrase descriptive of the position of the refugee, “membership of a particular social group”, is provided by the words “for reasons of” - the membership of the social group must provide the reason. There is thus a common thread which links the expressions “persecuted”, “for reasons of”, and “membership of a particular social group”. That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase “for reasons of”, and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.<sup>19</sup>

That case concerned membership of a particular social group. However, as was pointed out in *Chen Shi Hai v MIMA*, the thread to which Burchett J referred links ‘persecuted’, ‘for reasons of’ and each of the grounds specified in the definitions, namely, ‘race, religion, nationality, membership of a particular social group or political opinion’.<sup>20</sup>

In *Applicant A v MIEA*, Gummow J cited *Ram* with approval and added that the phrase ‘for reasons of’ serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it. The reason for the persecution must be found in the singling out of one or more of five attributes, namely race, religion, nationality, membership of a particular social group or political opinion.<sup>21</sup> In *MIMA v Haji Ibrahim* McHugh J similarly emphasised that the Convention requires the decision-maker to ascertain the motivation for the allegedly persecutory conduct which an applicant for refugee status fears.<sup>22</sup>

<sup>17</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 per Kirby J at [69]; *Gersten v MIMA* [2000] FCA 855 (Hill, Mathews and Lindgren JJ, 5 July 2000) at [23].

<sup>18</sup> *WAAJ v MIMIA* [2002] FCAFC 409 (Wilcox, RD Nicholson and Downes JJ, 12 December 2002) at [24].

<sup>19</sup> (1995) 57 FCR 565 at 568. Approved in *Applicant A v MIEA* (1997) 190 CLR 225 at 284.

<sup>20</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [12] and [24].

<sup>21</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 284, per Gummow J.

<sup>22</sup> (2000) 204 CLR 1 at [102]. To identify a motivation is to identify a reason; persecution will be Convention-related if it is Convention-motivated or stimulated: *WZARG v MIAC* [2013] FMCA 69 at [41] (Lindsay FM, 12 February 2013) in which the

Note that, in the context of Article 1A(2), the relevant nexus can be satisfied by either the discriminatory motivation of the perpetrators of the harm or the discriminatory failure of state protection. Thus, where the immediate harm appears to have no Convention nexus, then depending on the evidence, it may be necessary to consider whether there is a discriminatory failure of state protection attributable to one of the five reasons.<sup>23</sup> For example, in *MIMA v Khawar* the applicant claimed to have been subjected to domestic violence and denied state protection because she was a woman.<sup>24</sup> Although the judgments differed in their characterisations of the relevant persecution,<sup>25</sup> the majority<sup>26</sup> found that such circumstances could come within the Convention even though the harm by the private individuals was unrelated to the Convention. If the persecution was characterised as a combination of serious harm by private individuals and a failure by the state to provide protection against such harm, the Convention nexus requirement could be satisfied by the motivation of *either* the private individuals or the state.<sup>27</sup> If the persecution was characterised as the failure of the state to provide protection against non-Convention related domestic violence, then the reason for the inactivity of the state must be one or more of the Convention grounds.<sup>28</sup> Note, however, that the mere inability on the part of a state to prevent harm is not sufficient to establish a refugee nexus. Rather, it must be shown that the failure on the part of the state or state agents to prevent the relevant conduct is the result of toleration or condonation of the conduct, not simply inability to prevent it.<sup>29</sup>

While the above principle arose from the definition in Article 1A(2) of the Refugees Convention, given the similar wording adopted in ss.5H(1) and 5J of the Act, it would appear equally applicable to the statutory definition of 'refugee'. Such an interpretation is consistent with the Government's intention to codify Article 1A(2) as interpreted in Australian case law.<sup>30</sup>

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Federal Magistrate rejected a submission that the Reviewer was distracted by concepts of motivation rather than looking for the reasons for the persecution.

<sup>23</sup> Whether the issue of discriminatory failure of state protection arises for consideration will depend on the circumstances of each case and the claims advanced by the applicant. For example in *DZAAZ v MIAC* [2012] FMCA 39 (Brown FM, 25 January 2012) at [122]-[129] the Court found that the applicant had claimed only that the authorities were inept and unable to protect him, and had not squarely raised the issue of the absence or otherwise of state protection for any Convention reason, and accordingly there was no error in the Reviewer failing to consider whether there was any Convention nexus arising from a failure of state protection (upheld on appeal: *DZAAZ v MIAC* [2012] FCA 1128 (Dowsett J, 18 October 2012) although this point was not considered on appeal). A similar finding was made in *MZYOS v MIAC* [2012] FMCA 422 (O'Dwyer FM, 23 May 2012) at [60]. Contrast *SZQLV v MIAC* [2012] FMCA 337 (Barnes FM, 24 April 2012) at [77]-[87] where the Court found that the applicant's claims and submissions and the facts accepted by the Reviewer sufficiently raised the issue that the Iraqi state may condone or tolerate the persecution that he feared from his relatives, such as to oblige the reviewer to deal with the issue whether the Iraqi state would do so for a Convention reason. Similarly, in *MZYLR v MIAC* [2011] FMCA 633 (Riley FM, 14 September 2011) the Reviewer rejected that the claimant would need protection from the state for the reasons he claimed, but in the process of doing so, made findings that the roads around the town in which the applicant lived were prone to robbery and violence. The Court held at [33]-[34] and [37] that as the applicant had expressly claimed that he would be denied police protection because of his ethnicity and religion, the Reviewer's own findings provided a factual substratum which required consideration of that claim.

<sup>24</sup> *MIMA v Khawar* (2002) 210 CLR 1.

<sup>25</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [30] per Gleeson CJ, at [118] per Kirby J, and at [85] McHugh and Gummow JJ.

<sup>26</sup> Gleeson CJ and McHugh, Gummow and Kirby JJ; Callinan J dissenting.

<sup>27</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [31] per Gleeson CJ, and at [120] per Kirby J.

<sup>28</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [84] and [87], per McHugh and Gummow JJ.

<sup>29</sup> *MIAC v SZONJ* (2011) 194 FCR 1 at [31]-[32].

<sup>30</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.10, and 169 at [1168]. Although the Explanatory Memorandum indicates that certain principles arising from case law were deliberately not included in the codified definition, it makes no such statement in relation to the *Khawar*

### Imputed attribute sufficient to establish nexus

For the purposes of the Convention definition<sup>31</sup> and that in ss.5H(1) and 5J,<sup>32</sup> persecution may be constituted by the infliction of harm on the basis of *perceived* race, religion, nationality, membership of a social group or political opinion, even if the perception is mistaken. As Burchett J stated in *Ram v MIEA*:

People are persecuted for something perceived about them or attributed to them by their persecutors.

...

In this area, perception is important. A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words “persecuted for reasons of” look to their motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which they think he belongs, even if in truth they are mistaken.<sup>33</sup>

In other words, for the purposes of this aspect of the definitions, the relevant consideration is the perception and motivation of the persecutor. A person may be at risk of persecution because of a perception that he or she is a member of a particular race, religion, nationality or social group, or holds a political opinion, even if that perception does not conform with the reality.

### Motivation of the applicant insufficient

The motivation of the applicant does not establish the relevant refugee nexus although it may assist in determining the motivation of the persecutor.

In *Mai Xin Lu v MIEA*, for example, French J rejected the contention that punishment for illegal departure under Chinese laws would constitute a ground for a well-founded fear of persecution on the basis of political opinion if in fact the applicants’ motivation to depart had been based on their own political opinion.<sup>34</sup> Similarly, in *Welivita v MIEA* the Court emphasised that the motivation of the claimant alone was not decisive. Lindgren J stated:

Clearly, the mere fact that a person will, upon returning to his or her country of nationality, be prosecuted and penalised for a criminal offence does not establish the existence of a well founded fear of being persecuted for reasons of political opinion. ... the mere fact that the criminal offence was ‘politically

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principle, and Departmental Guidelines refer to that principle as applicable to s.5J: Department of Immigration, PAM3 ‘Refugee and Humanitarian – Refugee Law Guidelines’, section 9.4, as re-issued 1 July 2017 (‘Refugee Law Guidelines’).

<sup>31</sup> The High Court has held that persecution may occur for perceived political opinion or perceived membership of a particular social group: see *Chan v MIEA* (1989) 169 CLR 379 at 416 per Gaudron J and at 433 per McHugh J; *Applicant A v MIEA* (1997) 190 CLR 225 per Dawson J at 240 and per Gummow J at 284; and *MIEA v Guo* (1997) 191 CLR 559 at 570-1. See also *Applicant M164/2002 v MIMIA* [2006] FCAFC 16 (Lee, Tamberlin and Dowsett JJ, 22 February 2006) per Lee J at [38] and cases there cited. The Full Federal Court in *WALT v MIMA* [2007] FCAFC 2 (Mansfield, Jacobson and Siopis JJ, 22 January 2007), disagreeing with Nicholson J at first instance on this point, stated at [38] that there was no apparent reason in principle why persecution could not occur for imputed religious beliefs, as well as for imputed political beliefs or imputed membership of a particular social group. It seems clear that the same could be said for the refugee grounds of race and nationality.

<sup>32</sup> The Explanatory Memorandum to the Bill which introduced these sections acknowledges that a Convention reason may be imputed rather than actual: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.179 at [1221].

<sup>33</sup> *Ram v MIEA* (1995) 57 FCR 565 at 568-9, per Burchett J.

<sup>34</sup> *Mai Xin Lu v MIEA* (unreported, Federal Court of Australia, French J, 19 July 1996) at 29-30.

motivated' makes no difference.<sup>35</sup>

This view has been endorsed in a number of cases. In *Mehenni v MIMA* Lehane J rejected the proposition that an applicant's subjective motivation, of itself, could support a finding that otherwise non-Convention-related harm amounted to persecution for a Convention reason.<sup>36</sup> In *Aksahin v MIMA* French J commented that:

[t]he 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>37</sup>

Again, in *NAEU of 2002 v MIMIA* it was held by Madgwick J (with Merkel and Conti JJ agreeing) that it was not sufficient for the applicant to establish that there was a fear of harm and a Convention reason (in that case, his political opinion) to qualify as a refugee; rather, he 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.<sup>38</sup>

A different view appears to have emerged in *Applicant N403 of 2000 v MIMIA*<sup>39</sup> and *Erduran v MIMIA*,<sup>40</sup> cases involving 'conscientious objection' to military service. In each case, the Federal Court emphasised the motivation of the conscientious objector rather than the claimed persecutor.<sup>41</sup> In *Applicant N403 of 2000 v MIMIA*, Hill J stated:

if the reason [conscientious objectors] 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 ... 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>42</sup>

In *NACM of 2002 v MIMIA*<sup>43</sup> Madgwick J doubted the correctness of his own decision in *NAEU of 2002 v MIMIA* on this issue, preferring the approach of Hill J in *Applicant N403*. His Honour suggested that rather than asking whether the motivation of the persecutor is the applicant's actual or perceived political opinion, a more practical and properly inclusive

<sup>35</sup> *Welivita v MIEA* (unreported, Federal Court of Australia, Lindgren J, 18 November 1996) at 21. His Honour cited paragraphs 84-86 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, reissued December 2011) with approval.

<sup>36</sup> *Mehenni v MIMA* [1999] FCA 789 (Lehane J, 24 June 1999) at [20]-[21]. See also comments by the Court in *Peiris v MIMA* [1999] FCA 880 (Hill J, 6 August 1999), where Hill J commented that applying a common law test of causation, (the 'but for' test) as suggested in *Okere v MIMA* (1998) 87 FCR 112, would appear to introduce into Article 1A of the Convention a test which is not there.

<sup>37</sup> [2000] FCA 1570 [French J, 3 November 2000] at [25]. This emphasis on the motivation of the persecutor, rather than mere reliance on that of the applicant, can also be seen in *SZMKK v MIAC* [2010] FCA 436 (Barker J, 6 May 2010) at [67]-[68] and [77], where Barker J commented that it was necessary to inquire beyond the appellant's motivation in reporting a crime to ascertain whether subsequent threats he received were for reasons of any religious principle or political views upheld by the appellant or rather, were owed to the persecutor's desire for revenge on him for reporting the crime.

<sup>38</sup> [2002] FCAFC 259 (Madgwick, Merkel and Conti JJ, 24 October 2002) at [14]-[15]. Note that this authority would now need to be considered in light of s.91R(1)(a) of the Act.

<sup>39</sup> [2000] FCA 1088 (Hill J, 23 August 2000).

<sup>40</sup> (2002) 122 FCR 150. On appeal, the Full Federal Court reversed Gray J's decision but did not disturb his discussion of this issue: *MIMA v VFAI of 2002* [2002] FCAFC 374 (Black CJ, North & Merkel JJ, 25 November 2002).

<sup>41</sup> See also *VCAD v MIMIA* [2004] FCA 1005 (Kenny J, 4 August 2004) where the parties accepted the correctness of Gray J's analysis in *Erduran*. For the purposes of the case and in the absence of argument to the contrary, the Court accepted that analysis as correct. On appeal, the *Erduran* approach received endorsement from Gray J: *VCAD v MIMIA* [2005] FCAFC 1 (Gray, Sundberg and North JJ, 26 August 2005). For more recent cases referring to the *Erduran* approach see Chapter 11 of this Guide under the sub-heading 'Conscription Laws'.

<sup>42</sup> *Applicant N 403 of 2000 v MIMIA* [2000] FCA 1088 (Hill J, 23 August 2000) at [23]. See also *Erduran v MIMA* (2002) 122 FCR 150 for a similar analysis.

<sup>43</sup> (2003) 134 FCR 550.



question would 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 views, recognising that they were at odds with prevailing authority.<sup>44</sup>

To the extent that these cases might suggest that the applicant's own motivation could, of itself, found a causal connection between the harm feared and a refugee reason they appear to be contrary to the preponderance of Federal Court authority as discussed above, and to High Court authority on the meaning of 'for reasons of' in the Convention definition.<sup>45</sup> The same would appear equally applicable to the post 16 December 2014 statutory definition of refugee.

### Focus on the persecutor's motivation

While it is the motivation of the oppressor that is important,<sup>46</sup> the focus will normally be on the oppressor's perception of the *asylum seeker's* race, religion, etc., and not that of the oppressor.<sup>47</sup> However, that will not always be the case. In *Cameirao v MIMA*<sup>48</sup> the applicant feared persecution on the basis of her unacceptable status as a separated woman in a Catholic country where divorce was not permitted. Justice O'Loughlin observed that:

The Applicant is not at risk of being persecuted because of her religious beliefs. If there is any risk of persecution, it would be because of the religious beliefs of her supposed persecutors. Even so, ... the Convention does not talk of persecution for reasons of the Applicant's religion; it merely talks of persecution for reasons of religion. If then, there is a real chance of Ms Cameirao being persecuted because of her status as a woman from a failed marriage and the persecution is attributable to religion, she would be entitled to call in aid the Convention as amended by the Protocol.<sup>49</sup>

A somewhat similar analysis was adopted by Madgwick J in *Prashar v MIMA*,<sup>50</sup> where the applicants had ignored Hindu caste rules by 'marrying' into a prohibited relationship. The Tribunal stated that if they faced persecution, their choice of this lifestyle could not 'be characterised as an expression of a religious belief'. Justice Madgwick expressed the view that there may have been an error in this approach. His Honour held that well-founded fear of being persecuted for reasons of religion is not limited to people holding a religious belief but extends also to those persecuted because they do not hold a religious belief:

<sup>44</sup> *NACM of 2002 v MIMIA* (2003) 134 FCR 550 at [50], [63], [65].

<sup>45</sup> In particular, *Applicant A v MIEA* (1997) 190 CLR 225 at 240-242 per Dawson J, at 258 per McHugh J and at 284 per Gummow J: see *SZDJQ and SZDJR v MIMIA* [2006] FCA 533 (Bennett J, 11 May 2006) at [40]. For further discussion, see Chapter 11 of this Guide.

<sup>46</sup> See, for example, *Ram v MIEA* (1995) 57 FCR 565 at 568-569, and *MIMA v Haji Ibrahim* (2000) 204 CLR 1 per McHugh J at [70] and [102].

<sup>47</sup> For example, in *Applicant A v MIEA* (1997) 190 CLR 225 at 257, McHugh J described persecution as 'discrimination [of a particular kind] that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group' and as discrimination 'directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions' (at 258). In *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [34], the joint judgment cited with approval French J's observation at first instance that '[t]he majority judgment in *Applicant A* supports 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'.

<sup>48</sup> [2000] FCA 1319 (O'Loughlin J, 15 September 2000).

<sup>49</sup> *Cameirao v MIMA* [2000] FCA 1319 (O'Loughlin J, 15 September 2000) at [25].

<sup>50</sup> [2001] FCA 57 (Madgwick J, 7 February 2001). On appeal to the Full Federal Court this issue was decided on other grounds: see *Prashar v MIMA* [2001] FCA 1119 (Moore, Sackville and Kiefel JJ, 10 August 2001) and *Prashar v MIMA* (2001) 115 FCR 197.



The Convention speaks of a “well-founded fear of being persecuted for reasons of ... religion ...”. In my opinion, if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.<sup>51</sup>

In each of these cases the applicant's case was, in effect, that they feared harm because of conduct that offended against the religion of the alleged persecutors. A similar analysis may also be applicable in relation to ‘political opinion’<sup>52</sup> but might not be so readily applicable in relation to the other refugee grounds.<sup>53</sup>

### Refugee ground must be essential and significant reason or reasons

The harm feared need not be *solely* attributable to a refugee reason, but it must be sufficiently attributable to at least one of the grounds.<sup>54</sup> Under s.91R(1)(a) of the Act (for applications made prior to 16 December 2014) and s.5J(4)(a) (for applications made on or after that date), where the harm feared is attributable to a number of motivations, it will be insufficient if there are merely minor or non-central refugee related motivations. To come within Article 1A(2) as qualified by s.91R(1)(a), or s.5H(1) as qualified by s.5J, a refugee ground or grounds must constitute at least the **essential and significant reason or reasons** for the persecution.<sup>55</sup>

<sup>51</sup> *Prashar v MIMA* [2001] FCA 57 (Madgwick J, 7 February 2001) at [19]. His Honour added that if there were anything in *Awan v MIMA* [1998] FCA 435 (Davies J, 9 April 1998) to the contrary, he believed it to be clearly wrong and would not follow it. See also *Hellman v MIMA* [2000] FCA 645 (Branson J, 17 May 2000) at [26]-[27], and *SCAT v MIMIA* [2002] FCA 962 (von Doussa J, 6 August 2002) at [33] where von Doussa J held that a well founded fear could arise for reasons of religion if the risk of harm arose for reason of the religion of the persecutors and their disposition, by reason of their religion, towards the asylum seeker. Not disturbed on appeal: *SCAT v MIMIA* [2003] FCAFC 80 (Madgwick, Gyles and Conti JJ, 30 April 2003).

<sup>52</sup> For example, in *SZANB v MIMIA* [2004] FMCA 387 (Driver FM, 18 June 2004) Driver FM was of the view that the Tribunal was under the wrong impression that it was necessary for the applicant to demonstrate a nexus between the harm feared and his political opinion. It was held at [8] that under the Convention the political opinion need not necessarily be that of the asylum seeker. The political opinion of the alleged perpetrators of violent acts may also be relevant. In *SZDRV v MIMIA* [2005] FCA 926 (Lindgren J, 1 July 2005) it was stated at [9] that ‘an asylum seeker might be seen as politically uncommitted, inactive and neutral, yet be persecuted for that very reason by an individual or group who is or are politically zealous. In such a case, although it might be said that the individual is being persecuted because of the political opinion of the persecutors, nonetheless, the individual would be persecuted for reason of political opinion within the Convention definition. In such a case it matters little whether the position is described as one in which political opinion is held by the persecuted, the persecutors, or both: the individual is targeted by reason of political opinion’.

<sup>53</sup> For example, it has never been suggested that the expression ‘being persecuted for reasons of ... membership of a particular social group’ extends to being persecuted for reasons of the persecutor's membership of a particular social group. In *Rukhiyah Farrah Mohammed v MIMA* (unreported, Federal Court of Australia, Madgwick J, 3 September 1998), the Court held that in the context of clan violence in Somalia it was not enough to fear harm because the applicant was not a member of a particular clan (ie a particular social group). That judgment was upheld by the Full Court in *Mohamed v MIMA* [1999] FCA 305 (O'Connor, Tamberlin, Mansfield JJ, 26 March 1999). In *Husein Ali Haris v MIMA* (unreported, Federal Court of Australia, Moore J, 12 February 1998), Moore J held that the expression ‘for reasons of nationality’ was directed to persons of a particular nationality and could not encompass the absence of that characteristic. In *Brandigampolage v MIMA* [2000] FCA 1400 (Moore J, 5 October 2000) a similar question arose in relation to race but was left open.

<sup>54</sup> See comments of Perram J in *SZLWE v MIAC* [2008] FCA 1343 (Perram J, 19 September 2008) at [27] that ‘persecution for no reason cannot be persecution for one of the reasons set out in Article 1A(2) of the Convention’ (original emphasis). In *Mahesparam v MIMA* [1999] FCA 459 (Madgwick, 15 April 1999) the applicant claimed to fear harm partly for ‘personal’ reasons and partly for reason of his imputed political opinion. Justice Madgwick observed that if imputed political opinion played ‘a substantial part in the persecution feared by the applicant, that would be persecution ‘for reasons of ... political opinion’ within the meaning of the Convention.’ (at [30]). However this case was decided before the introduction of s.91R and no longer provides reliable guidance.

<sup>55</sup> In *MIAC v MZYRI* [2012] FCA 1107 (Jagot J, 16 October 2012) at [33] the Federal Court confirmed that s.91R(1)(a) recognises that there may be more than one ‘essential and significant’ Convention reason for the persecution.

Section 91R(1)(a) provides:

For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and ...

Section 5J(4)(a) is in relevantly similar terms:

If a person fears persecution for one or more of the reasons mentioned in [s.5J(1)(a)]:

- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and ...

The Explanatory Memorandum to the Bill introducing s.5J(4)(a) makes clear that, notwithstanding the slightly different wording, it is intended to have the same application as s.91R(1).<sup>56</sup>

Whether or not a refugee reason can be regarded as the essential and significant reason for the harm feared is a question of fact to be determined on the evidence.

The possibility of multiple reasons for harm caused has been particularly evident in cases where conduct involving self-interest such as revenge or extortion is involved.<sup>57</sup> As was observed in *Rajaratnam v MIMA*, 'extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct'.<sup>58</sup> Therefore, it is erroneous to apply a simple dichotomy of whether the perpetrator's interest in extortion or other conduct is personal or refugee-related.

This was highlighted in *SHKB v MIMIA* where the Court held that the Tribunal had erred by taking the view that there was an antithesis between retribution on the one hand and political

<sup>56</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.174 at [1198].

<sup>57</sup> See, e.g., *Rajaratnam v MIMA* [2000] FCA 1111 (Moore, Finn and Dowsett JJ, 10 August 2000), applied in *Ahmed v MIMA* [2000] FCA 1571 (Mathews J, 8 November 2000); *Kathiravelu v MIMA* [2000] FCA 1279 (Lindgren J, 11 September 2000); *MIMA v Sarrazola* (1999) 95 FCR 517; *SZBZJ v MIMIA* [2004] FMCA 728 (Lloyd-Jones FM, 11 November 2004; and *SHKB v MIMIA* [2004] FCA 545 (Selway J, 5 May 2004) where Selway J held that the Tribunal in attempting to draw a distinction between a Convention based reason and retribution committed jurisdictional error. For further discussion of extortion in a Convention context, refer to Chapter 11 of this Guide.

<sup>58</sup> *Rajaratnam v MIMA* [2000] FCA 1111 (Moore, Finn and Dowsett JJ, 10 August 2000) at [48] per Finn and Dowsett JJ. 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 *MIAC v MZYRI* [2012] FCA 1107 (Jagot J, 16 October 2012) at [33] where the court stated that s.91R(1) does not permit a decision-maker to disregard a claim on the basis of an unstated assumption that there is a simple dichotomy between persecution by reason of self-interest and for a Convention reason. In that case, 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 who had benefited from the persecution of the claimant's father, and the underlying religious reasons motivating the villagers to continue to persecute the family and to enable the oppressive conduct of the local commander. Similarly, see *SZQ// v MIAC* [2012] FCA 402 (North J, 22 February 2012) at [22] where the Court held that the Reviewer's finding that the motivation of a gang was to obtain money failed to address the claim that the appellant was a target for extortion because he was a young Tamil male. However, contrast *DZACC v MIAC* [2012] FMCA 314 (Cameron FM, 20 April 2012) for an example of circumstances where it was open to 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 the family of his girlfriend and the Reviewer found that although his religion and caste may be reasons that the family found him unsuitable, they were not the reasons that he was targeted by the family: the claimant 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

or racial persecution on the other. At the very least, the Tribunal, was required to determine whether or not it was satisfied that those seeking retribution against the applicant were doing so as an aspect of a broader political or racial campaign against the applicant, or were doing so for reasons unrelated to that campaign.<sup>59</sup>

Thus, in cases involving what appears to be revenge or criminal conduct, a decision-maker may be required to determine whether a refugee reason underlies the harm. The words ‘essential and significant’ in s.91R(a) do not allow the decision-maker to ignore the real or essential underlying reasons for a person’s conduct.<sup>60</sup> This was highlighted in *SZFZN v MIAC*, where it was held that the Tribunal had erred when it had paradoxically accepted that the applicant’s friend’s father was impelled by his society’s hostility to homosexuality when procuring persecution of the applicant and on the other hand found that the friend’s father was not motivated for reasons of the applicant’s membership of a particular social group (homosexuals), but rather by ‘a desire for personal revenge against the applicant for potentially bringing disgrace on his son and therefore himself, and also a desire to ensure the applicant left his home town’, without explaining how it could arrive at those paradoxical findings consistently with the test required to be applied.<sup>61</sup> These principles would apply equally to s.5J(4)(a).

Nevertheless, in these and other cases where the harm feared is multi-faceted, to satisfy the definition as qualified by s.91R(1)(a)/s.5J(4)(a), it is necessary to consider whether *the essential and significant* reason or reasons for the harm feared is a refugee reason or reasons.<sup>62</sup>

## THE REFUGEE GROUNDS

Both the Convention definition of ‘refugee’ and that in the Act specify five relevant grounds for persecution: race, religion, nationality, membership of a particular social group and political opinion.

Although applicants or their advisers will generally seek to identify the ground or grounds which they think might be applicable, they do not have an obligation to do so. It is for the applicant to tell his or her story; but it is for the decision-maker, after making findings of fact, to decide whether the circumstances fall within the definition. Thus, the decision-maker should consider any refugee ground that is raised by the evidence and material even though not expressly claimed by the applicant.

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<sup>59</sup> account multiple motivations and that the finding was open to the Reviewer.

<sup>60</sup> [2004] FCA 545 (Selway J, 5 May 2004) at [12].

<sup>61</sup> *SZFZN v MIAC* [2006] FMCA 1153 (Smith FM, 31 August 2006) at [21]. His Honour added that s.91R(1)(a) ‘provides a gloss requiring disregard of concurrent or contributory Convention causes of persecution if they can be characterised as inessential or insignificant’. However, it should be remembered that the language of the provision is directed to whether one or more of the refugee reason or reasons is the essential and significant reason or reasons for the persecution in question.

<sup>62</sup> [2006] FMCA 1153 (Smith FM, 31 August 2006) at [17].

The suggestion in *Rajaratnam v MIMA* [2000] FCA 1111 (Moore, Finn and Dowsett JJ, 10 August 2000) at [47] that the relevant consideration is merely whether the reason for the extortion ‘includes’ a Convention reason is no longer reliable.

The grounds may overlap.<sup>63</sup> For example, those of a particular race, or nationality, or who are adherents of a particular religion might all be said to be members of a particular social group.<sup>64</sup> For this reason, where an applicant's claims can readily be seen to fall within one ground, say membership of a particular social group, it will rarely be necessary to give much thought as to whether they might also fall within one of the other grounds.<sup>65</sup> Conversely, if a claimed ground, say membership of a particular social group, is doubtful, it may be necessary to consider whether a well-founded fear of persecution might fall within one of the other Convention grounds.

When considering whether the relevant nexus is established, it should be remembered that the notion of 'membership' is expressly mentioned in the definitions only in relation to 'particular social group' and, while critical to that ground, has no part to play in the other categories.<sup>66</sup>

As stated earlier, the same grounds appear in both the Convention and Act definitions. With the exception of the law pertaining to 'particular social groups' (which for post-16 December 2014 applications is a defined term in the Act under s.5L) the case law developed in the context of the other Article 1A(2) grounds – race, religion, nationality and political opinion – would appear to apply equally to those parallel concepts in the codified definition.

## Race

There is little Australian authority on 'race' as a refugee ground. It is generally considered to be a very broad concept and is not particularly contentious. In *Calado v MIMA* the Court, whilst being careful not to set up definitive tests, held:

When considering the meaning of the expression "race" in a case such as the present, it is appropriate to take into account the "popular" understanding of the term which accords importance to physical appearance, skin colour and ethnic origin. There can be no single test for the meaning of the expression "race" but the term connotes considerations such as whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of colour, and national or ethnic origins. Another consideration is whether the characteristics of members of the group are those with which a person is born and which he or she cannot change. These questions are discussed by Brennan J in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 243-244. At the latter part his Honour said:

As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common heritage or their

<sup>63</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 404. In *Mocan v MIEA* [1996] FCA 1532 (Merkel J, 6 June 1996), the Tribunal had dealt with the applicant's claims under the ground of religion. The Court held that it did not fail to give proper consideration to the likelihood of discrimination against the applicant as a member of a particular social group (his family) because the circumstances that may relevantly have made his family a particular social group all related to its religious affiliation or that of its members. See also *Lek v MILGEA (No.2)* (1993) 45 FCR 418 at 430-431.

<sup>64</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 284, per Gummow J; see also per Dawson J at 242 and McHugh J at 257-8.

<sup>65</sup> For example, see *SZONH v MIAC* [2012] FMCA 242 (Burnett FM, 28 March 2012) at [33] where the Court rejected the applicant's argument that the Tribunal had failed to consider whether she was a member of a particular social group bound by a common Christian faith and spirituality in circumstances where it had considered and rejected her claims under the nexus of religion. The Court stated that the distinction between 'Christianity' and the contended group was not at all plain.

<sup>66</sup> See *Okere v MIMA* (1998) 87 FCR 112 at 115-117.

common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide...

... in interpreting the conferral of a constitutional power it is appropriate that the term should be given a liberal and practical interpretation. In my view, a similar approach should be taken in considering the Convention in the present case.<sup>67</sup>

However, in *SZEGA v MIMIA* the Court did not agree with a submission that caste was a variant of race and indicated that caste would more appropriately fall within membership of a particular social group.<sup>68</sup>

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* also provides some guidance but is not definitive.<sup>69</sup> It states at paragraphs 68 and 70:

68. Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.

70. The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim for refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will itself be sufficient ground to fear persecution.<sup>70</sup>

The discussion of the refugee ground of 'race' in both the *Handbook* and the Federal Court's decision in *Calado* emphasise the broad nature of that term.

## Religion

An overview of the scope of 'religion' as a refugee ground can be found in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* where it is stated:

71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right include the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

72. Persecution for "reasons of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.<sup>71</sup>

However, while this provides some guidance, it is not definitive.<sup>72</sup> A body of Australian case law has developed around the scope of 'religion' and the circumstances in which persecution

<sup>67</sup> *Calado v MIMA* (1998) 81 FCR 450 at 455. Appeals from this judgment to the Full Federal Court were dismissed, see *Calado v MIMA* (1998) 89 FCR 59. The Full Federal Court's judgment did not interfere with, or expand upon, the meaning of 'race'.

<sup>68</sup> *SZEGA v MIMIA* [2006] FCA 1286 (Edmonds J, 3 October 2006) at [19].

<sup>69</sup> *Chan v MIEA* (1989) 169 CLR 379 at 392, per Mason CJ.

<sup>70</sup> *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, reissued December 2011) at [68], [70] ('*Handbook*').

<sup>71</sup> *Handbook*, above n70 at [71]-[73].

<sup>72</sup> *Chan v MIEA* (1989) 169 CLR 389 at 392, per Mason CJ.

is carried out 'for reasons of' religion in the Convention setting, which would appear to apply equally to the definition of 'refugee' in the Act.

### **Definition of 'religion'**

If an issue arises as to whether a claim falls within this refugee ground, a useful starting point will be the ordinary meaning of the word 'religion'. The word 'religion' is variously defined as:

The quest for the values of the ideal life, involving three phases, the ideal, the practices for attaining the values of the ideal, and the theology or world view relating the quest to the environing universe.<sup>73</sup>

A particular system in which the quest for the ideal life has been embodied.<sup>74</sup>

Action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; the exercise or practice of rites or observances implying this; A particular system of faith and worship.<sup>75</sup>

The High Court considered the meaning of 'religion' in the context of Australian Constitutional law, in *Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)*,<sup>76</sup> a case concerning the question as to whether Scientology constituted a religion for taxation purposes. The Court's conclusions in that case are conveniently summarised in Butterworths Australian Legal Dictionary where 'religion' is defined as:

A system of ideas and practices, usually involving a belief in the supernatural. ... There exists no formularised legal criterion, whether of inclusion or exclusion, for determining whether a given system constitutes a religion. However, indicia derived from empirical observation of accepted religions can be used as guidelines, some of which are: that there is belief in the supernatural; that the system of ideas relates to the place of humanity in the universe and its relationship with the supernatural; that the ideas are accepted by adherents as requiring the observation of particular codes of conduct; that the adherents constitute an identifiable group; and that they see the system as constituting a religion.<sup>77</sup>

Importantly, Wilson and Deane JJ observed that those indicia are no more than aids in determining whether a particular collection of ideas and/or practices should be characterised as 'a religion' and that the assistance to be derived from them will vary according to the context in which the question arises. Their Honours also emphasised that the question should be approached and determined as one of 'arid characterization not involving any element of assessment of the utility, the intellectual quality or the essential "truth" or "worth" of tenets of the claimed religion'.<sup>78</sup>

The scope of 'religion' within the context of the Convention has been considered by the Federal Court in several cases including *MIMA v Darboy*<sup>79</sup> and *Wang v MIMA*.<sup>80</sup> In *MIMA v*

<sup>73</sup> Macquarie Dictionary, revised 3<sup>rd</sup> edition.

<sup>74</sup> Macquarie Dictionary, revised 3<sup>rd</sup> edition.

<sup>75</sup> Shorter Oxford English Dictionary.

<sup>76</sup> (1983) 154 CLR 120.

<sup>77</sup> *Butterworths Australian Legal Dictionary*, Dr P Nygh & Peter Butt, eds., 1997, p. 1007, referring to *Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120. See the judgment of Mason CJ and Brennan J at 136, Murphy J at 151 and Wilson and Deane JJ at 174.

<sup>78</sup> *Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 at 174.

<sup>79</sup> [1998] FCA 931 (Moore J, 6 August 1998).

<sup>80</sup> (2000) 105 FCR 548. Followed in *Liu v MIMA* [2001] FCA 257 (Cooper J, 16 March 2001) at [19]-[22].



*Darboy* the Federal Court referred to the following passage from the High Court's judgment in *Church of the New Faith*:

The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself. Conversely, unless there be a real connexion between a person's belief in the supernatural and particular conduct in which that person engages, that conduct cannot itself be characterised as religious.<sup>81</sup>

In *Wang v MIMA* the issue was not whether a 'religion' was involved, but rather the extent to which Convention protection applied to its practice as well as the underlying belief. Delivering the main judgment in *Wang*, Merkel J, with whom Gray J agreed, observed that for the purposes of the Convention, the Courts have generally taken a broad view of what constitutes the practice of religion. His Honour took into account Article 18 of the Universal Declaration of Human Rights (UDHR) which states:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or **in community with others** and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>82</sup> (original emphasis).

According to Merkel J, when this and objects of the Convention are taken into account

it is clear that there are two elements to the concept of religion for the purposes of Art 1A(2): the first is as a manifestation or practice of personal faith or doctrine, and the second is the manifestation or practice of that faith or doctrine in a like-minded community. I would add that that interpretation is consistent with the commonly understood meaning of religion as including its practice in or with a like-minded community.<sup>83</sup>

While Wilcox J in the same case held a 'reservation' in respect of the legitimacy of having regard to Article 18 of the Declaration in determining the meaning of religion for the purposes of Article 1A(2) of the Convention,<sup>84</sup> his Honour nevertheless agreed that the concept of religion included the element of manifestation or practice of a religious faith in community with others.<sup>85</sup> He noted both that the major world religions require or encourage their adherents to participate in communal rites or practices; and that the form and content of such rites and practices is often a matter of enormous importance to adherents of a particular faith, as is their system of governance.<sup>86</sup> All members of the Full Court in *Wang* concluded that the Tribunal had adopted an unduly narrow interpretation of religion, by failing to take into account the importance of the second, communal aspect.<sup>87</sup> This should not be taken as suggesting that a communal aspect will necessarily be significant in all

<sup>81</sup> *MIMA v Darboy* (1998) 52 ALD 44 at 50, quoting Mason CJ and Brennan J in *Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 at 135.

<sup>82</sup> (2000) 105 FCR 548 at [73]. His Honour observed that Art 18(1) of the *International Covenant on Civil and Political Rights* was to similar effect. See also discussion of Art 18(1) in *Liu v MIMA* [2001] FCA 257 (Cooper J, 16 March 2001) at [21]. Cooper J followed the majority in *Wang v MIMA*, notably relying on Article 18 of the UDHR to determine the issue. As for the legitimacy of using other international instruments as an aid in construing the terms of the Convention, Merkel J relied particularly on comments made by Kirby J in *Applicant A v MIEA* (1997) 190 CLR 225 at 296-297 and French J in *MIMA v Mohammed* (2000) 98 FCR 405 at 421. See also the authorities cited at [79].

<sup>83</sup> *Wang v MIMA* (2000) 105 FCR 548 at [81].

<sup>84</sup> *Wang v MIMA* (2000) 105 FCR 548 at [2].

<sup>85</sup> *Wang v MIMA* (2000) 105 FCR 548 at [5].

<sup>86</sup> *Wang v MIMA* (2000) 105 FCR 548 at [7] and [8].

<sup>87</sup> *Wang v MIMA* (2000) 105 FCR 548 at [10] per Wilcox J; at [101] per Merkel J, with whom Gray J agreed - see [20]. Cf *W244/01A v MIMA* [2002] FCA 52 (RD Nicholson J, 5 February 2002) in which RD Nicholson J applied *Wang v MIMA* (2000) 105 FCR 548 in a doubtful manner, stating that it followed that absent any manifestation or practice of the applicant's faith or doctrine in a like minded community, there was no basis on which the applicant could be found to have a



cases - rather, its significance will depend on the particular circumstances, including whether it is an important aspect of the particular religion, and whether it is an important aspect of the particular applicant's practice of his or her religion.

### ***Persecution 'for reasons of' religion***

The question of whether an applicant has a well-founded fear of being persecuted for reasons of religion may arise in a variety of factual circumstances. These include the application of generally applicable religious-based laws, departing from orthodox religious beliefs or transgressing social mores, conversion, apostasy<sup>88</sup> and mixed marriage. Whether the relevant nexus exists will often depend on an analysis of the motivation of the persecutor in the particular circumstances or, where the harm feared involves the operation of generally applicable laws, whether there is a persecutory intent or nature to those laws or to the way they are applied.<sup>89</sup>

Persecution for reasons of religion will often involve prohibition against, restrictions on, or punishment for, a particular religious practice.<sup>90</sup> In cases of this kind, resolving the question whether the individual applicant has a well-founded fear of being persecuted for reasons of religion requires an assessment in the light of all the circumstances, including, where relevant, the 'central tenets' of the religion, how the applicant would be likely to manifest his or her religious beliefs and the likelihood of that manifestation attracting a persecutory reaction from the authorities.<sup>91</sup>

Religious persecution might also occur *indirectly* through a government regulatory regime. To take the well known example that Branson J referred to in *Okere v MIMA*:

[F]ew would question that Sir Thomas More was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.<sup>92</sup>

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well-founded fear of persecution on the Convention ground of religion (see [36]).

<sup>88</sup> To be an apostate does not require conversion from one faith to a different faith, but does require abandonment or rejection of the first faith: *WZAO v MIAC* (2012) 134 332 at [12], citing *W161/01A v MIMA* [2002] FCA 285.

<sup>89</sup> See *VCAD v MIMIA* [2004] FCA 1005 (Kenny J, 4 August 2004) at [35] where Kenny J held that where an applicant has avoided military service for religious reasons there may be a well-founded fear of persecution for reasons of religion if a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for reasons of religion. For further discussion of these issues, refer to Chapter 11 of this Guide.

<sup>90</sup> This might include a fear of punishment for practising a religion in a manner made unlawful by the laws of the applicant's country: See *Wang v MIMA* (2000) 105 FCR 548. See also *Woudneh v Inder* (unreported, Federal Court of Australia, Gray J, 16 September 1988); *MIMA v Zheng* [2000] FCA 50 (Hill, Whitlam & Carr JJ, 10 February 2000) per Hill J at [41] and per Carr J at [57]. *Zheng* was applied in *Liu v MIMA* [2001] FCA 257 (Cooper J, 16 March 2001). Cooper J stated: 'If properly characterised the conduct [by a State] amounts to no more than governance of the church involving no prohibition on the practice of a persons' religion, such conduct will not for that reason alone amount to persecution for a Convention reason' (at [18]). Note however, the Full Court in *Wang* distinguished *Zheng* on its facts. There may be a distinction also between an inability to practice religion in a particular way and a prohibition on that practice. In *DZABG v MIAC* [2012] FMCA 36 (Brown FM, 25 January 2012) (undisturbed on appeal: *DZABG v MIAC* [2012] FCA 827 (Dowsett J, 7 August 2012), the Court drew a distinction (at [74]-[75]) between circumstances such as those in *Wang* where the applicant was forbidden to practice his beliefs in the manner of his choosing, and those in the instant case, where the applicant, a Kuwaiti Bidoon of Shia faith, was unable to practice his religion in public due to the absence of a place to do so, rather than any prohibition on the practice of that religion.

<sup>91</sup> *Pei Lan He v MIMA* [2001] FCA 446 (Ryan J, 23 April 2001).

<sup>92</sup> (1998) 87 FCR 112 at 118.

There is some authority for the proposition that persecution ‘for reasons of religion’ can also include persecution because the applicant does *not* have a particular religion<sup>93</sup> or because the applicant’s conduct offends against the religion of the alleged persecutors.<sup>94</sup> In *Prashar v MIMA* the Federal Court held that this aspect of the Convention definition was not limited to people holding a religious belief but extended to non-believers.<sup>95</sup> His Honour stated:

... if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.<sup>96</sup>

In *NAQJ v MIMIA* Branson J, referring to *Prashar*, doubted the accuracy of a proposition that persecution on the ground of religion must involve a clash of religious doctrines or of persons of one religion seeking to persecute those of another.<sup>97</sup> Her Honour held that if the Tribunal had found that an applicant did not wish to comply with all of the rites and customs of Islam in that she did not accept a ban on living in de facto relationships, it may have been open to it, subject to s.91R of the Act, to conclude that any persecution that the applicant faced as a consequence would be persecution for reasons of religion.<sup>98</sup>

Note, however, that under s.91R(1)(a)/s.5J(4)(a) of the Act, where the harm feared is attributable to a number of motivations, it will be insufficient that religion constitutes a minor or non-central motivation. To come within either Article 1A(2) as qualified by s.91R(1)(a) or s.5H(1) as qualified by s.5J, religion (or religion together with other refugee reasons) must constitute at least the essential and significant reason or reasons for the persecution.

## Nationality

There is little Australian authority on ‘nationality’ as a refugee ground. It is not generally a contentious ground and rarely arises for consideration.<sup>99</sup> The UNHCR *Handbook on*

<sup>93</sup> *Prashar v MIMA* [2001] FCA 57 (Madgwick J, 7 February 2001).

<sup>94</sup> *Prashar v MIMA* [2001] FCA 57 (Madgwick J, 7 February 2001). See also *Cameirao v MIMA* [2000] FCA 1319 (O’Loughlin J, 15 September 2000) and *Hellman v MIMA* [2000] FCA 645 (Branson J, 17 May 2000) at [27].

<sup>95</sup> [2001] FCA 57 (Madgwick J, 7 February 2001).

<sup>96</sup> *Prashar v MIMA* [2001] FCA 57 (Madgwick J, 7 February 2001) at [19]. His Honour added that if there is anything in *Awan v MIMA* [1998] FCA 435 (Davies J, 9 April 1998) to the contrary, he believes it to be clearly wrong and would not follow it. On appeal to the Full Federal Court the case was dismissed. The Full Court did not specifically consider His Honour’s reasoning on non-believers, the case was decided on other grounds: *Prashar v MIMA* [2001] FCA 1119 (Moore, Sackville & Kiefel JJ, 10 August 2001) and *Prashar v MIMA* (2001) 115 FCR 197.

<sup>97</sup> [2004] FCA 946 (Branson J, 22 July 2004).

<sup>98</sup> *NAQJ v MIMIA* [2004] FCA 946 (Branson J, 22 July 2004) at [18]. See also *SCAT v MIMIA* [2002] FCA 962 (von Doussa J, 6 August 2002) at [33] where von Doussa J held that a well-founded fear of persecution could arise for reasons of religion if the risk of harm arose for reasons of the religion of the persecutors and their disposition, by reasons of their religion, towards the asylum seeker. On appeal, the Full Federal Court overturned von Doussa J’s decision, however, his Honour’s discussion of persecution for reasons of religion was not disturbed: *SCAT v MIMIA* [2003] FCAFC 80 (Madgwick, Gyles and Conti JJ, 30 April 2003).

<sup>99</sup> Claims to fear persecution on the basis of nationality may in some instances be more properly characterised as a claim on the basis of race. In *DZAAS v MIAC* [2012] FCA 828 (Dowsett J, 7 August 2012) at [30] the Federal Court rejected an argument that the labelling of Faili Kurds by Iranians as ‘Arab insect eaters’ was, in effect, a description of persons of Iraqi nationality and therefore raised a claim of persecution for reasons of nationality. The Court found that no such claim was raised and that any insult intended by use of the word ‘Arab’ was plainly racial rather than national. Contrast *DZAAA v MIAC* [2012] FMCA 699 (Lucev FM, 24 August 2012) where the Court found that the applicant’s submission that Faili Kurds are persecuted due to their imputed identities as Iraqis raised a claim of imputed nationality.

*Procedures and Criteria for Determining Refugee Status* provides some guidance but is not definitive.<sup>100</sup> It states:

74. The term “nationality” in this context is not to be understood only as “citizenship”. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term “race”. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

75. The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific “nationality”.

76. Whereas in most cases persecution for reason of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.<sup>101</sup>

In *Su Wen Jian v MIEA*<sup>102</sup> it was argued that Chinese laws applying sanctions against Chinese nationals for departure from China without permission, did so on the basis of nationality and thereby negated what was described as a fundamental right to leave and return to one’s country of nationality. It was put that this was discrimination on the grounds of nationality which resulted in persecution in the form of punishment by imprisonment. Justice Carr rejected the submissions and concluded that even if the departure laws applied only to Chinese nationals, imprisonment or fines for their contravention would not amount to persecution for reasons of nationality within the meaning of that expression in the Convention.<sup>103</sup> His Honour said:

... the evidence [does not] point to the fact that if Mr Su is imprisoned on return to China for having departed secretly, such treatment will be because he is a Chinese national. If he is sent to prison it will be because he has contravened the law, not because he is a Chinese national.<sup>104</sup>

This judgment is not authority for the proposition that such laws can never come within the scope of the Convention. Such determinations, whether in the context of the Convention or ss.5H and 5J of the Act, will be a matter of fact for the decision-maker in each particular case.

There is some authority for the proposition that the ground of nationality can only be raised where a particular nationality is identified. In *Husein Ali Haris v MIMA*<sup>105</sup> the applicant argued that the application of Indonesian laws which prevented entry to Indonesia of persons who were not Indonesian nationals amounted to persecution for reasons of nationality. However the Federal Court held that the reasons for the persecution feared must relate to a *particular* nationality. The Court stated:

As is apparent from the judgments of both McHugh J at p 398 [ALR] and Gummow J at p 413 [ALR] in *Re*

<sup>100</sup> *Chan v MIEA* (1989) 169 CLR 389 at 392, per Mason CJ.

<sup>101</sup> *Handbook*, above n70 at [74]-[76].

<sup>102</sup> unreported, Federal Court of Australia, Carr J, 24 April 1996.

<sup>103</sup> *Su Wen Jian v MIEA* (unreported, Federal Court of Australia, Carr J, 24 April 1996) at 25.

<sup>104</sup> *Su Wen Jian v MIEA* (unreported, Federal Court of Australia, Carr J, 24 April 1996) at 24.

<sup>105</sup> unreported, Federal Court of Australia, Moore J, 12 February 1998.

*Applicant A*, the Convention is directed to persecution for reasons relating to a particular nationality. It is where the characteristic of an applicant being a national of a particular country has led to persecution that the definition applies. The absence of that characteristic is not a matter upon which the Convention was intended to operate.<sup>106</sup>

## Membership of a particular social group

This is often regarded as the most difficult and controversial of the five refugee grounds and there is a wealth of Australian authority on it, as that term is understood under Article 1A(2) of the Convention.

However, for protection visa applications made on or after 16 December 2014, ‘particular social group’ is defined differently in s.5L of the Act. While the definition draws on the existing case law, it also imports elements from other jurisdictions and there are significant differences between the two constructs. The sections below will discuss the meaning of ‘particular social group’ under the Convention and the Act respectively.

For both definitions, before a decision can be made that a person is a refugee by reason of his or her membership of a particular social group, the decision-maker must be satisfied that:

- there is a relevant social group of which the applicant is a member; and
- the persecution feared is for reasons of membership of the group.

Although a range of possible approaches to those issues may be open in the circumstances of the particular case, it will usually be convenient to deal with the question whether there is a relevant ‘particular social group’ as a discrete question and to do so before considering whether the harm feared is for reasons of membership of the group.<sup>107</sup> The fact that a person

<sup>106</sup> *Husein Ali Haris v MIMA*, (unreported, Federal Court of Australia, Moore J, 12 February 1998) at 5.

<sup>107</sup> In *Dranichnikov v MIMA* [2003] HCA 26 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 8 May 2003), where the applicant had relied on his membership of a particular social group that the Tribunal had failed to consider, Gummow & Callinan JJ stated at [26] that ‘the task of the Tribunal involves a number of steps. First, the Tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. ... If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well founded, and if it is, whether it is for a Convention reason’. Despite some suggestion to the contrary (for example *SGBB v MIMIA* [2003] FCA 709 (Selway J, 16 July 2003) at [24]-[25]; *NAPU v MIMIA* [2004] FCAFC 193 (Moore, Branson & Emmett JJ, 5 August 2004) per Moore J at [36], [45], per Branson J at [48]-[50]; *NABE v MIMIA (No 2)* (2004) 144 FCR 1 at [55]-[56]; *SZBYZ v MIMIA* [2006] FMCA 380 (Barnes FM, 20 April 2006) at [50]; *MZXBC v MIAC* [2006] FMCA 819 (McInnis FM, 8 June 2006) at [31]; *SZQJH v MIAC* [2012] FCA 297 (Rares J, 2 March 2012) at [38], [44]), the weight of authority suggests that the approach exposed by *Dranichnikov* is not the only permissible approach to a claim based on membership of a particular social group. In *BRGAE of 2008 v MIAC* [2009] FCA 543 (Collier J, 26 May 2009), the Federal Court held at [23] that once the Tribunal did not accept that the appellants would have a well-founded basis for any fear of persecution in the future, it was unnecessary to identify the particular social group of which the appellants claimed to be members. See also *MZZTW v MIBP* [2015] FCA 475 (Jessup J, 19 May 2015) at [13]-[16]; *MZZXB v MIBP* [2014] FCCA 1466 (Judge McGuire, 1 October 2014) at [43]-[44]; *SZSON v MIAC* [2013] FCCA 1153 (Judge Barnes, 23 July 2013) at [42]-[43], [48]; *SZNOE v MIAC* [2012] FCA 96 (Greenwood J, 20 February 2012) at [77]-[78]; *SZQLO v MIAC* [2012] FMCA 23 (Nicholls FM, 20 January 2012) at [55]; *MZXDQ v MIAC* [2006] FCA 1632 (Finkelstein J, 28 November 2006) and *SZJRU v MIAC* [2009] FCA 315 (Besanko J, 6 April 2009). Note, however, comments of the Federal Court that although failure to follow the approach outlined in *Dranichnikov* will not amount to error, the advantage of following that approach is that it will alert the decision-maker to the possibility that other social groups may need to be considered and will also assist in the subsequent factual inquiry: *SXCB v MIMIA* [2005] FCA 102 (Selway J, 20 January 2005) at [16]-[17].

was once a member of a particular social group does not mean they will necessarily be a member of it or face persecution for that reason in the future.<sup>108</sup>

### ***'Particular social group' under the Refugees Convention***

The phrase 'membership of a particular social group' is indeterminate. It is impossible to define the phrase exhaustively and pointless to attempt to do so.<sup>109</sup> Further, it is not generally possible to define '*absolute*' particular social groups, because what constitutes a particular social group in one society at any one time may not in another society or at another time. The emphasis is upon whether or not a particular social group exists in the context of a *particular* society.

The phrase 'particular social group' should be given a broad interpretation, however, the category was not intended to provide a general safety net or 'catch all' to cover any form of persecution.<sup>110</sup> In *Morato v MILGEA* Lockhart J said:

The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. ...

In my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression.<sup>111</sup>

### **Characteristics of a particular social group**

*Applicant A's case* remains the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of 'particular social group' in this way:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.<sup>112</sup>

<sup>108</sup> In *MZZFQ v MIBP* [2013] FCCA 1995 (Judge Riethmuller, 10 December 2013), the Tribunal found that the applicant was not a member of the postulated social group of 'school children in Afghanistan' and that he would not return to study in the future. The Court observed at [27] that the group related to a social 'group' of which the applicant was no longer a member, and if the applicant was not at real risk of persecution as a former member of the group and would not be a member in the future, even absent the circumstances of the past which created a risk, it was difficult to see that he satisfied the criteria for a protection visa. An application for extension of time to appeal from this judgment was dismissed without any further consideration of this issue in *MZZFQ v MIBP* [2016] FCA 1133 (Moshinsky J, 16 September 2016).

<sup>109</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 259, per McHugh J.

<sup>110</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 241 per Dawson J, at 260 per McHugh J.

<sup>111</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 416.

<sup>112</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow and Kirby JJ. In *STXB v MIMIA* (2004) 139 FCR 1, Selway J at [25] - [27] in considering this test stated that there is one clear difference and another possible difference to the test identified by the Full Court of the Federal Court in *MIMA v Zamora* (1998) 85 FCR 458. The clear difference relates

Justice McHugh in *Applicant S* summarised the issue in broadly similar terms:

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.<sup>113</sup>

*Applicant S* also establishes that there is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a group that is set apart from the rest of the community.<sup>114</sup>

#### *Some common element that distinguishes the group from society at large*

A particular social group is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.<sup>115</sup> It was stated in *Applicant A*:

The adjoining of “social” to “group” suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word “particular” in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.<sup>116</sup>

The use of [the term “membership”] in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group.

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to the third proposition in both tests and pertains to the High Court rejecting that aspect of the third proposition stated by the Full Court, that society must recognise that the group is ‘set apart’. The possible difference between the tests pertains to the use by the High Court of the word ‘distinguish’ whilst the Full Court used the words ‘set apart’. However after considering a hypothetical example of ‘left handed persons’ in Australia, his Honour concluded that the High Court used the word ‘distinguish’ in the same sense in which the Full Court used the word ‘set apart’. In *MZZBO v MIBP* [2013] FCCA 1832 (Judge O’Dwyer, 8 November 2013) at [9], the Court held that *Applicant S* did not suggest a process to be followed where each of the three criteria spelt out in *Applicant S* must be addressed. If one of the criteria is not met, then a finding of membership of a particular social group cannot be made.

<sup>113</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [69] per McHugh J.

<sup>114</sup> That is, the third *Zamora* criterion. In *MIMA v Zamora* (1998) 85 FCR 458 the Full Federal Court stated at 464 that ‘Applicant A’s case was authority for the proposition that “[t]o determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.’ However the High Court held that the third of these propositions was incorrect. A number of Court decisions have required the third *Zamora* criterion to be satisfied. See for example: *MIMA v Applicant Z* (2001) 116 FCR 36 at 40 (able bodied Afghan men); *MIMA v Applicant M* [2002] FCAFC 253 (Whitlam, North and Stone JJ, 23 August 2003) at [21] (conscientious objectors in Afghanistan); *MIMIA v VFAY* [2003] FCAFC 191 (French, Sackville and Hely JJ, 22 August 2003) at [100] (unaccompanied children in Afghanistan); *SGGB and SGHB v MIMIA* [2002] FMCA 367 (Barnes FM, 1 May 2003) at [30] (feminist women in Afghanistan); *VBAL v MIMIA* [2003] FMCA 120 (Hartnett FM, 7 April 2003) at [30] to [31] (informants against the LTTE); and *VAM v MIMIA* [2002] FCAFC 125 (Black CJ, Drummond and Kenny JJ, 10 May 2002) at [12] - [14] (ex-policemen targeted for giving information about a gangster in Malaysia). In light of the High Court’s reasoning in *Applicant S v MIMA* (2004) 217 CLR 387 the reliance on the third *Zamora* principle is no longer good law.

<sup>115</sup> *Applicant A v MIEA* (1997) 190 CLR 225 per Dawson J at 241, McHugh J at 264-266 and Gummow J at 285.

<sup>116</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 241 per Dawson J.

Those indiscriminately killed or robbed by guerillas, for example, are not a particular social group.<sup>117</sup>

Justice Gummow agreed with the statement in *Ram*:

There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group.<sup>118</sup>

Justice McHugh in *Applicant S* stressed the necessity of the group being cognisable within the society in the following statement:

A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term "a particular social group" appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group". A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase "persecuted for reasons of ... membership" implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals.<sup>119</sup>

His Honour added that it did not follow that the persecutor or anyone else in the society must perceive the group as 'a particular social group',<sup>120</sup> and explained that it is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a 'uniting' feature or attribute, and the persons in that class are cognisable objectively as a particular social group.<sup>121</sup>

### *Persecutory conduct cannot define a particular social group*

The characteristic or element which unites the group cannot normally be a common fear of persecution. In *Applicant A*, Dawson J stated:

There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention "completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and

<sup>117</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 264 -265 per McHugh J.

<sup>118</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 285, citing *Ram v MIEA* (1995) 57 FCR 565 at 569 per Burchett J. These principles reflect the principles established in *Morato v MILGEA* (1992) 39 FCR 401 where Black CJ stated at 405-406: '...it is necessary to examine the characteristics of the supposed group to see whether, on any sensible view of the expression, those who are said to constitute it can be said to be members of a particular social group - a group that has to be sufficiently cognisable as to have something that may sensibly be identified as membership' and 'At the very least, a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of membership of such a group'. Note, however in relation to Burchett J's reference in *Ram* to what a person owns, that the possession of wealth is capable in some circumstances of constituting those who possess it as members of a particular social group: *Ram v MIEA* (1995) 57 FCR 565 at 570 per Nicholson J; *MZYPJ v MIAC* [2012] FMCA 98 (Whelan FM, 16 February 2012) at [51]. See n186 below.

<sup>119</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [64] per McHugh J.

<sup>120</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [64] per McHugh J.

<sup>121</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [69] per McHugh J. In *MZYRK v MIAC* [2012] FMCA 284 (Riley FM, 17 April 2012) the Court held at [37] that there is jurisdictional warrant, following *Applicant A* and *Applicant S*, for requiring a particular social group to possess a unifying or uniting element.



not vice versa). That approach would ignore what Burchett J in *Ram v Minister for Immigration* called the “common thread” which links the expressions “persecuted”, “for reasons of”, and “membership of a particular social group”, namely:

a motivation which is implicit in the very idea of persecution, is expressed in the phrase ‘for reasons of’, and fastens upon the victim’s membership of a particular social group. He is persecuted because he belongs to that group.<sup>122</sup>

In the same case McHugh J said:

The concept of persecution can have no place in defining the term “a particular social group”. ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the “particular social group” ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of “fear of persecution”, “for reasons of” and “membership of a particular social group” in the definition of “refugee”.<sup>123</sup>

For example, in a number of Albanian ‘blood feud’ cases, various postulated groups such as ‘citizens of Albania who are subject to the operation of the customary law Code of Leke Dukagjini (the Kanun)’<sup>124</sup> and men in Albania targeted in accordance with the Kanun<sup>125</sup> have been found by the Court not to constitute a particular social group because, on the evidence, the only identifying feature of such a group was a shared fear of persecution. A somewhat narrower social group consisting of ‘males in the general population who have become the target of a blood feud because some family member has killed a member of another family’ has also been rejected for the same reason.<sup>126</sup> In contrast, the Court has observed that it would be wrong to say that ‘failed asylum seekers in Sri Lanka’ could not constitute a particular social group on this basis, as neither the rejection of an asylum claim nor being returned to Sri Lanka could conceivably amount to the infliction of persecution by Sri Lankan authorities.<sup>127</sup>

Nevertheless, as McHugh J explained in *Applicant A* with his well-known ‘left-handed men’ example, the actions of the persecutors may serve to identify or cause the creation of a particular social group in society:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social

<sup>122</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 242.

<sup>123</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 263.

<sup>124</sup> *SCAL v MIMIA* [2003] FCA 548 (von Doussa J, 5 June 2003) (‘SCAL 1’) at [17] to [21]. Affirmed by the Full Court in *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg JJ, 18 December 2003) (‘SCAL 2’) at [9]. The Full Court said: ‘His Honour said the Code (Code of Leke Dukagjini (the Kanun)) is to be treated, at least in the geographical areas from which the appellant comes, as a law or practice of general application. He referred to authorities establishing that whilst a particular social group may be defined in a way that includes numerous members, a law or practice which, although in a sense persecutory, applies to all members of society cannot create a particular social group consisting of all those who bring themselves within its terms. See *Applicant A v MIEA* (1997) 190 CLR 225 and *MIMA v Khawar* (2002) 210 CLR 1’.

<sup>125</sup> *SCAL v MIMIA* [2003] FCA 548 (von Doussa J, 5 June 2003) (‘SCAL 1’) at [29].

<sup>126</sup> *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg, JJ, 18 December 2003) at [9]. See also *STXB v MIMIA* (2004) 139 FCR 1. In *SZQZG v MIAC* [2013] FCA 249 (Rares J, 20 February 2013) the Court held that the relevant characteristic of the claimed group ‘person’s victimised by individuals with political power and/or connections’ was a shared fear of persecution and did not constitute a particular social group.

<sup>127</sup> *SZTKE v MIBP* [2015] FCCA 103 (Judge Driver, 15 February 2015) at [41]-[47], though the Court’s observations were *obiter* as it was unnecessary to decide this question. Although overturning the judgment on appeal, the Federal Court agreed with Judge Driver on this aspect: see *SZTKE v MIBP* [2015] FCA 1002 (Bromberg J, 10 September 2015) at [78].

group.<sup>128</sup>

In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ helpfully expanded on McHugh J's example of left-handed men in the following way:

[i]f the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.<sup>129</sup>

Thus, when there is evidence of discriminatory or 'persecutory' laws or practices against a group because of an identifiable attribute other than the shared persecution of the group, such laws and practices may indicate a particular social group if over time the discriminatory treatment has been absorbed into the social consciousness of the community. In such circumstances, as in the 'left-handed men' example, a combination of legal and social factors (or norms) prevalent in a particular society may determine that a group of persons is a particular social group distinguishable from the rest of society. In this way the group is defined other than by reference to the discriminatory treatment or persecution feared.

Clearly, the question of whether or not a particular social group shares a unifying characteristic that makes them cognisable in society should be considered in isolation from whether or not its members share persecution in common. The issue to be resolved is whether or not there is something *apart from persecution* which makes the group cognisable as a particular social group.

#### *Significance of external perceptions - Societal perception and third party perspectives*

Whether a group is cognisable as a particular social group that is distinguished or set apart from society at large may be ascertained by reference to societal perceptions within the relevant society or by reference to third party perspectives.

One way in which the existence of a particular social group may be determined is by examining whether the society in question perceives there to be such a group.<sup>130</sup> In *Applicant A*, McHugh J stated that if the group is perceived by people in the relevant country as a particular social group, it will usually, but not always, be the case that they are members of such a group.<sup>131</sup> However, contrary to what was suggested by the Full Federal Court in *MIMA v Zamora*<sup>132</sup>, there is no *requirement* that there be a perception within the society that the collection of individuals is a group that is set apart from the rest of the society. In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ explained:

[P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within

<sup>128</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 264.

<sup>129</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [31].

<sup>130</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [27] per Gleeson CJ, Gummow and Kirby JJ.

<sup>131</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 264 per McHugh J.

<sup>132</sup> (1998) 85 FCR 458 at 464.

the society, but rather that the group must be distinguished from the rest of the society.<sup>133</sup>

*Applicant S* establishes that while a particular social group must be a cognisable group within the community, there is no requirement of recognition or perception *by the relevant society* that the collection of individuals comprises such a group.

Nevertheless, the judgments make it clear that perceptions held by the community are relevant and may amount to evidence that a social group is a cognisable group within the community.<sup>134</sup> Indeed, McHugh J stated that evidence of a perception on the part of the relevant society is usually compelling evidence that the relevant group is ‘a particular social group’ in that society.<sup>135</sup> Justice Callinan also stated that the attitude expressed by acts or words of people within a country towards others may, and usually will provide cogent evidence that those others are a particular social group.<sup>136</sup>

However, the perception of the relevant society cannot be conclusive of the issue.<sup>137</sup> A particular social group may exist although it is not recognised or perceived *as such* by the society in which it exists.<sup>138</sup> For example, communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community.<sup>139</sup> Or those who form a particular social group may be perceived by the society in which the group exists as aberrant individuals and may even be described by a particular name, yet the society may not perceive these individuals as constituting a particular social group.<sup>140</sup> Nevertheless, those living outside that society may easily recognise the individuals concerned as comprising a particular social group.<sup>141</sup>

In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ stated that there is no reason in principle why cultural, social religious and legal norms pointing to the existence of a particular social group cannot be ascertained objectively from a third-party perspective.<sup>142</sup> They explained:

The third-party perspective is a common feature in the decision-making by the Tribunal and by the

<sup>133</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [27] per Gleeson CJ, Gummow and Kirby JJ. See also McHugh J at [66] - [68] who came to the same view and stated that to require evidence of a recognition or perception by the society that the collection of individuals in that society comprises ‘a particular social group’ is to impose a condition that the Convention does not require.

<sup>134</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [27], [35] per Gleeson CJ, Gummow and Kirby JJ, at [67] per McHugh J and at [98] per Callinan J. See also *SZRAQ v MIAC* [2012] FMCA 371 (Raphael FM, 8 May 2012) at [13]-[15] and *SZQKS v MIAC* [2012] FMCA 168 (Barnes FM, 13 March 2012) at [64]-[65].

<sup>135</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [67].

<sup>136</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [98].

<sup>137</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [98] per Callinan J.

<sup>138</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [34] per Gleeson CJ, Gummow and Kirby JJ and at [68] per McHugh J.

<sup>139</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [34] per Gleeson CJ, Gummow and Kirby JJ referring to *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [25], [30], [69], [96], [98].

<sup>140</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [68] per McHugh J.

<sup>141</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [68] per McHugh J. His Honour commented that such cases are likely to be rare, but that they exist is shown by cases such as *Appellant S395/2002 v MIMA* and *Appellant S396/2002 v MIMA* (2003) 216 CLR 473. ‘The evidence in those cases suggested that Bangladesh society prefers to deny the existence of homosexuality within that society. However, there was evidence that police, hustlers and others in that society singled homosexuals out for discriminatory treatment amounting to persecution because they were homosexuals. Both the Tribunal and this Court accepted in *Appellant S395/2002* and *Appellant S396/2002* that homosexuals in Bangladesh are a particular social group. Objectively, homosexuals in Bangladesh society comprise “a particular social group”, whether or not that society recognises them as such’.

<sup>142</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [34] per Gleeson CJ, Gummow and Kirby JJ.

delegates of the Minister. Decisions made by these decision-makers may rely on “country information” gathered by international bodies and nations other than the applicant's nation of origin. Such information often contains opinions held by those bodies or governments of those nations. From this information it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community. Such conclusions are clearly objective.<sup>143</sup>

### *Relevance of legal, social, cultural and religious factors*

The High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society. In *Khawar*, for example, McHugh & Gummow JJ stated:

The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.<sup>144</sup> (emphasis added)

In *Applicant S*, the joint judgment outlined how social and legal factors could indicate a particular social group in McHugh J's example of left-handed men. They said:

[i]f the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.<sup>145</sup>

In that case, the issue before the Tribunal was whether young able bodied men comprised a particular social group that could be distinguished from the rest of Afghan society.<sup>146</sup> Chief Justice Gleeson, Gummow and Kirby JJ indicated that the determination of that issue had to be considered by reference to legal, social, cultural and religious norms prevalent in Afghan society.<sup>147</sup> Similarly, McHugh J stated that the determination of that issue may require consideration of legal, social, cultural and religious norms prevalent in Afghan society.<sup>148</sup>

In *VTAO v MIMIA*, Merkel J explained how the reasoning in *Applicant S* could be applied to the question as to whether parents of children born in breach of China's family planning laws, or parents of 'black children', comprised a particular social group:

...Applying the reasoning of Gleeson CJ, Gummow and Kirby JJ in *Applicant S* and, in particular, their Honours' observations at 252 [36] and 255 [50], the issue the RRT was required to consider in the present case was whether, because of the legal and social norms prevalent in Chinese society, parents of children born in breach of China's family planning laws, or parents of "black children", comprised a social group that could be distinguished from the rest of Chinese society. In considering that issue the RRT was entitled to disregard the shared fear of persecution of the parents as an attribute common to all members of the group. Nonetheless, it was required to consider whether, over time, the singling out of parents of "black children" for discriminatory treatment under China's family planning laws might have been absorbed into the social consciousness of the community with the consequence that a combination of legal and social factors (or norms) prevalent in the community indicated that such parents form a social group

<sup>143</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [35] per Gleeson CJ, Gummow and Kirby JJ.

<sup>144</sup> *MIMA v Khawar* (2002) 210 CLR 1 at 28 [83]; see also at 44 [130] per Kirby J.

<sup>145</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [31] per Gleeson CJ, Gummow and Kirby JJ.

<sup>146</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [50] per Gleeson CJ, Gummow and Kirby JJ; at [76] per McHugh J; at [98] per Callinan J.

<sup>147</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [50].

<sup>148</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [76].

distinguishable from the rest of the community.<sup>149</sup>

Although legal, social, cultural and religious factors or norms are the kinds of factors that may need to be examined in determining whether there is a 'particular social group' in a society, the relevant factors will depend upon all the circumstances of the particular case. What is important is that the group must be distinguished from the rest of society and that this may be ascertained by reference to societal perceptions or to third party perspectives.

### What is not required

The High Court has rejected a number of limiting principles, including principles which have been developed in other jurisdictions. Notably:

- There is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a particular social group that is set apart from the rest of the community.<sup>150</sup>
- A group may qualify as a particular social group, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. For example, Christians in Roman times were a particular social as well as religious group although they were forced to practise their religion in the catacombs.<sup>151</sup>
- It is not necessary that the group should possess the attributes that they are perceived to have. For example, witches were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft.<sup>152</sup>
- Self-identity as a member of a particular group is not a universal prerequisite. For example, many German citizens of Jewish ethnicity did not, in the 1930s, identify themselves as 'Jews'. They conceived of themselves as Germans. Yet this did not prevent their being members 'of a particular social group' and persecuted for that reason (as well as for reasons of race and religion).<sup>153</sup>
- Those who constitute the 'group' need not be known as members of the group, even to each other.<sup>154</sup>
- There is no reason to confine a particular social group to small groups or large ones.<sup>155</sup>

<sup>149</sup> *VTAO v MIMIA* [2004] FCA 927 (Merkel J, 19 July 2004) at [32].

<sup>150</sup> *Applicant S v MIMA* (2004) 217 CLR 387, overruling this aspect of *MIMA v Zamora* (1998) 85 FCR 458 at 464.

<sup>151</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 265 per McHugh J.

<sup>152</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 265 per McHugh J.

<sup>153</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 296 per Kirby J. Further, in theory at least, a particular social group could include persecutors of members of that group: see *MZYFM v MIAC* [2009] FMCA 1276 (Riley FM, 21 December 2009), where the Court opined at [19]: 'A person may persecute others who belong to his own group. An example is closet homosexuals who have been alleged to be the worst perpetrators of violence against gay men. There is also the well-known concept of an Uncle Tom, who is considered to be a traitor to his own race.'

<sup>154</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 301 per Kirby J.

- The uniting particular need not be voluntary.<sup>156</sup> Nor is it necessary for the individual applicant to have been a member of a concerted body or association affirming group identity.<sup>157</sup>
- A 'particular social group' need not necessarily exhibit an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion.<sup>158</sup> There is no requirement that a characteristic must be 'innate or unchangeable' before it can distinguish a social group.<sup>159</sup>
- Although cohesiveness may assist to define a particular social group it is not an essential attribute.<sup>160</sup>

### The 'is/does' distinction

Australian Courts have emphasised that the primary focus of this Convention ground is on what a person *is* - a member of a particular social group - rather than what a person has done, or may do, or possesses. However, the Courts have also emphasised that this distinction should not be taken too far.

In *Morato v MILGEA* Black CJ stated:

It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person is - a member of a particular social group - rather than upon what a person has done or does.<sup>161</sup>

It may well be that an act or acts attributed to members of a group that is in truth a particular social group provide the reason for the persecution that members of such a group fear, but there must be a social group sufficiently cognisable as such as to enable it to be said that persecution is feared for reasons of *membership* of that group.<sup>162</sup>

His Honour acknowledged, however, that the part played by acts done, or assumed to have been done, by those who are said to constitute a particular social group can give rise to difficult questions and that the activities of the members of an asserted group are not necessarily irrelevant:

It may be, for example, that over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group. The actions may, for example, bear upon an individual's identity to such an extent that they define the place in society of that individual and other individuals who engage in similar actions. There may be such an interaction in a particular society that a group of people becomes a cognisable element within the society by virtue of their common activity.

<sup>155</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 241 per Dawson J; contra at 266 per McHugh J. McHugh J's suggestion that a particular social group must be large is not supported by the other judges and should not be relied on. This was confirmed in *MIMA v Khawar* (2002) 210 CLR 1, at [33] per Gleeson CJ, at [82] per McHugh and Gummow JJ, and at [127] per Kirby J. Although, in *MIMA v Khawar*, Gleeson CJ stated that in some circumstances the large size of the group might make implausible a suggestion that the group is a target of persecution and might suggest that a narrower definition of the group is necessary (see [30]). See also McHugh J in *Applicant A v MIEA* (1997) 190 CLR 225 at 257.

<sup>156</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 241, per Dawson J. See also Callinan J in *MIMA v Khawar* (2002) 210 CLR 1 at [153].

<sup>157</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 236, per Brennan CJ, and at 301 per Kirby J.

<sup>158</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 234 per Brennan CJ.

<sup>159</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 236 per Brennan CJ.

<sup>160</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [33].

<sup>161</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 404.

<sup>162</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 405.

Persecution may be part of that interaction and may contribute to the development of the social group. Thus similar actions engaged in by people may be a factor to be considered when examining whether a particular social group in fact exists or whether a person is a member of such a group. But all this is far removed from the present case where acts, without anything at all more, are said to define a particular social group.<sup>163</sup>

In *Applicant A v MIEA*, Dawson J noted that, as Black CJ had recognised, the distinction in *Morato* between what a person is (a member of a particular social group) and what a person has done or does should not be taken too far. His Honour pointed out that the distinction may sometimes be unreal, or may be appreciable but not illuminating:

The distinction between what a person is and what a person does may sometimes be an unreal one. For example, the pursuit of an occupation may equally be regarded as what one is and what one does. At other times, the distinction may be appreciable but not illuminating. For example, the acts of conceiving and bearing a child may be what people do, but the result of those acts - that the persons involved are parents - is quite central to what they are.<sup>164</sup>

Nevertheless, as Burchett J explained in *Ram v MIEA*, if harmful acts are done purely *on an individual basis*, because of what *the individual* has done or possesses, the application of the Convention is not attracted, so far as it depends upon 'membership of a particular social group'. His Honour illustrated the point by reference to 'textbook' examples from history:

In the infamous Reign of Terror during the French Revolution, men, women and children were guillotined because they belonged to a class seen as dangerous to the emerging democratic State. Similarly, in Cambodia under Pol Pot, teachers, lawyers, doctors and others who were seen as having, by their education and status, a capacity to influence public opinion, were regarded as potentially dangerous to the new order, and were therefore eliminated. ... In neither case was the motivation what a particular individual possessed or had done. ... The fact is that it was the whole class which, in each instance, was attacked. Individuals were not persecuted for what they had done as individuals, nor for what they possessed as individuals.

When the linked ideas expressed by the definition of a refugee come to be applied to less clear examples, it remains important to keep steadily in mind the essential unity of the conception. ... When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is "for reasons of" his membership of that group.<sup>165</sup>

Ultimately, whilst in some instances what a person does can be relevant to determining whether that person belongs to a particular social group, the issue is the identification and characterisation, for the purposes of the Convention, of the social group to which the person is said to belong.<sup>166</sup>

### Identifying particular social groups

Australian Courts have consistently held that the term particular social group should not be defined narrowly. In *Morato v MILGEA* Lockhart J noted that the expression 'particular social group' is a flexible one intended to apply whenever persecution is found directed at a group

<sup>163</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 406.

<sup>164</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 242-243.

<sup>165</sup> *Ram v MIEA* (1995) 57 FCR 565 at 568-569.

<sup>166</sup> *Pepaj v MIMA* (unreported, Federal Court of Australia, Merkel J, 25 November 1998) at 5. Note that the is/does distinction is particular to this refugee ground, which focuses on the term 'membership', and is very likely to lead to legal error if brought to bear in relation to the other grounds.



or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. He noted:

Social groups may have interests in common as diverse as education, morality and sexual preference. Examples include the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies.<sup>167</sup>

As noted earlier, there is no obligation upon an applicant to articulate the particular social group to which they claim to belong, or even to characterise it as such - it is for the decision-maker, after making findings of fact, to decide whether the circumstances fall within the Convention definition. Thus, the decision-maker should consider any particular social group that is raised by the evidence and material before him or her, even though not expressly claimed by the applicant.<sup>168</sup> It should be noted however, that while decision-makers are obliged to consider claims that clearly arise on the material, they are not required to 'excavate any possible claim or to sift carefully through a morass of material in order to determine whether such a claim has been made',<sup>169</sup> or to consider claims that depend for their exposure upon constructive or creative activity by the decision-maker.<sup>170</sup> An applicant's mere possession of a number of attributes may not of itself give rise to a need to consider a claim on the basis of membership of a particular social group, as long as the underlying factual claims have been considered.<sup>171</sup>

<sup>167</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 416.

<sup>168</sup> See *NABE v MIMIA* (No 2) (2004) 144 FCR 1 at [55]-[61]. Whether or not a claim can be said to arise on the material will depend upon the particular case. For example, in *MZYPJ v MIAC* [2012] FMCA 98 (Whelan FM, 16 February 2012), the Court found at [56]-[58] that although the Reviewer had rejected that the harm the applicant feared was for reasons of his Hazara ethnicity, and rejected that 'rich citizens of Afghanistan' constituted a particular social group, the Reviewer had failed to consider a claim based on membership of a particular social group of 'Hazara from a rich family' which was clearly apparent on the material. In *SZRUT v MIAC* [2013] FCCA 368 (Judge Driver, 15 July 2013; undisturbed on appeal: *MIBP v SZRUT* [2013] FCA 1276 (Rares J, 20 November 2013)), Judge Driver held (at [16] - [19]) that although the applicant did not expressly claim to fear extortion threats by Maoists because of her membership of a particular social group of 'people who have lived abroad and who are considered wealthy', the applicant had expressly raised the claim to fear harm from the Maoists and the other elements of the claim arose from facts that were accepted by the Tribunal. Hence, the facts suggested that there may possibly be such a particular social group and it was incumbent on the Tribunal to consider whether there was such a particular social group. Contrast *SZQMC v MIAC* [2012] FCA 128 (Bromberg J, 23 February 2012) at [35]-[37] where the Court held that there was material before the Tribunal that the applicant had witnessed a murder committed by a gang, but no material which would suggest that people in Bangladesh who had witnessed murders committed by such gangs associated with the Awami League could comprise a particular social group. In the absence of such material, the Tribunal was under no obligation to consider an unarticulated claim based on a particular social group of 'individuals who witnessed murders committed by gangs' as it was not expressly made and did not arise clearly on the materials before it. Note also that, if a decision-maker identifies a group as arising from the material, it would be an error to then fail to consider a claim based on membership of that group: in *SZRKX v MIAC* [2012] FMCA 1055 (Nicholls FM, 23 November 2012) the Court found that, having posited the formulation of a particular social group as being said to arise from the applicant's circumstances, it was incumbent upon the Reviewer to then deal with it; that the particular social group posited by the Reviewer may not meet the requisite characteristics did not excuse the Reviewer from properly considering it.

<sup>169</sup> *SZUOK v MIBP* [2015] FCCA 1429 (Judge Smith, 29 May 2015) at [20].

<sup>170</sup> *SZRZF v MIAC* [2012] FCA 1450 (Emmett J, 12 November 2012) at [11]. The Court held in that case the Reviewer was under no obligation to consider whether the appellant was a member of a particular social group consisting of young Tamil males from Jaffna who are thought to be connected with the LTTE, as no such discrete claim was made. See also *SZSGA v MIMAC* [2013] FCA 774 (Roberston J, 6 August 2013) at [48]-[52].

<sup>171</sup> *SZQIL v MIAC* [2012] FMCA 109 (Barnes FM, 22 February 2012) at [64] (upheld on appeal: *SZQIL v MIAC* [2012] FCA 452 (Nicholas J, 3 May 2012)). In that case the applicant contended before the Court that the Tribunal failed to assess his claims against the correct particular social group, being 'young Tamils from the north (Vanni district) and/or former members of the LTTE (Maniam) with friends in the EPDP and whose family member had been of interest to the Sri Lankan regime'. The Court found the articulated group was not claimed to the Tribunal and it did not clearly arise on the material, rather it contained a list of overlapping attributes drawn from the applicant's claims which the Tribunal had addressed, and as such, the Tribunal was not obliged to determine whether the group articulated was capable of constituting a particular social group (at [61], [64]). See also *SZOYL v MIAC* [2011] FCA 914 (Bromberg J, 11 August 2011) at [21] where the Court held that although the claimed attributes of the group were in the material before the Tribunal, they were recognisable as attributes of the appellant only; the material did not suggest the existence of a group of people with the particular attributes

Whether a group is a 'particular social group' for the purposes of the Convention is a question of fact for the decision-maker to determine on the material before him or her.<sup>172</sup> Moreover, Kirby J emphasised in *Applicant A* that each case depends on its own facts and that there are dangers in attaching too much importance to identification of particular groups which have been the subject of successful or unsuccessful claims.<sup>173</sup>

Nevertheless, the way 'particular social groups' might be identified may be illustrated by reference to examples.

### Examples of particular social groups

The following examples illustrate the manner in which the courts have viewed the issue in various fact situations, but do not purport to provide any rules as to whether a group will prove to be a particular social group in any given situation.

#### *Classic examples*

In *Applicant A* McHugh J referred to the drafting history of the 'particular social group' ground and the sort of group the category was probably intended to cover. His Honour stated:

It seems likely that the category of "particular social group" was at least intended to cover those groups persecuted because of "the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families". In *Bastanipour v INS* (1992) 980 F 2d 1129 at 1132, Posner J thought that the kulaks (affluent Russian peasants) who had been persecuted by Stalin were the sort of group intended to be covered by the term "particular social group". All the foregoing groups are disparate in character. But what distinguishes their members from other persons in their country is a common attribute and a societal perception that they stand apart. Persecution, of course, reinforces the perception that they are "a particular social group" in their country.<sup>174</sup>

Burchett J in *Ram* described the following as 'textbook examples':

In the infamous Reign of Terror during the French Revolution, men, women and children were guillotined because they belonged to a class seen as dangerous to the emerging democratic State. Similarly, in Cambodia under Pol Pot, teachers, lawyers, doctors and others who were seen as having, by their education and status, a capacity to influence public opinion, were regarded as potentially dangerous to the new order, and were therefore eliminated. These were textbook examples of persecution for membership of a social group.<sup>175</sup>

Other 'obvious examples' have been 'the petty bourgeoisie ... regarded as class traitors in Stalinist Russia', and 'intellectuals [in] many regimes, including Communist China during the Cultural Revolution and by the Pol Pot regime in Cambodia'.<sup>176</sup>

#### *Examples in the Australian cases*

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relied upon. In *BZAEX v MIBP* [2014] FCCA 1532 (Judge Jarrett, 22 July 2014) the Court held that it was unnecessary for the Tribunal to consider whether the applicant was a member of the particular social groups particularised before the Court, having determined that he did not have a well-founded fear of persecution (at [40]).

<sup>172</sup> See for example, *Pepaj v MIMA* (unreported, Federal Court of Australia, Merkel J, 25 November 1998) at 5.

<sup>173</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 303.

<sup>174</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 265-266.

<sup>175</sup> (1995) 57 FCR 565 at 568.

<sup>176</sup> *MIMA v Khawar* (2000) 101 FCR 501 at [13] per Hill J.

Australian Courts have held that factors as broad ranging as gender, the possession or lack of wealth, occupation, illness, and family membership, can, but do not necessarily, identify a particular social group within a particular society. It must also be remembered that each case depends on its own facts and 'particular social groups' should be recognized on a case by case basis.<sup>177</sup> Furthermore, as Kirby J warned in *Applicant A*, there is a danger in attaching too much importance to the identification of particular groups, membership of which has been the subject of successful or unsuccessful claims to refugee status.<sup>178</sup> With that caveat in mind, examples of groups that the Courts have considered in Australia, some found to constitute particular social groups and others not, include:

- Persons who have 'turned Queen's evidence' in Bolivia<sup>179</sup>
- The Mafia<sup>180</sup>
- Conscripts - Conscientious objectors<sup>181</sup>
- Able bodied young men<sup>182</sup>
- *Groups arising from China's one-child policy* - In *Applicant A* the majority of the High Court held that 'those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised' were not a particular social group in China. *Applicant A* has been applied by the Federal Court in a number of cases.<sup>183</sup> However *Applicant A* is not authority for the proposition that parents of children born in breach of China's family planning laws could not be a particular social group.<sup>184</sup> As to children born in breach of China's one-child policy,

<sup>177</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 307 per Kirby J.

<sup>178</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 303.

<sup>179</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 416-17. Lockhart J, agreeing with the conclusion of the primary Judge, held that the evidence did not support any finding that there was a recognisable or cognisable group of people who are informers or who have turned Queen's evidence.

<sup>180</sup> *Kashayev v MIEA* (1994) 50 FCR 226 at 234. In *Kashayev*, the Court held that there was an absence of evidence to support the Tribunal's finding that 'the mafia' existed as a particular social group. In any event, accepting that there was such a group, the persecution of the applicant arose not from being a member of the group but from his acts in defying the code of that group.

<sup>181</sup> In *Timic v MIMA* [1998] FCA 1750 (Einfeld J, 23 December 1998), Einfeld J stated that 'conscripts/reservists under universally applicable legal arrangements' are not a social group within the Convention. Similarly, in *MIMA v Shaibo* [2000] FCA 600 (Lindgren J, 10 May 2000) at [35], Lindgren J held that 'deserters' are not a particular social group 'any more than those who contravene any other law are thereby made such a group for the purposes of the Convention'. On the other hand, in *Mehenni v MIMA* [1999] FCA 789 (Lehane J, 24 June 1999), Lehane J accepted that 'conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a "particular social group", defined as such by some characteristic, attribute, activity, belief, interest or goal that unites its members'.

<sup>182</sup> In *Applicant S v MIMA* (2004) 217 CLR 387, Callinan J at [101] considered that between 1960 and 1970 'able-bodied young men in Australia qualified by age to be balloted into national military service and of undertaking it in war in Vietnam' were a particular social group and were so regarded by many in this country. In the same case McHugh J expressed the view that in most societies 'able-bodied young men' would no more constitute 'a particular social group' than would 'good swimmers' or 'fit athletes'. He stated, however, it is possible that in Afghanistan the press-ganging of 'able-bodied young men' has created a perception that they are 'a particular social group'. But without evidence of some objective perception that 'able-bodied young men' comprise 'a particular social group', in circumstances where the perception is capable of being identified independently of the persecutory treatment, the appellant's claim must fail: *ibid*, at [72]-[75]. His Honour further stated at [76] that in *Sanchez-Trujillo v Immigration and Naturalization Service*, 801 F 2d 1571 at 1571, 1576 (1986), the United States Court of Appeals for the Ninth Circuit had found that a 'class of young, urban, working-class [El Salvadorian] males of military age who had maintained political neutrality' was not a 'particular social group' but that it did not follow that in Afghanistan young able-bodied men were not 'a particular social group'. Different legal, social, cultural and religious norms in different countries may bring about different results concerning similar groups or classes. The decision in *Sanchez-Trujillo* has been criticised for adopting an unduly narrow interpretation of the phrase 'a particular social group': see *Applicant A* (1997) 190 CLR 225 at 260-261 per McHugh J.

<sup>183</sup> For example, *Zheng Jia Cai v MIMA* [1997] FCA 923 (French J, 13 June 1997).

<sup>184</sup> See *VTAO v MIMIA* [2004] FCA 927 (Merkel J, 19 July 2004) where Merkel J found that the Tribunal had incorrectly applied

the High Court in *Chen Shi Hai v MIMA* held that there was no error in the Tribunal's finding that children born outside of officially approved parameters, 'black children', were a particular social group.<sup>185</sup>

- *Wealth based groups* - The possession or lack of wealth has been suggested as the basis for a particular social group in a number of cases. For example 'wealthy Punjabis living in circumstances which make them vulnerable to extortion',<sup>186</sup> 'the poor in the Philippines',<sup>187</sup> 'persons returning from Australia or some other foreign country who were perceived as having made money and who had debts in India',<sup>188</sup> and 'people who made money quickly between 1988 and 1990 by activities which raised the ire of the JVP' or 'persons who have lived and become fat through corruption and targeted by the JVP'.<sup>189</sup>
- Persons targeted for extortion by the NPA in the Philippines<sup>190</sup>
- Ethnic Chinese in Cambodia<sup>191</sup>
- Ali Sherkhail sub-tribe of the Shinwari tribe in Afghanistan<sup>192</sup>
- Young Tamil males from Jaffna or LTTE-controlled areas in Sri Lanka<sup>193</sup>
- Albanian citizens / men subject to the operation of the Kanun or men in Albania<sup>194</sup>

*Applicant A.*

<sup>185</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [23] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>186</sup> In *Ram v MIEA* (1995) 57 FCR 565 at 569 Burchett J referred to the difficulty of seeing 'wealthy Punjabis living in circumstances which make them vulnerable to extortion' as a sufficient group. Justice RD Nicholson J agreed with his Honour's reasons for judgment, but observed that in some circumstances the possession of wealth is capable of creating a particular social group (at 570). See for example *SZLAN v MIAC* (2008) 171 FCR 145 at [70] where Graham J commented that a Maoist 'policy of targeting suitably wealthy victims [for extortion] would tend to support a finding that "wealthy Nepalis" were a relevant particular social group that needed to be considered.' See also *MZYPJ v MIAC* [2012] FMCA 98 (Whelan FM, 16 February 2012) at [57] where Whelan FM found that a claim based on membership of a particular social group as a 'Hazara from a rich family' was before the Reviewer. The Court commented at [51] that, following *Ram*, the possession of wealth was capable in appropriate circumstances of constituting those who possess it as members of a particular social group. The Court was also critical (at [52]) of the Reviewer's finding that 'rich citizens of Afghanistan' did not constitute a particular social group on the basis of the divergent degrees and sources of wealth, although did not find error in that regard.

<sup>187</sup> In *Balbin v MIMA* (unreported, Federal Court of Australia, Lindgren J, 7 December 1998), Lindgren J did not think 'the poor' constituted a particular social group in the Philippines.

<sup>188</sup> In *SZAF v MIMIA* [2003] FMCA 380 (Driver FM, 5 September 2003), Driver FM stated at [17] to [18] that it would be difficult to construct a particular social group along those lines. Agreed on appeal: [2003] FCA 1405. See also *SZAML v MIMIA* [2004] FMCA 267 (Barnes FM, 14 May 2004) in which the Court found that the Tribunal had not erred in failing to consider whether, or to find that, Bangladeshis who live abroad (and are presumed to be wealthy) constitute a particular social group at [27].

<sup>189</sup> *Ratnayake v MIEA* (1997) 74 FCR 542 at 545. In that case the applicant claimed to have a well-founded fear of persecution for reasons of his membership of a social group so described. The Court stated at 551: 'I do not consider that acquisition of wealth through corrupt means is a characteristic or element which unites people or enables them to be identified by a common feature which makes them a definable group in society. ... It is even more difficult, if not impossible, to identify a common element or characteristic binding together persons who are associates of persons who have become wealthy through corruption'.

<sup>190</sup> In *Cabarrubias v MIMA* (unreported, Federal Court of Australia, Madgwick J, 4 May 1998) at 8, Madgwick J held that the applicants who were subjected to extortion demands from the New Peoples Army of the Philippines were not members of a particular social group as they exhibited 'no characteristic "pre-existing" their persecution which could enable recognition that they were members of a particular social group'.

<sup>191</sup> In *Lek v MILGEA (No 2)* (1993) 45 FCR 418 at 430, Wilcox J held that the delegate had erred in not accepting that 'ethnic Chinese' in Cambodia was a particular social group. His Honour stated: 'People of Chinese ethnicity constitute only a small proportion of the Cambodian population. They are recognisable group, notwithstanding that they may be geographically scattered and may vary in occupations, lifestyles, cultural activities and political leanings'.

<sup>192</sup> *MIMIA v WAIK* [2003] FCAFC 307 (Tamberlin, RD Nicholson and Emmett JJ, 19 December 2003) at [18] where their Honours stated that it may well be that the applicant belongs to the identified group but there was no basis advanced before the Tribunal to support a conclusion that tribal law would be applied differently to the applicant because he was a member of that sub-tribe.

<sup>193</sup> In *Paramanathan v MIMA* (1998) 94 FCR 28, it was accepted that young Tamil males in Jaffna (per Merkel J) or LTTE-controlled areas in Sri Lanka (per Lindgren J) were a particular social group in Sri Lanka.

- Persons who had breached a code of honour / unmarried fathers / 'the living dead' in Albania<sup>195</sup>
- Nepalese couples involved in incestuous relationships<sup>196</sup>
- Caste-based groups<sup>197</sup>
- Persons who have incurred deep personal enmity with powerful politicians in India / Hindus who have converted to Islam<sup>198</sup>
- *People suffering from an illness or disability* - Having a particular disease or illness has been accepted as constituting a particular social group in certain circumstances,<sup>199</sup> but it will depend upon the disease/illness.<sup>200</sup> Where a claim is made of membership of a particular social group based upon an illness or disease, the claim must be considered on its merits by reference to the attributes of the disease and the sufferers and the way in which the class of persons with the illness or disease are regarded within a particular society.<sup>201</sup>
- Individuals who have held information (the witnessing of a murder) adverse to the interests of the Awami League in Bangladesh<sup>202</sup>

<sup>194</sup> The Federal Court has held that this group variously described does not constitute a particular social group. See for example, *SCAL v MIMIA* [2003] FCA 548 (von Doussa J, 5 June 2003); *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg, JJ, 18 December 2003) and *STXB v MIMIA* (2004) 139 FCR 1.

<sup>195</sup> In *Pepaj v MIMIA* (unreported, Federal Court of Australia, Merkel J, 25 November 1998), the Court held there was no error in the Tribunal's finding that the applicant's actions in breaking an arranged engagement and in fathering a child outside of marriage were not such as to constitute him a member of a particular social group in Albania.

<sup>196</sup> See *SZAOU v MIMIA* [2004] FMCA 451 (Raphael FM, 19 July 2004) where Raphael FM at [9] held that because the Tribunal made a finding that the applicants faced potential violence at the hands of community members and the fear of harm at the hands of the community was a distinct claim, the Tribunal ought to have considered whether the applicant was a member of such a posited group.

<sup>197</sup> In *SZEGA v MIMIA* [2006] FCA 1286 (Edmonds J, 3 October 2006) Justice Edmonds rejected, at [19], that persecution for reasons of caste is persecution for reasons of race and stated that at most it might amount to persecution for reasons of membership of a particular social group. However, in *Prashar v MIMIA* [2001] FCA 57 (Madgwick J, 7 February 2001) Madgwick FM described the Tribunal's willingness to accept that persons who breach caste rules in India may form a particular social group in India in the Convention sense as a 'generous' assumption (at [7], [20]). In *DZACC v MIAC* [2012] FMCA 314 (Cameron FM, 20 April 2012) at [33]-[34] the Court went further, holding that the Reviewer was correct to find that 'young men who form relationships with women of a different religion or higher caste' is not a particular social group in Pakistan on the basis that the only common attribute of the members of the group identified is social inferiority to and religious difference from their partners and it could not be said that a group of such variety possessed a characteristic which distinguished it from Pakistani society at large.

<sup>198</sup> In *NACF v MIMIA* [2002] FMCA 119 (Driver FM, 20 June 2002) the Court found that the first purported social group was not properly a social group, but that persons who convert from Hinduism to Islam were a particular social group: at [13] - [14].

<sup>199</sup> In *Denissenko v MIEA* (unreported, Federal Court of Australia, Foster J, 29 May 1996), the Tribunal had found that 'people diagnosed as suffering from the mental illness of schizophrenia' were members of a particular social group for the purposes of the Convention. That finding was not challenged in the Court. The case of *Kuthyar v MIMIA* [2000] FCA 110 (Einfeld J, 11 February 2000) was conducted on the basis that 'people with HIV or AIDS' constituted a particular social group of which the applicant was a member.

<sup>200</sup> In *Lo v MIEA* (1995) 61 FCR 221 at 231, Tamberlin J held that 'hepatitis B sufferers in China' were not a particular social group for the purposes of the Refugees Convention but accepted that in some circumstances people afflicted with an illness may come to comprise a particular social group: 'a history of continuous persecution, discrimination or marshalling of social attitudes over time against individuals may give rise to a particular social group within the definition'. In *Gounder v MIMIA* (1998) 87 FCR 1 at 8 Lindgren J found that 'citizens of Fiji who suffer from kidney failure, or those of them who need long-term haemodialysis' were not a particular social group. In *SZQVD v MIAC* [2012] FMCA 1051 (Nicholls FM, 21 November 2012) the Court commented at [50] and [55] that the Tribunal appeared to have confused the distinction between a 'social group' or even a 'group' in general and a 'particular social group' when it accepted that 'kidney transplant recipients in Egypt' may constitute a particular social group.

<sup>201</sup> *SZRIR v MIAC* [2012] FMCA 1006 (Driver FM, 1 November 2012) at [22] in which the Court found no error in the Tribunal's finding that on the limited material before it, it was not satisfied that a particular social group of hepatitis C sufferers in Pakistan was cognisable. See also *Lo v MIEA* (1995) 61 FCR 221 at 231.

<sup>202</sup> In *SZQMC v MIAC* [2012] FCA 128 (Bromberg J, 23 February 2012) the Court posited at [37] that such a group could comprise a particular social group but held that there was no material before the Tribunal which indicated the existence of such a group and therefore, the Tribunal was under no obligation to consider it.

- Homosexuals<sup>203</sup>
- *Occupational groups* - In appropriate circumstances occupational groups can constitute a particular social group in a society.<sup>204</sup> However this will not always be the case. Australian courts have considered the following occupational groups: 'professionally accredited tourist industry workers' or 'certified tourist guides with the Ecuadorian Tourist Commission',<sup>205</sup> 'beauty workers in Algeria',<sup>206</sup> 'Russian seamen who plied their trade on the vessel *Krasnopolje* operating out of the port of Vanino and who used their ready access to Japanese ports to purchase second-hand motor vehicles for importation into Russia and subsequent sale at a huge profit',<sup>207</sup> a 'socially active group of businessmen' or 'Russian entrepreneurs',<sup>208</sup> 'business people in Sri Lanka',<sup>209</sup> and 'outspoken journalists in Bangladesh'<sup>210</sup>
- Entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals<sup>211</sup>

<sup>203</sup> The High Court accepted in *Appellant S395/2002 v MIMA* and *Appellant S396/2002 v MIMA* (2003) 216 CLR 473 that homosexuals in Bangladesh are a particular social group. See eg, at [55] per McHugh and Kirby JJ, [65] per Gummow and Hayne JJ. McHugh and Kirby JJ noted at [55] that if the Tribunal had found that homosexuals in Bangladesh were not a particular social group, its decision would arguably have been perverse. Gummow and Hayne JJ commented at [81]: 'It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality'. In *MMM v MIMA* (1998) 90 FCR 324 at 330, Madgwick J stated that '[o]rdinarily, homosexuals would constitute a social group...'. See also *Applicant A v MIEA* (1997) 190 CLR 225 at 265 where McHugh J states: 'If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status'. Other cases based on homosexuality include *F v MIMA* [1999] FCA 947 (Burchett J, 9 July 1999), *Shah v MIMA* [2000] FCA 489 (Tamberlin J, 4 April 2000), *Applicant LSLS v MIMA* [2000] FCA 211 (Ryan J, 6 March 2000), *MIMA v B* (2000) 105 FCR 304, and *MIMA v Gui* [1999] FCA 1496 (Heerey, Carr and Tamberlin JJ, 29 October 1999).

<sup>204</sup> In *Ram v MIEA* (1995) 57 FCR 565 at 568 Burchett J described the situation in Cambodia under Pol Pot, where 'teachers, lawyers, doctors and others ... were regarded as potentially dangerous to the new order' as textbook examples of persecution for membership of a social group. In *MIMA v Zamora* (1998) 85 FCR 458 the Court instanced human rights workers in some countries subject to totalitarian rule as possible examples. In *Nouredine v MIMA* (1999) 91 FCR 138, Burchett J mentioned 'landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, and ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural Revolution' as further illustrations.

<sup>205</sup> In *MIMA v Zamora* (1998) 85 FCR 458 the Full Federal Court doubted that a group constituted by 'professionally accredited tourist industry workers' or 'certified tourist guides with the Ecuadorian Tourist Commission' would be recognisable in Ecuadorian society as one whose members share something which unites them. Note that the High Court in *Applicant S v MIMA* (2004) 217 CLR 387 has rejected the proposition that a criterion for recognition under the Convention as a particular social group is that there must be a perception *within the society* that the group is a particular social group (the third *Zamora* criterion).

<sup>206</sup> In *Nouredine v MIMA* (1999) 91 FCR 138 it was held that 'beauty workers in Algeria' were a particular social group. Burchett J contrasted 'the tourist guides of Ecuador, who were simply a convenient target for criminal depredations really directed against the supposedly wealthy people they were guiding, and beauty workers seen by religious extremists as purveyors of immorality, and therefore as a group within society that should be eliminated': at 144.

<sup>207</sup> In *Kashayev v MIEA* (1994) 50 FCR 226 at 234 Northrop J held that it was not open to the Tribunal to find that the applicant was a member of a particular social group so described.

<sup>208</sup> See *VNAG v MIMIA* [2004] FMCA 354 (McInnis FM, 9 June 2004). These were found not to meet the criterion of being a cognisable group: at [42].

<sup>209</sup> In *Mahuroof v MIMA* (unreported, Federal Court of Australia, Branson J, 13 March 1998) at 9, Branson J stated that it may be open to doubt that 'business people are perceived in Sri Lanka as a cognisable group within society'.

<sup>210</sup> *NAPU v MIMIA* [2004] FCAFC 193 (Moore, Branson & Emmett, JJ, 5 August 2004). In that case the majority held that on the material before the Tribunal, and particularly as it had accepted that members of the Bangladeshi media were sometimes victims of violence or harassment from the government and/or powerful individuals, it should have considered whether outspoken journalists in Bangladesh constituted a particular social group. See at [35]-[38] per Moore and Branson JJ (Emmett J dissenting).

<sup>211</sup> In *Dranichnikov v MIMA* [2003] HCA 26 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 8 May 2003) (Gleeson CJ, Gummow, Kirby, Hayne & Callinan JJ, 8 May 2003), the majority (Gleeson CJ dissenting) of the High Court at [27] held that the Tribunal misunderstood and failed to address the applicant's case by assessing it on the basis that he was a member of the particular social group, of 'businessmen in Russia' instead of the narrower group identified above. Gummow and

- Bangladeshi ship deserters<sup>212</sup>
- Unsuccessful asylum seeker returnees<sup>213</sup>
- *Gender based groups* - Gender based groups have been considered in a number of cases, particularly in the context of claims of domestic violence. Australian courts have accepted that 'single women in India',<sup>214</sup> 'married women in Tanzania',<sup>215</sup> 'young Somali women'<sup>216</sup> and 'women or divorced women who had converted to Christianity in Nepal'<sup>217</sup> may constitute particular social groups for the purposes of the Convention. On the other hand, in *Lek v MILGEA (No.2)* Wilcox J held that 'young single women' in Cambodia were not a particular social group.<sup>218</sup> In *Jayawardene v MIMA* Goldberg J doubted that a group such as 'single women' or 'single women without protection in Sri Lanka' was a proper group for the purposes of the Refugees Convention.<sup>219</sup> The Court in *MIMA v Kobayashi* held that the evidence before the Tribunal provided no basis for finding that 'women in Japan' or 'unwed mothers in Japan' were persecuted groups in Japan.<sup>220</sup> In *Applicant S469 of 2002 v MIMIA* Bennett J found that it was open on the evidence before the Tribunal to find that females in Thailand did not constitute a particular social group.<sup>221</sup>

In *MIMA v Khawar*, Gleeson CJ found that it was open to the Tribunal to determine that 'women in Pakistan' were a particular social group<sup>222</sup> and McHugh and Gummow JJ held that it was open to the Tribunal to determine that there was a social group in Pakistan comprising, at its narrowest, 'married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household'.<sup>223</sup> Justice Kirby did not reach any conclusion about whether 'women in Pakistan' or 'married women in Pakistan' could

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Callinan JJ at [28] said that the narrower group was most likely a particular social group. Kirby J stated at [60] that there were added ingredients that refined the 'group' relied upon and that sharpened the focus of the claim. The principal ingredients involved the participation by the entrepreneurs or business people concerned in the making of representations to the authorities in Vladivostok; in attending public meetings to 'highlight the plague of corruption and lawlessness' and in appealing to the authorities for protection which the authorities were either unwilling or unable to provide. His Honour described at [63] the particular social group as 'businessmen or entrepreneurs in Vladivostok in the Russian Federation who grouped together in response to serious civic lawlessness and to the failure of the authorities to uphold the law and to address the grave violence to which the members of the group, including the applicant, were subjected'.

<sup>212</sup> *MIAC v SZNWC* (2010) 190 FCR 23.

<sup>213</sup> In *DZADC v MIAC (No.2)* [2012] FMCA 778 (Raphael FM, 3 September 2012) at [20] the Court commented that it is 'well-accepted' that there is a particular social group of that description, despite being defined solely by what people have done. In *SZRCF v MIAC* [2012] FCA 813 (Lander J, 3 August 2012) the Court noted at [50] the paradoxical result for a claim based on being a failed asylum seeker that an applicant could become entitled to a protection visa by applying for a protection visa to which he was not entitled, but noted cases in which the particular social group was accepted. In *SZTKE v MIBP* [2015] FCCA 103 (Judge Driver, 15 February 2015) the Court expressed disagreement with the Tribunal's finding that a particular social group of failed asylum seekers was necessarily defined by the harm feared: in *obiter* at [41]-[47]. See also *SZTKE v MIBP* [2015] FCA 1002 (Bromberg J, 10 September 2015) at [78], agreeing on this point.

<sup>214</sup> *Thalany v MIEA* (1997) 73 FCR 437.

<sup>215</sup> *MIMA v Ndege* [1999] FCA 783 (Weinberg J, 11 June 1999).

<sup>216</sup> *MIMA v Cali* [2000] FCA 1026 (North J, 3 August 2000).

<sup>217</sup> *NAIV v MIMIA* [2004] FCA 457 (Jacobson J, 20 April 2004) at [51]. Although the Tribunal found that divorced or separated women constituted a particular social group, it did not consider whether the harm the applicant claimed to fear was for reasons of membership of a group differently defined. See [47] to [53].

<sup>218</sup> (1993) 45 FCR 418 at 432.

<sup>219</sup> [1999] FCA 1577 (Goldberg J, 12 November 1999).

<sup>220</sup> [1998] FCA 722 (Foster J, 29 May 1998).

<sup>221</sup> [2004] FCA 64 (Bennett J, 6 February 2004) at [28]. On appeal the Full Federal Court dismissed the appeal and found no error in the primary judge's reasoning: *Applicant S469 of 2002 v MIMIA* [2004] FCAFC 214 (Kiefel, Allsop and Crennan JJ, 13 August 2004). See also *SZAFS v MIMIA* [2004] FCA 112 (Lindgren J, 20 February 2004).

<sup>222</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [32] per Gleeson CJ. His Honour went even further and stated that women in any society are a distinct and recognisable group (at [35]).

<sup>223</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [81] per McHugh and Gummow JJ.



be a particular social group but observed that material before the Tribunal suggested that there may be a particularly vulnerable group of 'married women in Pakistan, in dispute with their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law' and that the Tribunal had not considered whether a particular social group arose out of those circumstances.<sup>224</sup> In his dissenting judgment, Justice Callinan questioned whether all women in Pakistan of whatever age or circumstances could constitute a particular social group, stating that it seemed an unlikely proposition to regard half of the humankind of a country, classified by their sex, as a particular social group, and that to use the term 'particular' reinforces the notion of a specific, readily definable body or group of people forming part of a larger whole.<sup>225</sup>

In light of *Khawar*, it may be possible to find a particular social group constituted by 'women in Indonesia'<sup>226</sup> or 'Nepali women without the protection of a male relative'.<sup>227</sup>

- *Family* - It is well established that a family is capable of constituting a particular social group within the meaning of the Refugees Convention.<sup>228</sup> Whether members of a particular family do constitute a particular social group will depend upon the circumstances of the relevant case.<sup>229</sup> However, where the social group relied upon is membership of a family, it will be necessary also to have regard to s.91S of the Act.

<sup>224</sup> *MIMA v Khawar* (2002) 210 CLR 1 per Kirby J at [128]-[129].

<sup>225</sup> *MIMA v Khawar* (2002) 210 CLR 1 at [153].

<sup>226</sup> See *SZAIK v MIMIA* [2004] FMCA 104 (Raphael FM, 15 March 2004). Note however that in *SZAIK v MIMIA* (2006) 150 FCR 448 which concerned an application for review of a subsequent decision in respect of the same applicant, the Court found no error in that Tribunal's finding that women in Indonesia do not constitute a particular social group.

<sup>227</sup> *SZAIK v MIMIA* [2004] FMCA 407 (Raphael FM, 25 June 2004) at [8]. See also the domestic violence cases of *SDAV v MIMIA*; *MIMIA v SBBK* [2003] FCAFC 129 (Hill, Branson and Stone JJ, 13 June 2003) where the Full Federal Court found that the Tribunal failed to apply the principles articulated in *Khawar* in relation to whether women in Iran were a particular social group.

<sup>228</sup> See eg *Chan v MIEA* (1989) 169 CLR 379 at 396 per Dawson J; *Mocan v RRT* (1996) 42 ALD 241 at 246; *Mahuroof v MIMA* (unreported, Federal Court of Australia, Branson J, 13 March 1998) at 9; *De Leon v MIMA* [1999] FCA 52 (Hill J, 3 February 1999) at [9]; *Aliparo v MIMA* [1999] FCA 79 (O'Connor J, 12 February 1999); *Ali v MIMA* [1999] FCA 650 (Lehane J, 14 May 1999); and, *Sarrazola v MIMA* [1999] FCA 101 (Hely J, 19 February 1999); *MIMA v Sarrazola* (1999) 95 FCR 517; *C v MIMA* (1999) 94 FCR 366; *Giraldo v MIMA* [2001] FCA 113 (Sackville J, 23 February 2001); *MIMA v Sarrazola* (No. 2) (2001) 107 FCR 184. In *Singh v MIMA* [1999] FCA 762 (Madgwick J, 8 June 1999) Madgwick J gave the example of 'a regicide revolutionary regime persecuting distant members of the erstwhile royal family "for reasons of" such family membership' (at [38]).

<sup>229</sup> The family as a particular social group was discussed by the Federal Court in *C v MIMA* (1999) 94 FCR 366, *MIMA v Sarrazola* (No. 2) (2001) 107 FCR 184, *Mahuroof v MIMA* (unreported, Federal Court of Australia, Branson J, 13 March 1998) and *Aliparo v MIMA* [1999] FCA 79 (O'Connor J, 12 February 1999). In *Sarrazola*, Merkel J (with Heerey and Sundberg JJ agreeing) stated that the characteristics that usually unite a family and those which will set it apart from the rest of the community will be familial links of the kind described by Wilcox J in *C v MIMA* (i.e., relationship of blood, marriage etc.). The determination of which of those links apply in a particular case will identify, and thereby define, the relevant group as the particular social group for Convention purposes. His Honour stated that in addressing whether the group is recognised within the society as a group that is set apart from the rest of the community, the question is whether the family unit considered to be a social group is publicly recognised as being set apart as such. It is not whether the particular family is well known as such: at [36]-[37], referring to *MIMA v Zamora* (1998) 85 FCR 458, at 464. But cf *Mahuroof v MIMA* (unreported, Federal Court of Australia, Branson J, 13 March 1998) at 9 where the Court applied the reasoning in *Applicant A* to hold that the applicant's family was not a particular social group in the circumstances as there 'was nothing before the Tribunal which suggested that the applicant's family is perceived in Sri Lanka as a cognisable group within society'. Similar reasoning was applied by O'Connor J in *Aliparo v MIMA* [1999] FCA 79 (O'Connor J, 12 February 1999). Please note, however, that the reasoning in these cases may not be reliable in light of the High Court's decision in *Applicant S v MIMA* (2004) 217 CLR 387, and in particular, its rejection of the proposition that there must be a perception *within the society* that a group is a particular social group (the third *Zamora* criterion).

### ***‘Particular social group’ under s.5L of the Act***

Section 5L of the Act defines ‘particular social group’ (other than family) for protection visa applications subject to the codified definition of a ‘refugee’ – that is, those made on or after 16 December 2014. The definition provides:

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person’s family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member’s identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

Section 5K, discussed below, applies to particular social groups that do consist of a family.

The s.5L definition of particular social group contains a number of different elements, some of which are common to those in the Australian case law discussed above, and others which are distinct, and have been drawn from jurisdictions such as Canada, the United States, New Zealand and the European Union.<sup>230</sup>

The core requirements of this definition are that there must be a characteristic shared by each member of the group, other than a fear of persecution, the characteristic must be one of three specific types and the applicant must share, or be perceived as sharing, the characteristic. Satisfaction of the definition requires that the group satisfy either a ‘protected characteristics’ or ‘social perception’ approach, determined by the nature of the characteristic.<sup>231</sup> Each of the requirements of s.5L are discussed in turn below.

#### A characteristic shared by each member of the group

Partially reflecting the High Court’s interpretation of ‘particular social group’ under the Refugees Convention,<sup>232</sup> the definition in s.5L requires that each member of the group must share a characteristic.

#### A characteristic of a specified type

The Act requires that the characteristic meet one of three requirements. It must either be innate or immutable; be so fundamental to a member’s identity or conscience the member should not be forced to renounce it; or distinguish the group from society. The first two of

<sup>230</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.11.

<sup>231</sup> Supplementary Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.9 at [42].

<sup>232</sup> *Applicant A v MIEA* (1997) 190 CLR 225 per Dawson J at 241, McHugh J at 264-266 and Gummow J at 285.

these types of characteristics may be described as ‘protected’ characteristics and the third as a ‘social perception’.<sup>233</sup>

These three elements are alternatives – the relevant characteristic need only meet one of the three.

#### *Innate or immutable*

The first alternative ‘protected’ characteristic is that the characteristic is innate or immutable. A characteristic which is ‘innate’, according to the dictionary definition of that term, is one that is ‘inborn; existing or as if existing in one from birth’; ‘inherent in the essential character of something’; or ‘arising from the constitution of the mind, rather than acquired from experience’.<sup>234</sup> The Explanatory Memorandum to the Bill which introduced s.5L indicates that an ‘innate characteristic’ is intended to include inborn characteristics, which could be genetic, such as the colour of a person’s skin, a disability that a person is born with, or gender.<sup>235</sup>

The dictionary definition of ‘immutable’ is ‘not mutable; unchangeable; unalterable; changeless’.<sup>236</sup> According to the Explanatory Memorandum, this term is intended to encompass characteristics which are not capable of change. It may include attributes acquired during one’s life, such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking.<sup>237</sup> According to the Department of Immigration’s PAM3: Refugee Law Guidelines (the Refugee Law Guidelines), a characteristic may remain ‘immutable’ notwithstanding the ability to mask or hide it.<sup>238</sup>

The Guidelines differentiate between ‘characteristics’ and ‘acts’, stating that an act is, of itself, unlikely to be an innate or immutable characteristic for the purpose of the definition, although it may be a manifestation of a characteristic or identify that a person holds a characteristic.<sup>239</sup>

<sup>233</sup> Supplementary Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.9 at [42].

<sup>234</sup> Macquarie Dictionary (6<sup>th</sup> Edition, 2013).

<sup>235</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.178 at [1220].

<sup>236</sup> Macquarie Dictionary (6<sup>th</sup> Edition, 2013).

<sup>237</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.178 at [1220].

<sup>238</sup> Department of Immigration, ‘Refugee Law Guidelines’, section 6.6, as re-issued 1 July 2017. Note that Ministerial Direction No. 56, made under s.499 of the Act, requires the Tribunal to have regard to those Guidelines where relevant (for further discussion, see Chapter 12 of this Guide).

<sup>239</sup> Department of Immigration, ‘Refugee Law Guidelines’, section 6.6, as re-issued 1 July 2017. The Guidelines provide examples of act-based ‘groups’ that would be unlikely to meet the definition unless there is some characteristic that leads to such actions. They appear to take the view that as employment is an ‘act’, occupation-based groups would not share an ‘innate or immutable’ characteristic. To the extent that there is some tension between this and the employment-based examples in the Explanatory Memorandum (such as sex workers), this may be resolved by determining whether the ‘characteristic’ said to give rise to the harm is the act of performing a particular occupation (in which case it is unlikely to be ‘innate or immutable’) or the fact of having done particular work (which may be ‘immutable’).

*Fundamental to a member's identity or conscience*

The second alternative 'protected characteristic' is that the characteristic must be so fundamental to a person's identity or conscience that he or she should not be forced to renounce it. The phrase 'fundamental to [a person's] identity or conscience', is not further defined, but the Refugee Law Guidelines describe 'fundamental' as synonymous with a 'necessary base or core' or of 'central importance' and suggest that acts of certain kinds may be 'fundamental to identity or conscience' where they are of central importance to the identity or conscience of the group.<sup>240</sup> The term 'conscience', as it appears in a similar context, was intended to encompass aspects such as religion, political opinion or moral beliefs.<sup>241</sup>

The terms of this criterion, referring to 'a member', suggest that the inquiry is broader than whether it is fundamental to the applicant's own identity or conscience. Ultimately, determination of whether or not a characteristic is so fundamental to a member's identity or conscience the member should not be forced to renounce it will be a matter for the decision-maker.

*Distinguishes the group from society*

The 'social perception' element requires alternatively that the characteristic distinguishes the group from society. That is, the group is capable of being perceived or recognised in social terms.<sup>242</sup> This element is intended to codify the requirement articulated by the High Court in *Applicant S v MIMA* that a particular social group be distinguishable from society at large.<sup>243</sup> However, whilst that interpretation *required* that the group be distinguishable from society, under s.5L it is not necessary to establish this element if either of the other two protected characteristic elements - pertaining to the innate, immutable or fundamental nature of the characteristic - are met.<sup>244</sup>

Where this element does arise for consideration, the case law relating to the 'particular social group' in the context of the Convention definition discussed above under the heading, 'Some common element that distinguishes the group from society at large', may provide guidance to its application.

<sup>240</sup> Department of Immigration, 'Refugee Law Guidelines', section 6.6, as re-issued 1 July 2017.

<sup>241</sup> In relation to s.5J(3): Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.173 at [1191].

<sup>242</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.179 at [1222].

<sup>243</sup> (2004) 217 CLR 387. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.179, at [1222].

<sup>244</sup> Note that at the time the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 was published, s.5L of the Bill was in a different form than that ultimately passed by Parliament. To the extent that the EM refers to this element as a *requirement* for all particular social groups (rather than an alternate criteria), it does not reflect the intention of Parliament in passing the legislation. The intention to modify the approach is reflected in the 2<sup>nd</sup> Supplementary Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.8 at [42].

A characteristic that is not a fear of persecution

It is well established in Australian case law that a particular social group cannot be defined by the fear of persecution. The s.5L definition incorporates this principle as one of the mandatory requirements for establishing the existence of a particular social group. As such, the discussion above, under the heading ‘Persecutory conduct cannot define a particular social group’, is equally applicable to this definition.

A characteristic that the applicant shares, or is perceived as sharing

The s.5L definition of particular social group also requires that the applicant share, or be perceived as sharing, the characteristic. Consistent with the law developed under the Refugees Convention, this requirement makes clear that a person may be a refugee within the meaning of s.5H(1) of the Act even if they are not in fact a member of the particular social group in question. It is sufficient, provided the other aspects of the definition are met, that their persecutors would impute them to be a member of that group.<sup>245</sup>

As is the case under the Convention, a person will not meet the refugee definition in s.5H(1) merely because they are (or are perceived as) a member of a particular social group and have a well-founded fear of serious harm. As discussed further below, the harm must be *for reasons of* their membership or perceived membership of that group.

***Membership of a family as a particular social group***

The Act includes certain qualifications where the social group relied upon is membership of a family. Section 91S of the Act, which applies to applications made prior to 16 December 2014, and s.5K, which applies to applications made on or after that date, provide for the circumstances in which a family will be a particular social group for the purposes of the refugee definition. They are in relevantly identical terms, and are intended to operate in the same way.<sup>246</sup>

Both of these provisions require that in determining whether a person (the first person) has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person’s family, the decision-maker must

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not for a refugee reason;
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or
  - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;
 where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in (a) had never existed.

<sup>245</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.178-179 at [1221].

<sup>246</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.177 at [1213].

As a result of these provisions, a person who is pursued because he or she is a relative of a person who is targeted for a non-refugee reason<sup>247</sup> will not have a well-founded fear of persecution for this reason. These sections thus limit the application of those definitions for the purposes of the Act. It compels a decision-maker exercising powers under that Act to disregard a fear of persecution which might otherwise establish refugee status.

The Explanatory Memorandum to the Bill which introduced s.91S explains that this does not prevent a family, *per se*, being a particular social group for the purpose of establishing a Convention reason for persecution, but prevents the family being used as a vehicle to bring within the scope of the Convention persecution that is motivated for non-Convention reasons.<sup>248</sup> The Minister's Second Reading Speech made it clear that the intention was to restrict the capacity to claim protection on the basis of gang wars and the like.<sup>249</sup>

Thus, for example, in *STCB v MIMIA*<sup>250</sup> the appellant feared that he would be killed because his grandfather had killed a member of the Paja family in 1944-1945, and that family was therefore obliged by the customary law of Albania known as the Kanun to kill a male member of his family. The High Court held that s.91S was fatal to his claim, in so far as it was based on membership of a particular social group that consisted of his family. The Court explained:

Applying s 91S(a), it is clear that the grandfather had a fear of persecution for a reason other than those mentioned in Art 1A(2) of the Convention – revenge for murder. Section 91S(a) requires that fear of persecution to be disregarded. Section 91S(b)(i) requires the appellant's fear of persecution to be disregarded, for it is reasonable to conclude that that fear would not exist if the grandfather's fear had never existed. And s 91S(b)(ii) requires that the brother's and the father's fear of persecution be disregarded, for it is reasonable to conclude that neither of those fears would exist either if the grandfather's fear had never existed. The result of disregarding the fears of persecution of the grandfather, the appellant, the father and the brother is that the appellant is to be treated as not having a well-founded fear of persecution for the reason of membership of a particular social group that consists of the appellant's family.<sup>251</sup>

Sections 91S and 5K require the decision-maker to consider the following questions before determining that an applicant's fear of persecution must be disregarded:

- whether any other member or former member of the applicant's family had been persecuted in the past or had a fear of persecution;
- if so, what the reason for that persecution was; and
- whether the reason is one of the five refugee reasons.<sup>252</sup>

<sup>247</sup> Such as criminal pursuit for repayment of debts as in *MIMA v Sarrazola (No. 2)* (2001) 107 FCR 184, or revenge for a murder as in the Albanian 'blood feud' cases such as *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg JJ, 18 December 2003).

<sup>248</sup> Explanatory Memorandum to the Migration Legislation Amendment (No.6) Bill 2001, at [31].

<sup>249</sup> Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422. On the historical background to s.91S, see *STCB v MIMIA* [2006] HCA 61 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, 14 December 2006) at [16]-[19].

<sup>250</sup> [2006] HCA 61 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, 14 December 2006).

<sup>251</sup> *STCB v MIMIA* [2006] HCA 61 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, 14 December 2006), per Gleeson CJ, Gummow, Callinan and Heydon JJ at [24]; see also per Kirby J at [53].

<sup>252</sup> *STCB v MIMIA* [2006] HCA 61 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, 14 December 2006) at [26], approved at [29].

In applying ss.91S/5K, it is important to focus on the reason that the family member, other than the applicant, is being targeted and not on the family member's reason for acting in a way that attracts the persecution.<sup>253</sup> The mere fact that the original cause for the alleged fear was an unlawful act by someone would not be sufficient. The question is not whether the ultimate cause of the feud was an illegal act by a family member or not, but whether any member of the relevant family had been persecuted or feared persecution for a reason other than a refugee reason.<sup>254</sup> Importantly, too, ss.91S/5K refer to fear of *persecution*, or *persecution*. This calls for consideration of whether the harm feared or experienced by a family member is persecution in the relevant sense.<sup>255</sup>

The operation of s.91S has been considered in a number of Albanian 'blood feud' cases, discussed below, under '*for reasons of ... membership*'. In all of these cases, a member of the applicant's family had killed a member of another family thus precipitating a blood feud with a consequent fear of persecution. The member of the applicant's family whose actions precipitated the blood feud did not fear persecution for any refugee reason but rather, because that person had committed a criminal act and could anticipate that the other family would seek revenge. For this reason, pursuant to s.91S(b), that person's persecution or fear of persecution had to be disregarded. In addition, pursuant to s.91S(b), the applicant's derivative fear also had to be disregarded.<sup>256</sup> The same outcome would be required under s.5K. In a number of Albanian 'blood feud' cases applicants have sought to rely on groups such as 'men in Albania' or 'persons subject to blood feuds' or 'citizens of Albania who are subject to the operation of the customary law Code of Leke Dukagjini (the Kanun)' in an attempt to 'outflank' s.91S, which prevents membership of a family being used as a vehicle to bring within the Convention persecution that is motivated for non-Convention reasons.<sup>257</sup> However, such formulations have been rejected at every level because they rely on the shared fear of persecution as the defining attribute of the class.<sup>258</sup> The Full Federal Court in *SCAL v MIMIA*<sup>259</sup> said that even if the primary judge wrongly described the recast group as one solely united by their fear of persecution, it was unrealistic to accept that the appellant feared persecution *because of his membership* of such a group. Plainly he feared

<sup>253</sup> *SZLGS v MIAC* [2008] FMCA 253 (Nicholls FM, 13 March 2008) at [31]-[34]. The Court found the Tribunal correctly applied s.91S in that it focused on the motivation of the authorities in pursuing the applicant's father, rather than the father's claimed political opinion.

<sup>254</sup> See *STXB v MIMIA* (2004) 139 FCR 1.

<sup>255</sup> See *MIAC v SZCWF* (2007) 161 FCR 441 at [24]-[35]. In that case evidence of systematic and discriminatory conduct was found in the first respondent's own claim that a blood feud had arisen between the two families. The Full Federal Court observed at [33]-[35] that a blood feud of its very nature involves threats and counter-threats as each family exacts its revenge; it involves systematic and discriminatory targeting of each family, and that it was reasonable for the Tribunal to assume in all of the circumstances that the serious harm to the father involved systematic and discriminatory conduct. The concept of 'persecution' is considered in detail in Chapter 4 of this Guide.

<sup>256</sup> See *MIAC v SZCWF* (2007) 161 FCR 441 at [18].

<sup>257</sup> See *MIAC v SZCWF* (2007) 161 FCR 441 at [16] referring to *SDAR v MIMIA* (2002) 124 FCR 436; *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn & Sundberg, JJ, 18 December 2003); *STCB v MIMIA* [2004] FCAFC 266 (Spender, Stone and Bennett JJ, 6 October 2004); and *STYB v MIMIA* [2004] FCAFC 295 (Cooper, Marshall and Mansfield JJ, 12 November 2004). See also, eg, *STXB v MIMIA* (2004) 139 FCR 1.

<sup>258</sup> See eg, *SCAL v MIMIA* [2003] FCA 548 (von Doussa J, 5 June 2003) at [20]; *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg, JJ, 18 December 2003) at [19] and *STXB v MIMIA* (2004) 139 FCR 1 at [37].

<sup>259</sup> [2003] FCAFC 301 (Carr, Finn and Sundberg JJ, 18 December 2003).

persecution either because of his membership of his family or because of a fear of reprisal because his father killed a member of the Laca family.<sup>260</sup>

While the outcome will always depend on the evidence before the decision-maker and the circumstances of the particular case, the Albanian blood feud cases indicate that where the effect of ss.91S/5K is sought to be avoided by the identification of broader particular social groups, even if such groups are found to exist an applicant may face a difficult hurdle in establishing that his or her fear of persecution is *for reasons of membership* of these groups rather than membership of the relevant family.

### ***‘For reasons of ... membership’***

It is not enough to establish that an applicant is a member of a particular social group and that they also have a well-founded fear of persecution. The Convention definition and ss.5H(1) and 5J(1)(a) require that the persecution feared be *for reasons of membership* or perceived membership of the group.<sup>261</sup>

Furthermore, under ss.91R(1)(a)/5J(4)(a) of the Act, where the harm feared is attributable to a number of motivations, it will be insufficient that membership of a particular social group constitutes a minor or non-central motivation. Rather, membership of a particular social group (or membership of such a group together with other refugee reasons) must constitute at least the essential and significant reason or reasons for the persecution.

In *Applicant A*, McHugh J observed that where the claim is one of a ‘well-founded fear of being persecuted for reasons of ... membership of a particular social group’, the interaction between the concepts of ‘persecuted’, ‘for reasons of’ and ‘membership of a particular social group’ is particularly important:

Defining the group widely increases the difficulty of proving that a particular act is persecution “for reasons of ... membership” of that group.

...

Paradoxically, defining the group narrowly may take it outside the concept of “a particular social group” and increase the difficulty of proving that the act relied on is persecution “for reasons of ... membership” of the group. If the definition of a group has to be hedged with qualifications to relate it an alleged persecutory act, the proper conclusion may be that the reason for the act was not membership of the group but the conduct of the individual.<sup>262</sup>

The issue of whether the necessary ‘interaction’ is present will depend on the circumstances of the particular case.<sup>263</sup>

<sup>260</sup> *SCAL v MIMIA* [2003] FCAFC 301 (Carr, Finn and Sundberg JJ, 18 December 2003) at [19].

<sup>261</sup> See *Applicant A v MIEA* (1997) 190 CLR 225 at 240.

<sup>262</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 257.

<sup>263</sup> For example, in *MIAC v SZNWC* (2010) 190 FCR 23, the majority of the Full Federal Court (Perram J, Moore J agreeing) held that the Tribunal erred by finding that the applicant would be punished for deserting a ship rather than for being a member of a particular social group of ‘ship deserters’. It held, at [47]: ‘Where a social group is found, as this one was, to exist independently of the punishment inflicted under the allegedly persecutory criminal law it is no answer to say that what is being punished is past acts rather than membership to that group. A law outlawing homosexual conduct discriminates



## Political opinion

There is also a wealth of Australian case law on the meaning and scope of 'political opinion'. The cases indicate that in the Convention context the term 'political opinion' needs to be understood broadly. This would also appear to be the case for the term 'political opinion' in the context of s.5J(1)(a).

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* provides a useful starting point although of course it is not definitive.<sup>264</sup> The relevant discussion is at paragraphs 80-86:

80. Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions - in so far as this can be established from all the circumstances of the case - will also be relevant.

81. While the definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion". More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

82. As indicated above, persecution "for reasons of political opinion" implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

83. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugee "sur place".

84. Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political *opinion* or for politically-motivated *acts*. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.

85. Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.

86. In determining whether a political offender can be considered a refugee, regard should also be had to

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against homosexuals; a law criminalising homelessness discriminates against the homeless; and a law criminalising drug use discriminates against drug users. Discrimination is, in each case, the very point of the law.'

<sup>264</sup> *Chan v MIEA* (1989) 169 CLR 379 at 392, per Mason CJ.

the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment - for an act committed by him.<sup>265</sup>

As in each of the other refugee grounds, for the purposes of the Convention definition of refugee, or that in s.5H(1), a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her by the persecutor.<sup>266</sup> In *Saliba v MIMA* the Court held:

... for *Convention* purposes, a claimant's political opinion need not be expressed outright. It may be enough that a political opinion can be perceived from the claimant's actions or is ascribed to the claimant, even if the claimant does not actually hold the imputed opinion.<sup>267</sup>

In *Applicant A v MIEA* Gummow J distinguished 'political opinion' from the other four refugee grounds, noting that those of a particular race, or nationality, or who are adherents of a particular religion, might be said in each case to be members of a particular social group, but that a person may not be a member of any group but still fall within the definition by reason of the fear of persecution for reasons of political opinion:

Political opinions ... may be diverse, imprecise, and even idiosyncratic. Thus a refugee may be classified as such if that person is outside the country of nationality owing to a well-founded fear of being persecuted for reasons of political opinion and, owing to such fear, may be unwilling to avail himself or herself of the protection of the country of nationality. That refugee may not be a member of any group but still fall within the definition by reason of the fear of persecution with a view to repression or extirpation of the political opinion adopted by that person.<sup>268</sup>

In *MIMA v Y*, Davies J noted that '[t]he words "political opinion" are ordinary words of the English language and have not been the subject of judicial exposition limiting their meaning in the context of the Refugees' Convention'.<sup>269</sup> In considering the Tribunal's finding that the applicant's stance against criminal activity by police was the expression of a political opinion the Court held:

In the context of the Refugees' Convention, an opinion could be thought to be a political opinion if it were such as to indicate that its holder ... held views which were contrary to the interests of the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the Government and the instruments which enforce the power of the State, such as the armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters.<sup>270</sup>

His Honour's statements above were approved by the Full Federal Court in *V v MIMA*.<sup>271</sup> The Court observed in respect of political opinion:

<sup>265</sup> Paragraphs 84-86 of the *Handbook* were cited with approval in *Welivita v MIEA* (unreported, Federal Court of Australia, Lindgren J, 18 November 1996).

<sup>266</sup> *MIEA v Guo* (1997) 191 CLR 559 at 571 referring to *Chan v MIEA* (1989) 169 CLR 379 at 416 per Gaudron J and at 433 per McHugh J.

<sup>267</sup> (1998) 89 FCR 38 at 49.

<sup>268</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 284. See also *X v MIMA* [1999] FCA 697 (Hill, Whitlam and Kiefel JJ, 3 June 1999) at [32].

<sup>269</sup> [1998] FCA 515 (Davies J, 15 May 1998) at 4.

<sup>270</sup> *MIMA v Y* [1998] FCA 515 (Davies J, 15 May 1998) at 5.

<sup>271</sup> (1999) 92 FCR 355, at 363.

- it is enough that a person holds (or is believed to hold) views antithetic to instruments of government and is persecuted for that reason;<sup>272</sup>
- it is not necessary that a person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge;<sup>273</sup>
- '*political opinion*' within the meaning of the Convention is clearly not limited to party politics in the sense that expression is understood in a parliamentary democracy;<sup>274</sup>
- the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts reflective of an unstated political agenda, will be the holding of a political opinion;<sup>275</sup>
- for the purposes of the Convention '*political opinion*' may be shown by repeated conduct which is never (or rarely) converted into articulate political protest of the kind familiar to Australian society.<sup>276</sup>

Justice Merkel in *Zheng v MIMA*<sup>277</sup> applied the Full Court's observations to another case concerning the exposure of corrupt activities. His Honour stated:

... 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>278</sup>

Similarly, Wilcox J in *C v MIMA*<sup>279</sup> repeated a number of the observations of the Court in *V v MIMA*. *C* involved applicants who claimed a fear of harm arising from a perception that they would inform the authorities about the illegal activities of a group of criminals. The Court said that the Tribunal was entitled to find that the applicants' fear arose out of a reaction by the agents of harm to the husband's informing activities.<sup>280</sup> However, Justice Wilcox went on to find that, in that case, the Tribunal had failed to understand that the term '*political opinion*'

<sup>272</sup> *V v MIMA* (1999) 92 FCR 355, per Wilcox J at 363. See also *Ramirez v MIMA* [2000] FCA 1000 (Hill, Mathews and Lindgren JJ, 2 August 2000) at [42] where the Full Court referred, with approval, to *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 in which La Forest J (at 39), in delivering the judgment of the Court, adopted the interpretation of '*political opinion*' suggested by Goodwin-Gill, in *The Refugee in International Law* 1983 at 31 namely, "any opinion on any matter in which the machinery of state, government, and policy may be engaged".

<sup>273</sup> *V v MIMA* (1999) 92 FCR 355, per Wilcox J at 363.

<sup>274</sup> (1999) 92 FCR 355 at 367 per Hill J. See also *Nefiodova v MIMA* [2000] FCA 179 (Hely J, 28 February 2000) at [82] per Hely J.

<sup>275</sup> *V v MIMA* (1999) 92 FCR 355, per Hill J at 367.

<sup>276</sup> (1999) 92 FCR 355 at 369 per Whitlam J.

<sup>277</sup> [2000] FCA 670 (Merkel J, 23 August 2000).

<sup>278</sup> *Zheng v MIMA* [2000] FCA 670 (Merkel J, 23 August 2000) at [32]. For further discussion of the situation of exposure of corruption see Chapter 11 of this Guide.

<sup>279</sup> (1999) 94 FCR 366.

<sup>280</sup> *C v MIMA* (1999) 94 FCR 366 at 372.

was broader than adherence to a political party or support for its policies.<sup>281</sup> The Court considered that, not only could the term ‘political opinion’ extend to any action which is perceived to be a challenge to government authority, but also to action which constituted a challenge to a group opposed to the government.<sup>282</sup> It has also been held that an applicant’s conduct in bringing legal actions to prevent exploitation of the poor was “arguably the expression of political opinion by the applicant”.<sup>283</sup>

Although a narrower concept of political opinion has been suggested in some Federal Court cases,<sup>284</sup> a broader approach has been identified and accepted in more recent case law, with the perception and motivation of the ‘persecutor’ as the paramount considerations.

In sum, care should be taken not to unduly limit the concept of ‘political opinion’ as that expression is used in the Convention, or in s.5J(1)(a). Provided that the decision-maker does not misdirect him or herself in this respect, it is a matter of fact for the decision-maker whether or not a discernible political opinion (actual or imputed) can be attributed as a reason for the harm feared.

### **‘For reasons of ... political opinion’**

Whether feared persecution in any particular case is ‘for reasons of’ political opinion in the relevant sense is a question of fact and degree, having regard to all the circumstances as disclosed by the evidence.

In *Maningat v MIMA*<sup>285</sup> the applicant’s fear arose from witnessing the abduction of a military officer by Communists in the Philippines. The Court held:

...the Convention is concerned with the political opinion held by the applicant rather than of those who carried out the abduction. Fear of reprisal or being harmed or “silenced” because a person might be able to give evidence against the perpetrators of a violent or criminal act, without more is not fear of persecution for a Convention reason. The word “opinion” contained in the Convention is of central importance in this case. The circumstances that the act was carried out by Communists does not mean that the witness was in danger of persecution for reasons of opinions held by him. The fact that a person is in fear because he witnessed an abduction is, taken by itself, a neutral circumstance under the Convention. Such fears might equally arise as the result of being a witness to a killing by criminal groups such as the Mafia, where, for example, there may be no suggestion of persecution for holding a political opinion.<sup>286</sup>

In *Jarrin v MIMA*<sup>287</sup> the Tribunal had found that the applicants did not face persecution for their political opinion on return to Ecuador for taking part in actions to bring the former President of Ecuador to justice. Justice Madgwick held there was no error with the Tribunal’s findings and observed:

<sup>281</sup> *C v MIMA* (1999) 94 FCR 366 at 375.

<sup>282</sup> *C v MIMA* (1999) 94 FCR 366 at 373. In support of this point the Court cited the Canadian Supreme Court decision of *Attorney-General of Canada v Ward* (1993) 103 DLR (4th) 1. See also *Devarajan v MIMA* [1999] FCA 796 (Moore J, 16 June 1999) at [26].

<sup>283</sup> *Devarajan v MIMA* [1999] FCA 796 (Moore J, 16 June 1999) at [26].

<sup>284</sup> See *Ye Hong v MIMA* (unreported, Federal Court of Australia, Tamberlin J, 2 October 1998) and *Wei Chen v MIMA* (unreported, Federal Court of Australia, Dowsett J, 3 November 1998).

<sup>285</sup> unreported, Federal Court of Australia, Tamberlin J, 30 April 1998.

To a greater or lesser extent, powerful figures in any country, including our own, may from time to time be able to move governments to act in spiteful ways against citizens who have angered those powerful figures or whom the powerful figures fear. The same sorts of powerful figures may be able to induce governments to act with less than propriety in protecting such citizens when the powerful figures seek directly to do them some harm. Even if the reason for anger and fear on the part of the powerful figure has connotations which include the actual or imputed political opinions of such citizens, in my view, it cannot be said that the reason for such persecution is their political opinion, unless it is such political opinion which excites the hatred or fear of the powerful figure. In this case, that which might excite Cordero directly or indirectly to act against the Jarrin family would hardly be whether or not they shared in part or in whole the views of the deceased Arturo but that they very humanly sought to know the truth and bring his murderers to book. That is why Cordero might wish to persecute them. That is not for a reason of political opinion.<sup>288</sup>

However, in *Mahesparam v MIMA*, Madgwick J expressed concern with the Tribunal's use of his statements in *Jarrin* and gave the following caution:

If (imputed) political opinion plays a substantial part in the persecution feared by the applicant, that would be persecution "for reasons of ... political opinion" within the meaning of the Convention.

To the extent that any remarks in *Jarrin* may tend to the contrary of the analysis offered here, they should be considered to have been limited to the specific facts of *Jarrin*.<sup>289</sup>

His Honour's concerns highlight the importance of a careful consideration of the facts and circumstances of *each case* and the inappropriateness of applying statements from particular judgments as formulae or principles.

Note also that Madgwick J's reference to 'a substantial part' no longer provides reliable guidance. Under s.91R(1)(a)/s.5J(4)(a) of the Act, where the harm feared is attributable to a number of motivations, it will be insufficient that political opinion constitutes a minor or non-central motivation. To come within Article 1A(2) as qualified by s.91R(1)(a) or s.5H(1) as qualified by ss.5J(1) and 5J(4)(a), political opinion (or political opinion together with other refugee reasons) must constitute at least the essential and significant reason or reasons for the persecution.

In *NAEU of 2002 v MIMIA* 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 in part because of the applicant's political opinion.<sup>290</sup> However, in *SZANB v MIMIA* Driver FM was of the view that the Tribunal was under the wrong impression that it was necessary for the applicant to demonstrate a nexus between the harm feared and his political opinion.<sup>291</sup> It was held that the political opinion need not necessarily

<sup>286</sup> *Maningat v MIMA*, unreported, Federal Court of Australia, Tamberlin J, 30 April 1998 at 4.

<sup>287</sup> [1998] FCA 765 (Madgwick J, 25 June 1998).

<sup>288</sup> *Jarrin v MIMA* [1998] FCA 765 (Madgwick J, 25 June 1998) at 7.

<sup>289</sup> [1999] FCA 459 (Madgwick J, 15 April 1999) at [30].

<sup>290</sup> [2002] FCAFC 259 (Madgwick, Merkel and Conti JJ, 24 October 2002) at [14]. However Madgwick J in *NACM v MIMIA* (2003) 134 FCR 550, doubted but declined to give effect to his doubts as a single judge, the correctness of his own decision in *NAEU* 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.

<sup>291</sup> [2004] FMCA 387 (Driver FM, 18 June 2004) at [8].

be that of the asylum seeker. The political opinion of the alleged perpetrators of violent acts may also be relevant.<sup>292</sup>

### Fact-finding – testing an applicant’s knowledge

It is generally accepted that as a matter of common sense, it is a perfectly legitimate fact-finding technique for an administrative decision-maker to test the veracity of an applicant’s claim by reference to knowledge or attitudes which members of the relevant religion, social group or political party might be expected to possess.<sup>293</sup> An evaluation of an internally held attribute such as religious belief (or political opinion) is likely to involve questions about how the individual understands that belief, what it means to that individual and how they manifest that belief.<sup>294</sup>

However, the questioning needs to be rationally capable of assisting a decision as to whether the person’s claim to hold the belief was genuine or not, and must involve questioning of that individual’s belief rather than the application of some standardised or assumed level of knowledge.<sup>295</sup> Degrees of understanding will vary from person to person and it may be erroneous to ascribe to all adherents of a particular religion, for example, a required and consistent minimum understanding of its tenets,<sup>296</sup> or to quiz an applicant who

<sup>292</sup> For a more detailed discussion, refer to Chapter 11 of this Guide.

<sup>293</sup> *MIAC v SZOCT* (2010) 189 FCR 577 at [6]-[10] (knowledge of Christianity); *MIAC v SZLSP* (2010) 187 FCR 362 at [39] (understanding of Falun Gong doctrine); and *MIMIA v SBAN* [2002] FCAFC 431 (Heerey, Moore and Kiefel JJ, 18 December 2002) at [65] (knowledge of or familiarity with the culture of male homosexuals in Iran). For application of this approach in relation to religious knowledge, see, eg, *Nejad v MIMA* [1999] FCA 1827 (Tamberlin J, 9 December 1999) at [8]-[9], upheld on appeal: [2000] FCA 741 (Spender, Lindgren and Madgwick JJ, 31 May 2000) (Baha’i faith); *Lanying Wang v MIMA* [2000] FCA 963 (Goldberg J, 19 July 2000) (Christianity in China); *SBCC v MIMA* [2006] FCAFC 129 (French, Lander and Besanko JJ, 23 August 2006) at [45]-[49] (Falun Gong); *WALT v MIMIA* [2007] FCAFC 2 (Mansfield, Jacobson and Siopis JJ, 22 January 2007) at [27]-[32] (Christianity in Kenya); *SZLUS v MIAC* [2008] FCA 1917 (Jacobson J, 18 December 2008) at [33]-[37], citing *SBCC* (Christianity in China); *SZONC v MIAC* [2010] FMCA 723 (Raphael FM, 10 September 2010) (Christianity in China); *SZQBM v MIAC* [2011] FMCA 807 (Nicholls FM, 21 October 2011) at [67]-[73], upheld on appeal in *SZQBM v MIAC* [2012] FCA 551 (Buchanan J, 30 May 2012) (assessing genuine Falun Gong practitioner); *SZQTB v MIAC* [2012] FMCA 32 (Nicholls FM, 20 January 2012) at [87]-[90] (knowledge of Christianity); *SZONH v MIAC* [2012] FMCA 242 (Burnett FM, 28 March 2012) at [25-28] (knowledge of Christianity); *SZQSA v MIAC* [2012] FMCA 328 (Nicholls FM, 17 April 2012) (knowledge of Christianity); *SZQOH v MIAC* [2012] FMCA 345 (Cameron FM, 30 April 2012) (knowledge of Christianity); *SZROX v MIAC* [2013] FMCA 244 (Barnes FM, 6 March 2013) (practice of the Local Church in China and Australia); and *SZSMC v MIAC* [2013] FCCA 575 (Emmett J, 20 June 2013), upheld on appeal in *SZSMC v MIBP* [2013] FCA 1205 (Katzmann J, 14 November 2013) (Yi Guan Dao faith in China). For application of this approach in relation to political knowledge, see, eg, *T v MIMA* [2000] FCA 467 (Drummond, Mathews and Mansfield JJ, 12 April 2000) at [20], [47]; *NAOP v MIMIA* [2003] FMCA 572 (Driver FM, 8 December 2003) at [13]-[14]; and *SZDSG v MIMIA* [2005] FMCA 170 (Smith FM, 16 February 2005) at [22]-[23]. This approach has also been used to test the veracity of an applicant’s claim as to their country or region of origin, eg *SBAQ v MIMIA* [2002] FCA 985 (Mansfield J, 21 August 2002); *SBBC v MIMIA* [2002] FCA 819 (Mansfield J, 3 July 2002); *WAAP v MIMA* [2002] FCA 131 (RD Nicholson J, 14 February 2002); *VCAS of 2002 v MIMA* [2002] FCAFC 368 (Merkel, Goldberg and Kenny JJ, 20 November 2002). A similar approach was also taken in *SZUTY v MIBP* [2015] FCCA 1379 (Judge Smith, 26 May 2015), where the Court found no error in the Tribunal testing an applicant by reference to his familiarity with and interest in the homosexual community in Australia, in circumstances where the applicant had claimed that he had travelled to Australia because he wanted to explore his sexuality: at [19], [23].

<sup>294</sup> *MZZJO v MIBP* [2014] FCAFC 80 (North, Bromberg and Mortimer JJ, 4 July 2014) at [47].

<sup>295</sup> *MZZJO v MIBP* [2014] FCAFC 80 (North, Bromberg and Mortimer JJ, 4 July 2014) at [47].

<sup>296</sup> *WALT v MIMIA* [2007] FCAFC 2 (Mansfield, Jacobson and Siopis JJ, 22 January 2007) at [28]. See also *SZOIW v MIAC* [2010] FMCA 568 (Raphael FM, 2 August 2010) at [15] where the Court held that the Tribunal had impermissibly set itself up as an arbiter of religious knowledge by relying upon a witness’s failure to meet its standards of religious knowledge. The Court also expressed concern that the Tribunal did not fully take into account the cultural, social and religious difference that might exist in China when assessing the religious knowledge of the witness. Note also that in *SZRRV v MIAC* [2012] FMCA 997 (Driver FM, 30 October 2012) at [24] the Court was critical of the Tribunal’s attempt to test the applicant’s Christian faith by reference to her heterosexual lifestyle, stating that this line of questioning was not appropriate and that it was wrong to assume that modern concepts of marriage have much to do with fundamental Christian beliefs or indeed, whatever concepts of marriage existed at the time of Jesus.

does not claim to have been teaching the philosophy or history of democracy, about the origins of democracy and historical figures who were democratic philosophers.<sup>297</sup> In *Mashayekhi v MIMA* Merkel J expressed concern over the Tribunal's reliance upon answers to questions that 'would be relevant to ascertaining the genuineness of a conversion to Roman Catholicism in Australia, but which may be problematic in respect of the conversion in Iran attested to by the applicant'.<sup>298</sup> Similarly, in *Wang v MIMA* Gray J stated:

Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion.<sup>299</sup>

In *SZHCI v MIAC*<sup>300</sup> the Tribunal had administered what the Court described as an 'unwarned, *viva voce* history examination', without any proper foundation for its expectation that the applicant should be expected to have the political knowledge demanded: the applicant had made no claims suggesting that he had ever studied or was expected to have any level of knowledge of the origins and history of the political party whose local organisation he supported. On the other hand, in *NAOP v MIMIA* the Court found no difficulty with the Tribunal member's conclusion that the applicant did not have the level of knowledge about political events in his local area that she would have expected from someone with his claimed profile.<sup>301</sup>

There must be a logical connection, supported by probative evidence, between an applicant's failure to hold specific knowledge and the expectation that a follower of the particular belief would have that knowledge. Accordingly, testing of this kind would not be appropriate where there is no comparator against which a qualitative assessment of an applicant's knowledge about a particular belief can be rationally made, such as where the applicant claims to be agnostic.<sup>302</sup> Where an assessment is made against the most basic tenets or features of a religion (or political tradition or belief), it is more likely to be such that all followers could be expected to have that particular knowledge. However, the more the assessment of knowledge moves from the basic to the sophisticated, the more that would be required to show the connection between the specific knowledge and the expectation that the applicant would hold that knowledge.<sup>303</sup> In each case, the degree of knowledge which

<sup>297</sup> *SZDSG v MIMIA* [2005] FMCA 170 (Smith FM, 16 February 2005) at [22]-[23]. His Honour doubted whether this was a very useful method of testing the applicant's claims, commenting that he 'would not assume that democratic ideals or practices cannot be taught to junior high school children in China without knowledge of ancient Greece', but found that as a matter of law it was open to the Tribunal to have tested the applicant in the manner described and to have acted upon its opinions about his responses.

<sup>298</sup> *Mashayekhi v MIMA* (2000) 97 FCR 381 at [12].

<sup>299</sup> *Wang v MIMA* (2000) 105 FCR 548, per Gray J at [16]. See also *SZUOI v MIBP* (No.2) [2015] FCCA 2183 (Judge Driver, 12 August 2015) at [42] where the Court observed that a solitary or cerebral path to religious conversion is no less correct or plausible than a path embarked on in a religious community. The Court held that the Tribunal erred by setting itself up as the arbiter of the correct path to religious conversion.

<sup>300</sup> [2006] FMCA 1016 (Smith FM, 26 July 2006).

<sup>301</sup> [2003] FMCA 572 (Driver FM, 8 December 2003).

<sup>302</sup> *MZZJO v MIBP* [2014] FCAFC 80 (North, Bromberg and Mortimer JJ, 4 July 2014) at [53]-[54].

<sup>303</sup> *SZLSP v MIAC* [2012] FCA 451 at [35]. In that case, the Tribunal rejected the appellant's claim to be a Falun Gong practitioner on the basis of evidence as to what a genuine practitioner 'would commonly know'. The Court held at [47]-[48] that the Tribunal erred by applying that evidence as an absolute standard as to what a genuine practitioner 'will know'. Neither this, nor the Tribunal's conclusions as to the appellant's knowledge of Falun Gong exercises and the level of public participation that would be expected of a genuine practitioner, was grounded in probative evidence (at [52], [55], [56]). By

can be expected of an applicant will ultimately depend upon what the applicant claims. For instance, if an applicant claims to have been a religious or political leader, a greater depth of knowledge can be expected than if he or she were claiming to be a mere follower, or a newcomer.

However, knowledge of religion or another subject matter may not necessarily be determinative of the credibility of an applicant's claims. Even where an applicant manifests sound knowledge of the religion (or opinion) to which he or she claims adherence, in certain circumstances it may be appropriate for the decision-maker to consider whether that knowledge has been consciously acquired for the purpose of enhancing a claim for protection.<sup>304</sup>

It should also be remembered that because the *perception* of a person's religion, political opinion, or membership of a particular social group may attract persecution, even if the perception is mistaken,<sup>305</sup> testing an applicant's knowledge will not always assist. In *Nader v MIMA* Justice Hill questioned whether it was at all necessary for the applicant's case that he have a detailed knowledge of the religion to which he said he had converted in Iran or the one he said he had attended in Australia.<sup>306</sup> As his Honour explained, if a person in Iran professed to convert to Christianity, that person could well be open to persecution on religious grounds whether he or she understood fully, or even not at all, the tenets of the religion which they said they had adopted.<sup>307</sup>

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contrast, in *SZONH v MIAC* [2012] FMCA 242 (Burnett FM, 28 March 2012) at [28]-[29] the Court found no error in the Tribunal's application of matters of common knowledge (the existence of Jesus Christ and his relevance to Christianity) to find that the applicant was not a Christian. The Court's statement at [25] that in a Judeo-Christian society, matters such as the existence of Jesus Christ and his relevance to Christianity are so notorious that they go without saying, suggests that independent evidence is not required to support findings on such matters. In *MZYRS v MIAC* [2013] FCCA 747 (Judge Burchardt, 12 July 2013), the Court found no error in the Reviewer's finding that the applicant only had a very rudimentary grasp about Christianity, including because he had no understanding of the Holy Trinity. Judge Burchardt found at [33] – [36] that although there was no objective evidence before the Reviewer to support the finding to the effect that the Holy Trinity was a key aspect of Anglican faith, the question about the Holy Trinity was not unreasonable.

<sup>304</sup> *SZULN v MIBP* [2015] FCCA 2455 (Judge Manousaridis, 11 September 2015) at [24], finding that the mere fact that the Tribunal did not accept the applicant's knowledge of Christianity as evidence that she had a genuine faith did not give rise to a reasonable apprehension of bias. As the Tribunal had also relied on a number of other matters in rejecting the applicant's claims, it was reasonably open to it to consider whether the applicant's demonstrated knowledge was acquired for the purpose of enhancing her visa application: at [25].

<sup>305</sup> See above, 'Imputed attribute sufficient to establish nexus'.

<sup>306</sup> (2000) 101 FCR 352.

<sup>307</sup> *Nader v MIMA* (2000) 101 FCR 352 per Hill J at [69].