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### INTRODUCTION

In assessing the criteria for a protection visa, it is necessary to establish the person’s ‘country of reference’ – usually the country in which they claim to fear harm. The considerations vary somewhat depending upon whether the claim is one for refugee status or for complementary protection and, in both cases, the date of the protection visa application.

For protection visa applications made prior to 16 December 2014, there are different requirements in determining the relevant country for the purpose of the refugee criterion in s.36(2)(a) of the *Migration Act 1958* (the Act) and the complementary protection criterion in s.36(2)(aa). For the refugee criterion, the country is established by reference to the definition of a refugee in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* (the Refugees Convention, or the Convention). However, for the purposes of the complementary

protection criterion, decision-makers must apply the pre 16 December 2014 definition of 'receiving country' in s.5(1) of the Act.<sup>1</sup>

Protection visa applications made on or after 16 December 2014 are no longer assessed by reference to Article 1A(2) of the Refugees Convention. Instead, the definition of 'refugee' is codified in s.5H of the Act.<sup>2</sup> For such applications, the relevant country of reference for both the refugee and complementary protection criteria is determined under the post 16 December 2014 definition of 'receiving country' in s.5(1).<sup>3</sup>

Although the concept of country of reference in each of these contexts overlap, and in some cases is the same, there are some variations. This chapter will firstly outline the considerations relevant to country of reference in the context of the Refugees Convention, and the definition of 'receiving country', before discussing concepts common to both of those contexts.

## COUNTRY OF REFERENCE - THE REFUGEES CONVENTION

For protection visa applications made prior to 16 December 2014, s.36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom Australia has protection obligations under the Refugees Convention as amended by the 1967 *Protocol relating to the Status of Refugees* (the Protocol).<sup>4</sup> Generally speaking, as a Contracting State to the Refugees Convention and Protocol, Australia has protection obligations to persons who are 'refugees' as defined in those instruments. Article 1A(2) of the Refugees Convention as amended by the Protocol defines a refugee as any person who:

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

In the case of a person who has more than one nationality, the term "the country of his nationality" shall

<sup>1</sup> The complementary protection criterion in s.36(2)(aa) and definition of receiving country in s.5(1) were introduced by the *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011), which commenced on 24 March 2012 and applied to applications not finally determined as at that date: s.2; Schedule 1, item 12, and Proclamation, Migration Amendment (Complementary Protection) Act 2011 dated 21 March 2012 (FRLI F2012L00650) fixing date of commencement as 24 March 2012.

<sup>2</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 Caseload Legacy) Commencement Proclamation dated 16 April 2015 (FRLI F2015L00543).

<sup>3</sup> The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135) amended the definition of 'receiving country' in s.5(1) of the Act in respect of protection visa applications lodged on or after 16 December 2014: table items 15 and 22 of s.2 and items 18 and 28 of Schedule 5. Prior to that date, 'receiving country' applied only to the determination of the complementary protection criteria in s.36(2)(aa).

<sup>4</sup> Note that the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (No.113 of 2012) came into effect on 18 August 2012 and amended s.36(2)(a) to include the wording 'in respect of whom' Australia has protection obligations, Schedule 1, item [7]. Prior to this amendment this provision applied to persons 'to whom' the Minister is satisfied Australia has protection obligations.

mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

For applicants who make claims under the Convention, the first issue to be determined is the country or countries against which those claims are to be assessed.<sup>5</sup> For the purposes of Article 1A(2), applicants who have a nationality must be considered in relation to their country or countries of nationality; conversely, applicants who are stateless must be considered in relation to their country or countries of former habitual residence.<sup>6</sup> Thus, the first task is to identify either the country (or countries) of nationality; or in the case of stateless persons the country (or countries) of former habitual residence.<sup>7</sup>

## COUNTRY OF REFERENCE UNDER THE MIGRATION ACT

The Migration Act defines the country of reference (receiving country) for the complementary protection criterion (regardless of application date) and, with respect to post 16 December 2014 protection visa applications, for the refugee criterion.

The concept of ‘receiving country’ was first introduced into the Act as part of the complementary protection criterion in s.36(2)(aa), which refers to a non-citizen being removed from Australia to a **receiving country**.

For protection visa applications made on or after 16 December 2014, ‘receiving country’ is also relevant to the determination of whether or not a person is a refugee within the meaning of s.5H(1) of the Act. A person is a refugee under s.5H(1) if the person

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Section 5J(1), which sets out the meaning of ‘well-founded fear of persecution’, refers to the relevant country of nationality or former habitual residence as a ‘receiving country’. Thus, for both criteria, the ‘receiving country’ provides the reference point for the assessment of the risk of harm.<sup>8</sup>

<sup>5</sup> Not all applicants make claims under the Convention. An alternative criterion is that the applicant is a non-citizen in Australia who is a member of the family of a person in respect of whom Australia has protection obligations and who holds a protection visa of the same class: see s.36(2)(b) of the Act and Schedule 2 to the Migration Regulations 1994, discussed in Chapter 1 of this Guide. For applicants who rely on the alternative (family membership) criterion and do not claim to be refugees, issues relating to the Convention definition do not arise for consideration.

<sup>6</sup> The position of an applicant who has a nationality but has resided in a third country is discussed later in this Chapter, under ‘Other Issues’.

<sup>7</sup> In some cases there may also be a need to assess an applicant’s claims against a third country. See Chapter 9 of this Guide.

<sup>8</sup> According to the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011, ‘receiving country’ is intended ‘to provide a country of reference for the Minister when considering whether Australia owes a *non-refoulement* obligation to a non-citizen who makes an application for a protection visa’: at [33].

As set out below, there are minor differences in the definition of ‘receiving country’ applicable to applications made on or after 16 December 2014, or applications made prior to that date. Further, whereas the post 16 December 2014 definition is applicable to both the refugee and complementary protection criteria, the pre 16 December 2014 definition is relevant only to consideration of complementary protection.

### **Receiving country – refugee and complementary protection criteria post 16 December 2014**

For applications made on or after 16 December 2014, receiving country is defined in s.5(1) of the Act as:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

For persons who have a nationality, the ‘receiving country’ is the country of nationality. Whether a person is a national of a particular country is to be determined solely by reference to the law of the relevant country. This reflects the position in regards to nationality for the purposes of the Refugees Convention based on international law, and the assessment of nationality for the purposes of the application of s.36(3) of the Act.<sup>9</sup>

For persons without a nationality, the receiving country is the country of former habitual residence with the added qualification, as under the Convention definition, that it does not matter whether return to that country would be possible. As with claims under the Convention, subject to s.36(3) of the Act, an application by a stateless person with more than one country of habitual residence should be allowed if the person’s claims are made out in relation to any one such country. See discussion below under [‘More than one country of former habitual residence?’](#) for details.

### **Receiving country – complementary protection criterion pre 16 December 2014**

The pre 16 December 2014 definition of ‘receiving country’ is applicable only to the assessment of complementary protection, and only to applications made prior to that date. The definition is as follows:

- (a) a country of which the non-citizen is a national; or
  - (b) if the non-citizen has no country of nationality – the country of which the non-citizen is a habitual resident;
- to be determined solely by reference to the law of the relevant country.<sup>10</sup>

<sup>9</sup> See Chapter 9 of this Guide for discussion of s.36(3) of the Act.

<sup>10</sup> The definition was amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, to enable its application to the new statutory framework relating to refugees introduced by that Act (the definition was previously only relevant to questions of complementary protection): paragraph 1324 of the Explanatory

For persons who have a nationality, this definition is the same as that in effect after 16 December 2014.

For stateless applicants, there are a number of textual differences between the pre and post 16 December 2014 codified definitions but these do not have any practical impact. For example, although not expressed in such terms (as it is in the current definition), the pre 16 December 2014 definition of receiving country will also apply regardless of any right to return to, or enter and reside in, the country of habitual residence.<sup>11</sup>

Further, while the structure of the pre 16 December 2014 definition suggests that the question of habitual residence is to be determined by reference to the laws of the receiving country, that requirement is in fact applicable only to determination of nationality (as it is in the current definition).<sup>12</sup> In effect, despite the textual differences in the definition, determination of the country of habitual residence under the pre 16 December 2014 definition of 'receiving country' will be the same as it would under the post 16 December 2014 definition or the Convention.

## DETERMINING THE COUNTRY OF REFERENCE

In most cases before the Tribunal, the country of reference is not in issue, and can be determined by reference to information provided by the claimant.<sup>13</sup> However in some cases further investigation may be required. Where a claimant's nationality cannot be clearly established, it may be appropriate to determine his or her case as against the country of former habitual residence.<sup>14</sup> Where the decision-maker finds that the applicant is not a national (or former resident) of the country against which his or her claims are made, it is not

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Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

<sup>11</sup> *SZUNZ v MIBP* [2014] FCCA 2256 (Judge Driver, 17 October 2014) at [45], [57], [59]. These observations were not contradicted on appeal: *SZUNZ v MIBP* (2015) 230 FCR 272.

<sup>12</sup> *SZUNZ v MIBP* (2015) 230 FCR 272 per Buchanan J at [28]-[29] and Wigney J at [115]-[116]. Contrast *SZSMQ v MIBP* [2013] FCCA 1768 (Judge Nicholls, 31 October 2013) at [102] and [104], concluding that the reviewer erred by failing to have regard to the laws of Iran in making a finding that the applicant was neither a national nor a habitual resident of that country.

<sup>13</sup> There appears to be no reason in principle why the Tribunal should not accept an applicant's assertion as evidence of nationality, and assess his or her refugee claims accordingly. See *SZOXM v MIAC* [2011] FMCA 564 (Cameron FM, 22 July 2011), at [20]. Contrast *SZFIQ v MIMA* [2006] FMCA 671 (Scarlett FM, 27 April 2006), where the Court held that the Tribunal had erred by assuming, based on the applicant's claim, that the applicant child, born in Australia of Bangladeshi citizens, was a citizen of Bangladesh. The position of children born in Australia is discussed further below, under 'Other Issues'.

<sup>14</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, (UNHCR, reissued 2019) ('*Handbook*') at [89]. Contrast *Anwari v MIMA* [2002] FCA 217 (Mansfield J, 15 March 2002) where the Court held that, having found that the applicant was not a national of Afghanistan as claimed, the Tribunal was not obliged to make a finding as to his actual nationality, or to make a finding in the face of his claim, that he was a person who did not have a nationality. This may arguably go too far, and should not be taken as authority for the proposition that the Tribunal does not need to consider an applicant's claims to have a well-founded fear of persecution in a country in which it accepts they have resided, simply on the basis that it cannot be satisfied that they are, as claimed, a national of that country. It should be noted that although Article 1A(2) treats nationals and stateless people differently, those differences are generally not critical to the question as to whether an applicant is outside his or her country owing to a well-founded fear of being persecuted. However, see *SZIPL v MIAC* [2007] FMCA 643 (Raphael FM, 17 May 2007) at [12] where the Court found that the Tribunal can only apply the test based on country of habitual residence when it is satisfied on the basis of the law of the country of claimed nationality that the applicant is stateless and that assessing against a country of habitual residence is not an alternative to assessing a person against their country of nationality.

strictly necessary to make a finding as to whether the applicant is a national (or former resident) of another country.<sup>15</sup>

While much of the case law discussed in this Chapter arose from consideration of Article 1A(2) of the Convention, it will also be relevant to the determination of ‘receiving country’ under the Act given the common concepts of ‘nationality’ and ‘former habitual residence’ which appear in both of these contexts.

### What is a ‘country’?

Both Article 1A(2) of the Refugees Convention and the definition of ‘receiving country’ in s.5(1) of the Act refer to ‘country of nationality’ or ‘country of which the non-citizen is a national’ and ‘country of former habitual residence’ but do not define the term ‘country’. However, both context and purpose indicate that it is used in the sense of a nation state, defined by a body politic with a subordinate geographic feature reflecting where the body politic exercises sovereignty.<sup>16</sup>

The relevant features of a country include an ability to confer nationality on a person, possession of a system of domestic law and a sovereign law-making body,<sup>17</sup> and responsibility for national security.<sup>18</sup> Applying these principles, the Full Federal Court in *BZAAH v MIAC* rejected the contention that the European Union was a country for the purposes of s.36(3) of the Act.<sup>19</sup> Although *BZAAH* was concerned with the meaning of ‘country’ in s.36(3), the Court stated that such is the engagement between s.36 and the definition of refugee in the Convention that the word ‘country’ must have the same meaning in both<sup>20</sup> and so its reasoning would be equally applicable to the interpretation of ‘country’ as it appears in the Refugees Convention and s.5(1).

Whilst the word ‘country’ in the phrase ‘country of nationality’ is used to denote a country capable of granting nationality, in the phrase ‘country of former habitual residence’ it is used

<sup>15</sup> *Hussaini v MIMA* [2002] FCAFC 10; [2002] FCA 104 (French, Merkel and Gyles JJ, 14 February 2002) at [11]-[13], *Raza v MIMA* [2002] FCAFC 82; [2002] FCA 350 (French, Merkel and Gyles JJ, 28 March 2002) at [23]. See also, eg, *Hussain v MIMA* [2001] FCA 523 (Carr J, 4 May 2001) at [21]-[23], *Abedi v MIMA* [2001] FCA 1081 (Hely J, 10 August 2001) at [22], *VCAS of 2002 v MIMIA* [2002] FCAFC 368 (Merkel, Goldberg and Kenny JJ, 20 November 2002). Although these judgments considered this issue in the context of the Convention, given the similar wording and structure of Article 1A(2) to s.5H(1) (as applicable to visa applications made on or after 16 December 2014), it would appear that this principle would apply equally to the codified refugee definition. This is supported by the Explanatory Memorandum to the Bill which introduced s.5H(1), which stated that it was intended to codify Article 1A(2) as interpreted in Australian case law: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.169 at [1167].

<sup>16</sup> *BZAAH v MIAC* (2013) 213 FCR 261 per Logan J at [24], [25].

<sup>17</sup> *BZAAH v MIAC* (2013) 213 FCR 261 per Logan J at [28].

<sup>18</sup> *BZAAH v MIAC* (2013) 213 FCR 261 per Logan J at [46].

<sup>19</sup> (2013) 213 FCR 261. In *BZAAH v MIAC* [2012] FMCA 1228 (Burnett FM, 20 December 2012) at [65]-[66] the Federal Magistrate, consistent with *Koe*, had regard to the absence of common immigration laws and a unified defence force to find the EU was not a country. Before the Federal Court the appellant argued that the EU did have common laws and courts, a currency, defined borders, citizenship and the conclusion to be drawn from a proper application of *Koe* was that the EU was a country. The Court rejected that argument, finding, among other things, that those competencies were mere conferrals from member states, that the member states conducted their own foreign policy and were responsible for their national security, that there was no ‘Head of State’, and EU citizenship was not as the result of being a citizen of the EU but because a person was a national of a member state: see Logan J at [46], [49], [50] and Nicholas J at [74], [75], [79], and [80]. The Court found the EU was a supranational organization and not a state: per Logan J at [40], [51], [58] and Nicholas J at [73] and [83].

<sup>20</sup> (2013) 213 FCR 261 per Logan J at [22].



to denote a country which need not have this capability.<sup>21</sup> In *Koe v MIEA*<sup>22</sup> a question arose as to whether Hong Kong (before its reversion to Chinese sovereignty) could be regarded as a 'country of former habitual residence'. Having regard to general principles of interpretation of treaties, Tamberlin J considered that to approach the term 'country' in a narrow technical way would undermine the humanitarian purpose of the Convention by excluding some persons from its protection without any sound reason in principle for so doing. His Honour stated that it should not be concluded that an applicant has no recourse under the Convention simply because his or her 'country' of former habitual residence happens to be a colony or other entity that is not an independent sovereign state.<sup>23</sup> He concluded that although Hong Kong did not have an independent capacity to enter into legal relations, it was appropriate to treat it as a 'country' for the purposes of Article 1A(2) of the Convention, as it had a distinct area with identifiable borders, its own immigration laws, and a permanent identifiable community.<sup>24</sup>

This view has however been questioned. In *BZAAH v MIAC*, Logan J disagreed that the word 'country' extended to a colony such as Hong Kong.<sup>25</sup> His Honour expressed some doubt that *Koe* was correct in saying that the meaning of 'country' changes between 'country of nationality' and 'country of former habitual residence', but left open the question as to whether it was correctly decided.<sup>26</sup>

Although aspects of the Court's reasoning in *BZAAH* are at odds with the reasoning in *Koe*, both cases provide guidance as to factors that may be relevant in determining whether a particular territory is a 'country' for the purposes of Article 1A(2) or s.5(1).

## Country of nationality

The concept of nationality has been described as follows:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.<sup>27</sup>

While the term 'country' should not be construed in a narrow technical way for the purposes of the Convention,<sup>28</sup> or the Act, the phrase 'country of nationality' clearly denotes a country capable of granting nationality.<sup>29</sup> In international law, states are capable of granting

<sup>21</sup> *Koe v MIEA* (1997) 78 FCR 289.

<sup>22</sup> *Koe v MIEA* (1997) 78 FCR 289.

<sup>23</sup> *Koe v MIEA* (1997) 78 FCR 289 at 296.

<sup>24</sup> (1997) 78 FCR 289 at 298-9.

<sup>25</sup> (2013) 213 FCR 261 per Logan J at [56]-[58].

<sup>26</sup> (2013) 213 FCR 261 per Logan J at [56]-[58].

<sup>27</sup> *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 at 23.

<sup>28</sup> *Koe v MIEA* (1997) 78 FCR 289.

<sup>29</sup> *Koe v MIEA* (1997) 78 FCR 289 at 298.

nationality, and as such a 'country of nationality' should be taken to mean a state as defined by international conventions, customs and legal principles.<sup>30</sup>

The Montevideo Convention on the Rights and Duties of States<sup>31</sup> is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law.<sup>32</sup> Article 1 of the Convention provides that the state as a person of international law should possess: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter relations with other states.<sup>33</sup>

### **What is nationality?**

In international law, nationality has been described, in general terms, as:

... a specific relationship between individual and State conferring mutual rights and duties as distinct from the relationship of the alien to the State of sojourn.<sup>34</sup>

Nationality is determined by the law of the relevant state and is to be recognised by other states in so far as it is consistent with international conventions, custom and principles of law generally recognised with regard to nationality.<sup>35</sup>

Nationality is not identical to citizenship, although there is some overlap between the terms.<sup>36</sup> The distinction has been described as follows:

"Nationality" stresses the international, "citizenship" the national, municipal, aspect. Under the laws of most States citizenship connotes full membership, including the possession of political rights; some States distinguish between different classes of members (subjects and nationals). In the United States, for example, Philippine citizens were, until 1935 when the Philippines became independent, not citizens of the United States although they owed allegiance to that country...

... Every citizen is a national, but not every national is necessarily a citizen of the State concerned; whether this is the case depends on municipal law; the question is not relevant for international law.<sup>37</sup>

In Australia, the Federal Court has described the concept of 'nationality' as it relates to protection visas as:

... a term somewhat lacking in precision. It is generally used to signify the legal connection between an individual and a State. The primary relevance of nationality under international law is to provide a basis upon which a State can exercise jurisdiction over persons. However, the term is employed in different ways in international law, and domestic law.<sup>38</sup>

<sup>30</sup> See I Brownlie, *Principles of Public International Law* (OUP, 2001), at 385-388. In contrast, a 'country of former habitual residence' need not be capable of granting nationality, and therefore need not be a State.

<sup>31</sup> *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933 165 LNTS 19 (entered into force 26 December 1934) (*Convention on the Rights and Duties of States*).

<sup>32</sup> DJ Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7<sup>th</sup> edition, 2010), at 92.

<sup>33</sup> *Convention on the Rights and Duties of States*, Article 1.

<sup>34</sup> P Weis, *Nationality and Statelessness in International Law* (Hyperion Press, 2<sup>nd</sup> edition, 1979), at 31.

<sup>35</sup> *Convention on Certain Questions Relating to the Conflict of Nationality Law*, signed 13 April 1930, 179 LNTS 8 (entered into force 1 July 1937) (*Hague Convention*) Article 1.

<sup>36</sup> See *VSAB v MIMIA* [2006] FCA 239 (Weinberg J, 17 March 2006) at [50]-[53].

<sup>37</sup> Weis, above n 34, at 5-6.

<sup>38</sup> *VSAB v MIMIA* [2006] FCA 239 (Weinberg J, 17 March 2006), at [48].



### Elements of nationality

The *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* 1930 (the Hague Convention) sets out the international law relating to nationality. The relevant articles state:

#### Article 1

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

#### Article 2

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

#### Article 3

Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

As an international law concept, nationality is generally considered by commentators to consist of two elements: the right of a state to provide diplomatic protection for its nationals<sup>39</sup> and the duty of admission, a duty of the state to allow its nationals to settle and reside in its territory.<sup>40</sup> While this latter duty is accepted by most commentators in theory, its status as a binding principle of international law is less certain. It may be subject to exceptions, including municipal laws which permit the expulsion of nationals as a penal sanction.<sup>41</sup> Further, the conditions under which a residence right may be restricted vary according to the internal law of each state.<sup>42</sup> Accordingly, a person may be a national of a country, without having an immediate right of entry and residence in that country.<sup>43</sup>

Generally, an assessment of nationality is made by reference to the nationality laws of the relevant state. Whether the international or municipal aspect of nationality need be dominant depends on the facts and issues raised in any particular case.<sup>44</sup> Unless a party (generally a state) is seeking a determination as to nationality at international law, municipal laws are generally determinative of nationality, as demonstrated by the approach of the International Court of Justice in the *Nottebohm* case:

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain... Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

<sup>39</sup> K Hailbronner, 'Nationality in public international law and European law', in R Baubock et al, (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States, Vol 1* (Amsterdam University Press, 2006), at 71; Weis, above n 34, at 35.

<sup>40</sup> Weis, above n 34, at 49.

<sup>41</sup> Weis, above n 34, at 49.

<sup>42</sup> Hailbronner, above n 39, at 78.

<sup>43</sup> See, eg, *SZOUY v MIAC* [2011] FMCA 347 (Smith FM, 3 June 2011) at [42]-[44].

<sup>44</sup> I Brownlie, *Principles of Public International Law* (Oxford University Press, New York, 1998), at 387.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection... To exercise protection, to apply to the Court, is to place oneself on the plane of international law.<sup>45</sup>

Article 1 of the Hague Convention, however, states that such a law shall be recognised in so far as it is consistent with international legal principles. For example, a state has no power, through a law or administrative act, to confer its nationality on all the inhabitants of another state or on all foreigners entering its territory.<sup>46</sup>

### ***The factual assessment of nationality***

Whether a person has a particular nationality is a question of fact for the decision maker which, for the purpose of the definition of 'receiving country', must be determined solely by reference to the laws of the country. An *entitlement* to nationality or a capacity to become a national under the laws of the country is insufficient to establish nationality under the Act.<sup>47</sup> The evidentiary basis for a determination of nationality will depend on the circumstances of the particular case. In some cases, the nationality of an applicant may be determined having regard to the applicant's own assertion as to his or her nationality<sup>48</sup> and/or documentary evidence, such as a passport.<sup>49</sup> However, in other instances consideration may need to be given to the applicant's history, including, where appropriate, assessment of the applicant's credibility,<sup>50</sup> and/or the application of the municipal nationality laws of the individual country. Thus, whilst the determination must be made by reference to the laws of the country, the evidence to support such a determination may vary.

<sup>45</sup> *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 at 20-21.

<sup>46</sup> Hailbronner, above n 39, at 52.

<sup>47</sup> In *FER17 v MICMA* [2019] FCAFC 106 (Kerr, White and Charlesworth JJ, 24 June 2019) the Full Federal Court confirmed that the terms 'national' and 'nationality' in the Act do not extend to someone who is not presently a national but has the capacity to become one: at [78]. At first instance, the Federal Circuit Court found that although the applicant was entitled to seek citizenship of Sri Lanka, according to Sri Lankan law he would not be a citizen of Sri Lanka until his birth was registered in the prescribed manner: *FER17 v MIBP* [2018] FCCA 3767 (Judge Young, 20 December 2018) at [28].

<sup>48</sup> See *SZOXM v MIAC* [2011] FMCA 564 (Cameron FM, 22 July 2011) at [20]. The Department of Home Affairs, 'Policy - Refugee and humanitarian - Refugee Law Guidelines', section 5.4, as re-issued 1 July 2017 (Refugee Law Guidelines) also note that where there is no reason before the decision maker to doubt the claimed nationality, the decision maker may proceed on the basis that the person is a national of the countries claimed without having to make an independent verification. However, note *SZFJQ v MIMA* [2006] FMCA 671 (Scarlett FM, 27 April 2006) which held that the Tribunal had erred by assuming, based on the applicant's claim, that the applicant child, born in Australia of Bangladeshi citizens, was a citizen of Bangladesh. The Court held that it is fundamental to the jurisdiction of the Tribunal to make a finding as to nationality and that an applicant's own assertion is not sufficient without proper consideration.

<sup>49</sup> See *AZK15 v MIBP* [2015] FCCA 2303 (Judge Street, 25 August 2015) at [25], holding that where a decision-maker finds that a person has legally obtained a passport of a particular country it is not necessary, for the purpose of making a finding as to the 'receiving country', to set out the law under which the passport was issued. This is consistent with the view of the Department of Home Affairs, Refugee Law Guidelines, section 5.4, as re-issued 1 July 2017 that an applicant who produces *bona fide* evidence of nationality may be accepted as having nationality of a particular country.

<sup>50</sup> For example, in *WZA0V v MIAC* [2013] FMCA 9 (Lucev FM, 8 February 2013) the reviewer rejected the applicant's claim that he was a stateless Faili Kurd who had been born in Ilam province in Iran, and who had no identity documents, finding instead that he was an Iranian citizen. The Court held at [48]-[49] that there was country information that supported factual findings made by the reviewer about the categories into which Faili Kurds from Ilam may fall, including the category of Iranian citizen, and as to citizenship generally, which when considered together with the applicant's own history, was sufficient to justify the reviewer's conclusion.

### The municipal law of a country

Under the Hague Convention, it is for each state to determine under its own law who are its nationals.<sup>51</sup> In order to establish whether an applicant is a national of a particular country, it may be necessary in some circumstances to consider the operation of the municipal law of that country.<sup>52</sup> The Court in *Koe v MIMA* indicated that in cases where the operation of the country's nationality law is unclear, ambiguous or very complex it may be appropriate for the Tribunal to obtain expert evidence on the operation of the nationality law in question.<sup>53</sup> Generally, however, it is open to the Tribunal to acquaint itself with as much of the foreign law of the relevant state as is necessary to make findings on the issue, including by reference to secondary sources of a non-scholarly nature.<sup>54</sup>

### Evidence of nationality

As noted above, the nationality of an applicant can often be readily determined by reference to the applicant's own assertion as to his or her nationality, and/or documentary evidence such as a passport. According to the United Nations High Commissioner for Refugees (UNHCR), 'possession of ... a passport creates a *prima facie* presumption that the holder is a national of the country of issue, unless the passport itself states otherwise'.<sup>55</sup> Of course, absence of a passport does not necessarily mean that the person is not a national of the claimed country. Conversely, there may be circumstances where a person may hold a passport of a particular country, yet not be a national of that country.<sup>56</sup>

There are no formal prescriptions as to evidence of nationality which must be considered. Any evidence which bears rationally upon the issue of nationality, including the text of a foreign statute, the views of an expert in foreign law, scholarly works upon the subject, a series of primary facts (e.g. a person's periods of residence in a country, and access to employment, re-entry and other benefits) that lead to an inference as to the requirements of

<sup>51</sup> Article 2. In rare cases the conferment of nationality by one state upon a person may not be recognised by other states, where there is no 'genuine connection' between the person and the state conferring the nationality: *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 at 4; see also Harris, above n 32 at 505. The *Nottebohm* case concerned the naturalisation by Liechtenstein of a person who had no connection with the state by reason of birth, residence or any other form of significant attachment. The Court in *Koe v MIMA* (1997) 74 FCR 508 at 517 found it to be of limited assistance on the question of whether the act of one state conferring or removing nationality should be recognised where there was a clear connection by birth within a territory.

<sup>52</sup> *The King v Burgess; ex parte Henry* (1936) 55 CLR 608 at 649; *Sykes v Cleary No.2* (1992) 176 CLR 77 at 105-106. In some circumstances, failure to have regard to the municipal laws of a country when making a finding as to nationality may amount to error. In *WZAQH v MIAC* [2013] FCCA 182 (Judge Lucev, 9 May 2013) the Court held that while the personal circumstances of the particular applicant, a Faili Kurd who claimed to be stateless, were indicative of Iranian nationality, these were not factors which precluded the necessity to have regard to the municipal law or any applicable legislative or quasi-legislative process for the purpose of determining whether under the applicable Iranian law the applicant might be or be eligible to be an Iranian citizen. By contrast, in *SZQZF v MIAC* [2013] FMCA 23 (Nicholls FM, 30 January 2013) where the reviewer made a similar nationality finding based on the personal circumstances of the applicant as well as country information relating to the operation of Iranian nationality laws, no error was found.

<sup>53</sup> (1997) 74 FCR 508 at 515. See also *Lay Kon Tji v MIMA* (1998) 158 ALR 681.

<sup>54</sup> Such as information obtained from the Department of Foreign Affairs and Trade, media reports and other sources routinely used by the Tribunal. See *VSAB v MIMA* [2006] FCA 239 (Weinberg J, 17 March 2006); and *Savic v MIMA* [2001] FCA 1787 (Mansfield J, 18 December 2001). Note that the existence, nature and scope of the rules and principles of the law of a foreign jurisdiction are issues of fact for the Tribunal; the effect of the application of those rules and principles to the particular facts and circumstances of the case before the Tribunal is a question of law. See *Cross on Evidence*, (Butterworths, 8<sup>th</sup> Australian Edition, 2010) at [41005].

<sup>55</sup> UNHCR, *Handbook*, above n 14, at [93].

<sup>56</sup> For example, it may be a so-called 'passport of convenience' (an apparently regular national passport that is sometimes issued by a national authority to non-nationals): UNHCR, *Handbook*, above n 14 at [93]; or where the passport was

that domestic law, and secondary sources of a non-scholarly nature such as Department of Foreign Affairs and Trade (DFAT) information, may be considered.<sup>57</sup>

### ***Dual or multiple nationality***

In the case of a person with more than one country of nationality, the second paragraph of Article 1A(2) of the Refugees Convention excludes from refugee status those who can avail themselves of the protection of at least one of the countries of which they are a national.<sup>58</sup> This exclusion is reflected in statutory provisions introduced on 16 December 1999.<sup>59</sup> As these provisions only apply to protection visa applications or purported applications made on or after 16 December 1999,<sup>60</sup> the proper approach to applicants with more than one nationality will depend on when the protection visa application was lodged.

### **Applications made on or after 16 December 1999**

Since 16 December 1999, non-citizens with more than one nationality are generally speaking, precluded from lodging a valid application for a protection visa by operation of Part 2 Division 3 Subdivision AK of the Act. This subdivision has the effect that a non-citizen who is a national of two or more countries cannot make a valid application for a protection visa, unless the Minister has exercised his or her discretion to allow the applicant to lodge a valid application.<sup>61</sup>

In cases where the Minister has allowed a non-citizen with dual nationality to lodge a protection visa application, reference should be made to ss.36(3)-(5A) of the Act. In essence, these provisions provide that Australia is taken not to have protection obligations in respect of non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country, *including countries of which the applicant is a national*, where they do not have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there are not substantial grounds for believing that there is a real risk they will suffer significant harm or they do not have a well-founded fear of being returned to another country where they will be

<sup>57</sup> obtained fraudulently, which was the claim in issue in *NBKE v MIAC* [2007] FCA 126 (Siopis J, 15 February 2007). *VSAB v MIMIA* [2006] FCA 239 (Weinberg J, 17 March 2006), at [57]-[59]. This judgment was followed in *AEH16 v MIBP* [2019] FCCA 34 (Judge A Kelly, 17 January 2019), where the Court found that in circumstances where the applicants claimed to be stateless, the Tribunal had accepted that they were Faili Kurds and had not cavilled with their claims to have been born in Baghdad to Iraqi parents, the Tribunal's affirmative finding of Iranian citizenship necessarily required consideration of the domestic law of Iran contained in Departmental and DFAT sources: at [70] and [80].

<sup>58</sup> See *SZIPL v MIAC* [2009] FMCA 585 (Driver FM, 24 July 2009) at [17] (undisturbed on appeal: *SZIPL v MIAC* [2009] FCA 1405 (Cowdroy J, 30 November 2009)). In that case, the applicant had claimed dual Syrian and Iraqi citizenship. Having found that the applicant did not have a well-founded fear of persecution in Syria, the Tribunal did not make a clear finding in relation to Iraqi citizenship. The Court found no error in this approach, noting that the applicant would not be entitled to protection unless she had a well-founded fear of harm for a Convention reason in both Iraq and Syria.

<sup>59</sup> See ss.36(3), (4) and (5) 'Protection obligations', and Subdivision AK of Part 2 Division 3 of the Act 'Non-citizens with access to protection from third countries', inserted by the *Border Protection Legislation Amendment Act 1999* (No.160 of 1999).

<sup>60</sup> *Border Protection Legislation Amendment Act 1999* (No.160 of 1999), Schedule 1 Item 70.

<sup>61</sup> See ss.91M – 91Q of the Act and in particular s.91N(1). Therefore, cases of dual nationality should only reach the Tribunal where the Minister has exercised his or her discretion, or the facts disclosing dual nationality only emerge during the review. See Chapter 1 of this Guide for further discussion of statutory exclusions.

persecuted for such a reason, or where there are substantial grounds for believing that they will suffer significant harm.<sup>62</sup>

#### Applications made before 16 December 1999

Subdivision AK and ss.36(3)-(7) of the Act do not apply to visa applications lodged prior to 16 December 1999. Therefore, in these cases the provisions of Article 1A(2), as picked up by s.36(2) of the Act (as then in force),<sup>63</sup> will usually be determinative. The second paragraph of Article 1A(2) of the Refugees Convention provides as follows:

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

According to UNHCR, this provision is intended to exclude from refugee status all persons with dual or multiple nationalities who can avail themselves of the protection of at least one of the countries of which they are a national. Wherever available, national protection takes precedence over international protection.<sup>64</sup>

In some cases an issue may arise as to whether a second nationality is ‘effective’ in offering protection from persecution in another country. If an applicant does not dispute his or her access to the protection of the second country of nationality, or if it is evident from past residence together with the applicant's status in that country that nationality is effective, it will not usually be necessary to inquire further into the effectiveness of the nationality. However, in some instances, the question of whether the applicant genuinely has access to the protection of a second country of nationality will need to be closely considered.

The correct approach (under the Convention) to the assessment of cases involving multiple nationality was considered by the Full Federal Court in *Koe v MIMA*.<sup>65</sup> In that case the Tribunal had found that the East Timorese applicant had both Indonesian and Portuguese nationality and so was excluded from the Convention because he could avail himself of the protection of Portugal. The Court held that the Tribunal did not err in finding that the applicant had Portuguese nationality, but that it did err by failing to consider the ‘effectiveness’ of his Portuguese nationality as a distinct issue. It held that ‘nationality’ where it first appears in the second paragraph of Article 1A(2) refers to nationality that is effective as a source of protection and not merely formal.<sup>66</sup>

<sup>62</sup> For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country, but this does not, by implication, affect the interpretation of any other provision of the Act: ss.36(6) and (7). By including countries of which the applicant is a national, s.36(3), read with subsections (4)(a) and (5), reflects the second paragraph of Article 1A(2) of the Refugees Convention. Subsections 36(3)-(7) are discussed in detail in Chapters 7 and 9 of this Guide.

<sup>63</sup> Prior to 1 October 2001, s.36(2) of the Act was in similar terms to s.36(2)(a) as now in force.

<sup>64</sup> UNHCR, *Handbook*, above n 14, at [106]. See also, eg, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [20].

<sup>65</sup> (1997) 74 FCR 508.

<sup>66</sup> *Koe v MIMA* (1997) 74 FCR 508, at 521-522.

The Court explained that whether nationality is ‘effective’ must be assessed in the light of all the circumstances of the particular case, and would extend to a range of practical questions, ‘parallel to those posed by the expression “unable” in the first paragraph of Article 1A(2)’. The considerations relevant in that case related to whether the applicant could genuinely access protection against return to the country in which he feared, and had a real chance of, being persecuted.<sup>67</sup>

Thus, a finding that a person has dual nationality but lacks a well-founded fear of persecution in one of the countries of nationality would not necessarily preclude a finding that the person was a refugee.<sup>68</sup> The Court’s reasoning, in reaching that conclusion, suggests that a country should not be regarded as a ‘country of nationality’ for the purposes of Article 1A(2) if it does not provide protection from persecution in another country, notwithstanding that it may be a country of nationality under international law.<sup>69</sup>

However, the Court also outlined a somewhat different path to the same conclusion. In respect of an applicant who left the country of nationality where he or she had lived owing to a well-founded fear of persecution, and as a practical matter was unable to seek the protection of his or her second country of nationality, it would be correct to say the applicant is outside each country of nationality owing to a well-founded fear of persecution. It would then be necessary to consider whether they are now able to avail themselves of the protection of the country of their second nationality (in Mr Koe’s case, Portugal). That would involve consideration of the willingness and ability of that country to offer protection (issues of a kind which arise when considering effectiveness, if the other approach is taken). If the second country could not or would not offer protection, the concluding words of the second paragraph of Article 1A(2) would not be applicable.<sup>70</sup> On this alternative approach, the fact that an applicant’s second nationality may not be ‘effective’ as a source of protection from persecution in another country would not mean that they do not *have* a second nationality for the purposes of the second paragraph of Article 1A(2) but it would mean that they would satisfy the Convention definition in respect of each country. This alternative approach would seem to be consistent with the language of Article 1A(2)<sup>71</sup> and with the general principle that *wherever available*, national protection takes precedence over international protection.

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<sup>67</sup> *Koe v MIMA* (1997) 74 FCR 508, at 521-522. In that case, the Court regarded relevant matters as including whether Portugal was able or willing to offer the applicant in Australia effective protection or the means of obtaining effective protection or whether, on the other hand, if effective protection was available it could be obtained only in Portugal; if the latter, whether Mr Koe was reasonably able to travel to Portugal to obtain protection there and whether, if he were to travel there, he would be admitted; and whether, having been admitted, he would satisfy the Portuguese authorities that he was a Portuguese national entitled to Portuguese protection. In *Lay Kon Tji v MIEA* (1998) 158 ALR 681 at 692, Finkelstein J went somewhat further, stating that “effective nationality” is a nationality that provides all of the protection and rights to which a national is entitled under customary or conventional international law’.

<sup>68</sup> *Koe v MIMA* (1997) 74 FCR 508 at 521.

<sup>69</sup> See also P Weis, ‘The concept of the refugee in international law’, *Journal du droit international* (1960) 928, at 974 for a similar view. It is not easy to reconcile this approach with the language of the Convention definition, which assumes that a person may be unable to avail him or herself of the protection of a country (or countries) of nationality. For critical discussion of the Court’s reasoning in *Koe*, see R Piotrowicz, ‘Dual nationality and refugee status’ (1997) 71 ALJ 590, and M Sidhom, ‘Jong Kim Koe v MIMA: Federal Court Loses Sight of the Purpose of the Refugee Convention’ (1998) 20(2) *Sydney Law Review* 315.

<sup>70</sup> *Koe v MIMA* (1997) 74 FCR 508 at 521-522.

<sup>71</sup> In particular, while the paragraph clearly excludes a dual national who (without any valid reason based on well-founded



Note that the difficulties of interpretation of the second paragraph of Article 1A(2) will have no direct significance for protection visa applications lodged on or after 16 December 1999 because, as explained above, questions of dual nationality in those cases will need to be considered under s.36(3) of the Act.

### **Statelessness and country of former habitual residence**

Under Article 1A(2) of the Refugees Convention and s.5(1) of the Act, a person without a nationality (ie who is stateless) must be assessed against his or her 'country of former habitual residence'.<sup>72</sup>

While a state is clearly a 'country' within the meaning of the Refugees Convention and the Act, a 'country of former habitual residence' does not have to be a state.<sup>73</sup> In determining whether a territory that is not a state can be a 'country' in this context, relevant considerations may include factors such as whether it has a distinct area with identifiable borders, its own immigration laws, a permanent identifiable community, some autonomy in relation to its administration, and whether as a matter of everyday usage of language, a person may be referred to as coming from, belonging to, or returning to that territory.<sup>74</sup>

### **Identifying the country of former habitual residence**

The drafters of the Convention defined 'country of former habitual residence' as 'the country in which [the claimant] had resided and where he had suffered or fears he would suffer persecution if he returned'.<sup>75</sup> The Act does not define the term as it appears in s.5H (meaning of 'refugee') or as it appears in the definition of 'receiving country' in s.5(1).

As with country of nationality, identifying the relevant country will often not be an issue. The stateless applicant's own assertion as to his or her country of former habitual residence can often be relied on to determine the country against which their substantive claims should be

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fear) does not avail him or herself of the protection of one of the countries of nationality, it is not at all clear that it necessarily requires a refugee to show a well-founded fear of being persecuted in each of those countries, if the protection of one country from persecution in another country is simply not available.

<sup>72</sup> Note *SZIPL v MIAC* [2007] FMCA 643 (Raphael FM, 17 May 2007) at [12] in which the Court held that assessment may only be undertaken in relation to a country of former habitual residence once the decision-maker is satisfied on the basis of the law of the country of claimed nationality that an applicant is stateless. Statements by Kirby J in *Koroitama v Commonwealth* (2006) 227 CLR 31 at [77]-[78] and [82] to the effect that a person who has not yet acquired a nationality, but who has a legally enforceable right to acquire a nationality is not stateless suggest that there is a state in between having a nationality and being stateless. However, this does not alter the relevant question for the purposes of the definition of refugee which is whether the applicant *has* a nationality. If the applicant does not have a nationality, the applicant is to be assessed in relation to a country of former habitual residence.

<sup>73</sup> *Koe v MIEA* (1997) 78 FCR 289. In *BZAAH v MIAC* (2013) 213 FCR 261 at [56] Logan J concluded that 'country' had the same meaning where ever it appeared in the Convention, that is, a nation state. However, Logan J did not find *Koe* to have been clearly wrong and Nicholas JJ (with whom Greenwood J agreed) was silent on whether it was correctly decided.

<sup>74</sup> In *Koe v MIEA* (1997) 78 FCR 289, the Court held that having regard to these factors, it was appropriate to treat Hong Kong (prior to its reversion to Chinese sovereignty) as a 'country' as that term is used in 'country of former habitual residence' in Article 1A(2). Note however that in *BZAAH v MIAC* (2013) 213 FCR 261 at [56] Logan J contended that the word 'country' could not extend to a colony such as Hong Kong.

<sup>75</sup> *Report of the First Ad Hoc Committee on Statelessness and Related Problems*, UN Doc. E/1618 (E/AC.32/5) (17 February 1950) Annex II.

assessed. In other cases, particularly where there may be more than one relevant country, further consideration may be required.

#### Factors relevant to identifying a country of former habitual residence

There is no direct Australian authority on the requirements necessary for the identification of a country of former habitual residence.

The High Court has said that the phrase ‘usual residence’ (which it likened to ‘habitual residence’ as used in a different context) involves a broad factual inquiry, which will include relevant factors such as the actual and intended length of stay in a state, the purpose of the stay, strength of ties to the state and to any other state (both past and current), and the degree of assimilation into the state.<sup>76</sup> These considerations have been applied to the determination of ‘habitual residence’ as it appears in the pre 16 December 2014 definition of ‘receiving country’.<sup>77</sup> In this context, the Federal Court observed that a short period of residence in a country during a person’s childhood would not establish a basis for a finding of habitual residence.<sup>78</sup>

Judicial consideration of Tribunal findings also provides guidance on the correct interpretation of the term. In *Tjhe Kwet Koe v MIMA* the Federal Court found that the Tribunal had made no error of law in considering the following factors adequate to establish Hong Kong as such a country:

- the applicant had acquired permanent residence;
- he had resided in Hong Kong for 8 years before coming to Australia;
- he was employed in Hong Kong;
- he was not ordered to leave and no indication was given that he was only to remain for a limited period;
- he had received a permanent identity card permitting permanent residence and work in Hong Kong with permission to travel overseas and re-enter Hong Kong.<sup>79</sup>

While these factors were found to be sufficient in that case, they do not represent a checklist of minimum features required to constitute former habitual residence. It may be that something less will suffice in other circumstances.

<sup>76</sup> *Tahiri v MIAC* [2012] HCA 61 (French CJ, Bell and Gageler JJ, 13 December 2012) at [16].

<sup>77</sup> *SZUNZ v MIBP* (2015) 230 FCR 272 per Buchanan J at [30]-[31], Flick J at [53], and Wigney J at [118]. Although the Court was considering the term ‘habitual residence’ in the definition of ‘receiving country’ under s.5(1) of the Act as applicable to s.36(2)(aa) prior to 16 December 2014, these comments appear equally relevant to the meaning of ‘former habitual residence’ under the Convention or the post 16 December 2014 ‘receiving country’ definition.

<sup>78</sup> *SZUNZ v MIBP* (2015) 230 FCR 272 per Buchanan J at [36], and separately Flick J at [67] and Wigney J at [122]. That case concerned an applicant who had lived in Western Sahara from shortly after birth until the age of six and then in various European countries after that time.

<sup>79</sup> (1997) 78 FCR 289 at 299.

The Department of Home Affairs' Refugee Law Guidelines (the Refugee Law Guidelines) provide the following examples of factors relevant for determining an applicant's country of former habitual residence:

- the applicant must have been admitted to the country with a view to continuing residence of some duration without some qualifying minimum period of residence;
- the applicant must have established a significant period of de facto residence in the country in question;
- residence or settlement of some duration that is more than a short term or temporary stay;
- there is continuity of stay or a settled intention or purpose to stay;
- nature of residence, for example, whether the applicant has made the country their abode or the centre of their interests;
- there is no requirement for formal permanent residence or domicile.<sup>80</sup>

The factors in the Refugee Law Guidelines may be relevant to determining an applicant's country of former habitual residence in a particular case. However, in light of the limited judicial consideration of this concept, they also should not be treated as a checklist of minimum requirements.

### ***More than one country of former habitual residence?***

It is generally accepted that a stateless person may have more than one country of former habitual residence.<sup>81</sup> Australian courts have held that there is no obvious reason why a claimant could not have more than one country of former habitual residence.<sup>82</sup> A claimant with more than one country of former habitual residence is not required to satisfy the Convention definition in relation to each such country. In *Al-Anezi v MIMA* Lehane J held that

... a stateless person may have more than one country of former habitual residence ... but it does not follow that a stateless person who has had more than one country of former habitual residence is necessarily to be assessed, in relation to a claim for recognition as a refugee, by reference to each of those countries. ... A person who has a nationality, who has left the country of nationality owing to persecution for a Convention reason and is, as a result of a fear of such persecution, unwilling to return or is unable to avail himself or herself of the protection of that country, remains a refugee no matter in how many intermediate countries he or she may have resided and however many of them may correctly be described as countries of former habitual residence. It would be surprising if a stateless person who, owing to a well-founded fear of persecution for a Convention reason, had left (was outside) a country of former habitual residence and was unable or, due to such a fear, unwilling to return to that country,

<sup>80</sup> Department of Home Affairs, Refugee Law Guidelines, section 5.4, as re-issued 1 July 2017.

<sup>81</sup> See, eg, UNHCR *Handbook*, above n 14, at [104]; A Grahl-Madsen, *The Status of Refugees in International Law*, Vol.1 (AW Sitjhoff-Leyden, 1966), at 160-161. The alternate argument for having only one country of former habitual residence relies on the principle of statutory interpretation of *expressio unius est exclusio alterius*. Thus, the express reference to the occurrence of more than one nationality in conjunction with a definition which only refers to 'country of former habitual residence' in the singular, may operate to limit the possibility of having more than one country of former habitual residence.

<sup>82</sup> *Al-Anezi v MIMA* (1999) 92 FCR 283 at [22]. In *Taiem v MIMA*[2001] FCA 611 (Carr J, 25 May 2001), Carr J agreed with the view expressed by Lehane J in *Al-Anezi* that there is no reason why a person may not have more than one country of former habitual residence.

ceased to be a refugee merely because of subsequent habitual residence in another country in which he or she had no fear of persecution.<sup>83</sup>

This appears equally applicable to the refugee definition of ‘refugee’ in s.5H(1) and has been held to apply to the complementary protection criterion in s.36(2)(aa).<sup>84</sup> It also accords with UNHCR’s view that an applicant can have more than one country of former habitual residence and does not have to have a well-founded fear of persecution in relation to all of them.<sup>85</sup> Although some academic commentators have taken the view that in circumstances where a person has more than one country of former habitual residence, the second paragraph of Article 1A(2) should be applied such that to qualify as a refugee the person needs to show well-founded fear of persecution in both,<sup>86</sup> such an interpretation is not supported by Australian jurisprudence.

Whilst it is not necessary under the Convention, s.5H(1) or s.36(2)(aa) to show a well-founded fear of persecution or real risk of significant harm in respect of each country of former habitual residence, this does not necessarily mean that an applicant will succeed on the basis that they have such a well-founded fear or risk in relation to one such country only. In relation to protection visa applications lodged on or after 16 December 1999 it will be necessary to consider whether the claimant has access to protection in another country in which he or she does not have a well-founded fear of persecution or real risk of significant harm, including other countries of former habitual residence as well as third countries that are not countries of former habitual residence.<sup>87</sup>

### **Where an applicant has no right of return**

It is clear from the post 16 December 2014 definition of ‘receiving country’ in s.5(1) that the ability of the applicant to return to their country of former habitual residence is irrelevant to the determination of whether they satisfy the s.5H(1) definition of a refugee or meet the criterion for complementary protection. Although not expressed in such terms, the pre 16 December 2014 definition is of similar effect.<sup>88</sup>

<sup>83</sup> (1999) 92 FCR 283 at [22].

<sup>84</sup> Given the similar wording and structure of Article 1A(2) to s.5H(1), it would appear that the principle from *Al-Anezi* is applicable to the codified refugee definition. This is supported by the Explanatory Memorandum to the Bill which introduced s.5H(1), which stated that it was intended to codify Article 1A(2) as interpreted in Australian case law: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.169 at [1167]. In *SZUNZ v MIBP* [2014] FCCA 2256 (Judge Driver, 17 October 2014) the Court held, referring to *Al-Anezi* at [22], that a stateless person’s claims for complementary protection should be assessed in relation to each country of habitual residence and allowing the application if the claim is made out in relation to one such country: at [45]. On appeal, the judgment of the Full Federal Court did not touch on this issue: *SZUNZ v MIBP* (2015) 230 FCR 272.

<sup>85</sup> UNHCR, *Handbook*, above n 14, at [104]-[105].

<sup>86</sup> See Grahl-Madsen, above n 81, at pp.160-161. Grahl-Madsen considered, however, that as a rule a person will only have one country of former habitual residence, and the country from which a stateless person had to flee in the first instance remains the country of former habitual residence irrespective of any subsequent changes of factual residence: *id.* In *Maarouf v Canada (MEI)*, [1994] 1 F.C 723 (TD) the Federal Court of Canada rejected this view as unduly restrictive.

<sup>87</sup> Section 36(3)-(5A) of the Act. For a discussion of these provisions see Chapter 9 of this Guide. Note however that where a stateless applicant has been found *not* to have a well-founded fear of being persecuted in his or her country of former habitual residence, it is unnecessary for a decision-maker to consider any claims made against another country that is not a country of former habitual residence: see for example *DZACP v MIAC* [2012] FMCA 570 (Driver FM, 7 August 2012) at [78]-[79].

<sup>88</sup> *SZUNZ v MIBP* [2014] FCCA 2256 (Judge Driver, 17 October 2014) at [45], [57], [59]. These observations were not contradicted on appeal: *SZUNZ v MIBP*(2015) 230 FCR 272.

Similarly, for the purpose of the Convention definition, a person does not need to have a legal right to return to a country before that country can be regarded as a country of ‘former habitual residence’.<sup>89</sup> In *Taiem v MIMA*, Carr J suggested that the Tribunal would have been in error if it had found that a country was not considered as a country of former habitual residence simply because the applicant had no right to re-enter that country.<sup>90</sup>

Conversely, the inability to re-enter a country where a person was habitually resident because that person has no right of entry does not, without more, constitute persecution.<sup>91</sup> Nor would it be likely to meet the definitions of ‘significant harm’ for the purpose of s.36(2)(aa).

#### Assessing a well-founded fear of persecution or real risk of significant harm where no right of return

A person may have a well-founded fear of persecution or real risk of significant harm in a country despite their not being able to lawfully return to that country. Article 1A(2) of the Convention is to be construed as including the requirement that a stateless person, outside of his or her country of former habitual residence and without any legal right of return, must also hold a well-founded fear of persecution.<sup>92</sup> This approach is also implicit in those cases which have held that applicants may have their refugee claims assessed against a country to which they have no right of return.<sup>93</sup> In *Taiem v MIMA*, for example, a stateless Palestinian applicant had resided in, and made claims against, Syria and Libya. The Tribunal found that he did not face a real chance of persecution in Syria, and went on to state that given the significance of Syria in the matter, not least because he had right of re-entry there, all claims against the notion of return to Libya were moot. Justice Carr upheld the Tribunal’s decision, but stated:

The tribunal did not characterise the applicant’s claims in relation to Libya as being moot only because he had no right to re-enter that country. *Had it done so, that would most probably have been an error of law.* In the absence of any relevant third country, a refugee must surely be entitled to have his or her status assessed on the basis of what has happened to him or her in the relevant country even if he or she has no right of return to that country [emphasis added].<sup>94</sup>

It is clear from the definition of ‘refugee’ in s.5H(1) and the complementary protection criterion in s.36(2)(aa), when read with the definition of ‘receiving country’ in s.5H(1), that a person outside their country of former habitual residence with no right to return must also have a well-founded fear of persecution or real risk of significant harm in order to satisfy either of those tests.

<sup>89</sup> *Rishmawi v MIMA* (1997) 77 FCR 421; *Taiem v MIMA* [2001] FCA 611 (Carr J, 25 May 2001); *MIMA v Savvin* (2000) 98 FCR 168. This, however, has been a controversial issue among commentators: see JC Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> edition, 2014), at 69-71; G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> edition, 2007), at 67.

<sup>90</sup> [2001] FCA 611 (Carr J, 25 May 2001) at [14].

<sup>91</sup> *BZADW v MIAC* [2013] FCCA 1229 (Judge Jarrett, 3 September 2013) at [71], citing *Diatlov v MIMA* [1999] FCA 468 (Sackville J, 25 October 1999). This judgment was upheld on appeal: *BZADW v MIBP* [2014] FCA 541.

<sup>92</sup> *DZABG v MIAC* [2012] FMCA 36 (Brown FM, 25 January 2012) at [135] (undisturbed on appeal: *DZABG v MIAC* [2012] FCA 827 (Dowsett J, 7 August 2012)).

<sup>93</sup> *Rishmawi v MIMA* (1997) 77 FCR 421; *Taiem v MIMA* [2001] FCA 611 (Carr J, 25 May 2001); *MIMA v Savvin* (2000) 98

The correct approach in such circumstances is to consider the hypothetical possibility of whether the applicant has a well-founded fear of being persecuted on the basis of what would happen *if* they were to return to their country of former habitual residence, not whether they could return there.<sup>95</sup> This is in contrast to the situation where a country refuses to accept the return of a citizen – for further discussion see '[Refusal of country to accept return of citizen](#)' below.

#### Statelessness alone is not sufficient to attract refugee status or complementary protection

Refugee status under either s.5H(1) of the Act or Article 1A(2) of the Convention will not be accorded to persons merely because they are stateless and unable to return to their country of former habitual residence. Given the specific requirements of s.36(2)(aa), the same would apply to complementary protection.

In *MIMA v Savvin* the Full Federal Court held that Article 1A(2) of the Convention is to be construed as including the requirement that a stateless person, being outside the country of his or her former habitual residence, have a well-founded fear of being persecuted for a Convention reason.<sup>96</sup>

In *QAAE v MIMIA* the applicant sought to rely on the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness* in support of his claim for a protection visa. The Court held that as those Conventions had not been incorporated into Australian municipal law and the applicant had not identified any particular provision which might have created an expectation as to how his application would be treated, there was no basis for invoking them in support of his refugee claim.<sup>97</sup>

The question for determination is whether the behaviour of which an applicant complains amounts to persecution and not the circumstances or impact of an inability to return. In *DZABG v MIAC*, the court observed that it would be erroneous for an individual's subsequently arising statelessness to be regarded as adding to his disadvantageous circumstances such that he or she could be regarded as a refugee rather than as a stateless person.<sup>98</sup>

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FCR 168.

<sup>94</sup> *Taiem v MIMA* [2001] FCA 611 (Carr J, 25 May 2001) at [14].

<sup>95</sup> *SZSPX v MIMAC* [2013] FCCA 1715 (Judge Barnes, 25 October 2013) at [42], [69]-[70]. In that case, the applicant had claimed to fear persecution as a member of a particular social group of undocumented children in Iran and the Tribunal had accepted that the applicant's parents would not obtain documentation for him. The Court found that the Tribunal had erred by considering whether the applicant *could* return to Iran [69]. However, the Court noted that it might have been open to the Tribunal to reason that the applicant would not be returning to Iran undocumented because his parents would take steps to obtain documents for him, however it did not in fact do so [67].

<sup>96</sup> (2000) 98 FCR 168. Although the members of the Court arrived at this conclusion by slightly different paths, their ultimate position regarding Article 1A(2) was the same. See also *Rishmawi v MIMA* (1997) 77 FCR 421, *Diatlov v MIMA* [1999] FCA 468 (Sackville J, 25 October 1999) and *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)).

<sup>97</sup> [2003] FCAFC 46 (Spender, Finn and Dowsett JJ, 17 March 2003) at [12].

<sup>98</sup> *DZABG v MIAC* [2012] FMCA 36 (Brown FM, 25 January 2012) at [132] (undisturbed on appeal: *DZABG v MIAC* [2012] FCA 827 (Dowsett J, 7 August 2012)). The Court further commented at [137] that it is unnecessary to consider the circumstances an individual may face because of their statelessness which might arise upon his or her return as a consequence of the absence of any necessary documents such as a passport. The Court also observed at [135] that,



Under the Convention, whilst a stateless claimant must demonstrate a well-founded fear of being persecuted, the second limb of Article 1A(2) does not require an inability to return to their country of former habitual residence to be linked to that fear: the claimant must be either unable to return (for any reason) or, owing to their well-founded fear, unwilling to return. Although the structure of the definition of ‘refugee’ in s.5H(1) is slightly different, with the effect that the person must be unable or unwilling to return to their country of former habitual residence owing to a well-founded fear of persecution, the distinction is unlikely to be of any practical effect.<sup>99</sup>

#### A past fear of persecution is not sufficient

There is some authority for the view that where an applicant is *unable* to return to a country of former habitual residence, a past fear of persecution is enough. However, the preferable view appears to be that a past fear is not sufficient for the purposes of the Convention.

Justice Cooper in *Rishmawi v MIMA* expressed the opinion that a past fear as the reason for being outside the former country of nationality or former habitual residence is sufficient.<sup>100</sup> In *Al-Anezi v MIMA*, Lehane J expressed a similar view.<sup>101</sup>

However, other cases have not supported this view. In *Savvin v MIMA*, Dowsett J suggested that such an approach was inconsistent with the approach adopted by the High Court in *Chan v MIEA*.<sup>102</sup> His Honour considered that the test was not whether an applicant had the relevant well-founded fear at two different points in time. It was whether the applicant was outside the country of nationality owing to a *present*, well-founded fear of persecution for a Convention reason; and unable, or owing to such present, well-founded fear, unwilling to avail him or herself of the protection of that country.<sup>103</sup> This would appear equally applicable to s.5H(1). Similarly, the terms of the complementary protection criterion suggest that the test under s.36(2)(aa) is a forward-looking one.

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although statelessness may be a significant disadvantage, the absence of nationality per se is insufficient to satisfy the requirements for protection.

<sup>99</sup> The Explanatory Memorandum to the Bill which introduced s.5H(1) states that it was intended to codify Article 1A(2) as interpreted in Australian case law and provides no indication that the difference in wording was intended to have any significant effect: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.169 at [1167].

<sup>100</sup> *Rishmawi v MIMA* (1997) 77 FCR 421 at 430. In some respects it is difficult to reconcile this view with Cooper J’s own reasons for the conclusion that statelessness alone is not sufficient to attract refugee status, particularly his references at 427 to the object of the Convention, that is, “to provide sanctuary for those persons who had a well-founded fear of persecution for a Convention reason and not for any other reason”.

<sup>101</sup> (1999) 92 FCR 283 at [20]: ‘... if a claimant were unable for any reason to return to the country of former habitual residence, he or she was a refugee if, and only if, the reason for the claimant’s absence from the country of former habitual residence was a (past) well-founded fear of persecution; it did not matter that the well-founded fear did not continue’. See also supplementary reasons for judgment in *Al-Anezi v MIMA* [1999] FCA 556 (Lehane J, 5 May 1999) at [3].

<sup>102</sup> *Savvin v MIMA* [1999] FCA 1265 (Dowsett J, 13 September 1999) at [61]-[62], referring to *Chan v MIEA* (1989) 169 CLR 379.

<sup>103</sup> [1999] FCA 1265 (Dowsett J, 13 September 1999) at [60]. See also *Diatlov v MIMA* [1999] FCA 468 (Sackville J, 25 October 1999) at [32] and *DZABG v MIAC* [2012] FMCA 36 (Brown FM, 25 January 2012) at [134] (undisturbed on appeal: *DZABG v MIAC* [2012] FCA 827 (Dowsett J, 7 August 2012)). This point was not expressly discussed by the Full Court in *MIMA v Savvin* (2000) 98 FCR 168, but Dowsett J’s view is consistent with the Full Court’s construction of Article 1A(2).

## Other issues

### ***Where applicant is a national of a country and former resident of a second country***

As stated at the outset of this Chapter, for the purposes of ss.5H(1) and 36(2)(aa) and Article 1A(2), applicants who have a nationality must be considered in relation to their country or countries of nationality. Even if the applicant has lived in another country and claims to face persecution in the country of former residence, it would not be correct to apply the term ‘country of former habitual residence’ to that country, as that term is only relevant to stateless applicants.<sup>104</sup>

The position of an applicant who has a nationality but has resided in a third country may give rise to other issues, such as whether their country of nationality will protect them from persecution in the third country<sup>105</sup> or whether they may be excluded under s.36(3) of the Act<sup>106</sup> or Article 1E of the Convention;<sup>107</sup> but these issues should not be confused with the essential issues posed by s.5H(1), s.36(2)(aa) or the first limb of Article 1A(2).

### ***Where family members are of different nationalities***

Some cases that come before the Tribunal involve family members of different nationalities (or different countries of former habitual residence). In these cases, the Refugees Convention and the Act require each applicant who claims to be a refugee to satisfy the definition with respect to their own country or countries of nationality or, if stateless, their own country or countries of former habitual residence.<sup>108</sup>

Depending upon the circumstances, a proper assessment may involve consideration as to whether an applicant who is a national of one country is able to avail him or herself of the protection of their country against persecution in the other relevant country. For example, in *SZAON v MIMIA*<sup>109</sup> the Tribunal found the principal applicant to be a Chinese national and his wife and children to be Indonesian nationals. It found the principal applicant not to have a well-founded fear of persecution in relation to China and the other family members not to have a well-founded fear of persecution in relation to Indonesia. The Court accepted that

<sup>104</sup> For example, in *SZEJN v MIMIA* [2005] FMCA 961 (Nicholls FM, 23 June 2005), the applicant had claimed to fear harm in both Malaysia, where he had lived and worked, and India. However, the Tribunal found that he was a citizen of India and that his claims of persecution needed to be assessed against that country. Federal Magistrate Nicholls held at [14] that the Tribunal had properly considered the applicant's claims in relation to India, his country of nationality.

<sup>105</sup> Discussed in Chapter 9 of this Guide; see also the discussion earlier in this chapter, in relation to dual nationality.

<sup>106</sup> Discussed in Chapters 7 and 9.

<sup>107</sup> Discussed in Chapter 7.

<sup>108</sup> See for example *SZAON v MIMIA* [2004] FMCA 216 (Driver FM, 16 April 2004). Contrast *MZKAH v MIMIA* [2004] FMCA 388 (Connolly FM, 23 July 2004) and on appeal [2004] FCA 1589 (Weinberg J, 3 December 2004). In that case, the applicant and his wife were citizens of Egypt and Greece respectively and had both claimed to fear persecution in both countries, essentially for reasons of their mixed marriage. The Tribunal had found that they both might be at risk of persecution in Egypt but was not satisfied that they were refugees in relation to Greece. Accordingly, it found that they were not persons to whom Australia had protection obligations. While the Tribunal's conclusion may have been open to it on the facts under s.36(3) of the Act, the Tribunal did not take that path, and it may be doubted whether its conclusion that the husband was not a refugee with respect to Greece was open to it under the Convention. However the Tribunal's approach to the question of nationality under the Convention definition was not challenged, or commented on, either at first instance or on appeal.

<sup>109</sup> [2004] FMCA 216 (Driver FM, 16 April 2004).

although the Tribunal could not consider claims in relation to a country of habitual residence where the applicant is a national of another country, nationality must be considered in the context of effective nationality, that is, it must be open to an applicant to avail himself or herself of the protection of his or her country of nationality.<sup>110</sup>

Depending upon the circumstances, it may also be necessary to consider whether any or all of the applicants are excluded by s.36(3) of the Act, by reason of a right to enter and reside in another country where they do not have a well-founded fear of being persecuted.<sup>111</sup>

### **Children born in Australia**

A number of cases that come before the Tribunal involve children born in Australia. Where the child does not claim to be a refugee but rather relies solely on his or her membership of his or her parents' family,<sup>112</sup> the child's status in another country does not arise as a critical issue for determination.<sup>113</sup> However, where refugee claims are made by or on behalf of the child, it is necessary to determine the country of nationality or 'former habitual residence' against which those claims are to be assessed. The nationality of the child will be a question of fact to be determined on the basis of the evidence, including testimony given by or on behalf of the applicant, any corroborative evidence such as a passport, and evidence relating to the laws of the country in question.

In many cases involving children born in Australia, the child has been found to be of the same nationality as his or her parents.<sup>114</sup> However this will not always be the case and difficult questions may arise as to the proper application of the refugee definitions or complementary protection criterion to a child born in Australia who is found to be stateless.<sup>115</sup>

On one view, it would be stretching the language too far to apply the concept of 'former habitual residence' to a country where a person has never been. On that view a child who

<sup>110</sup> *SZAON v MIMIA* [2004] FMCA 216 (Driver FM, 16 April 2004) at [10]. His Honour reasoned at [10] that hypothetically, if the principal applicant could not gain entry to China his nationality may not be effective and the Tribunal would have been required to consider his claims in relation to Indonesia, his country of habitual residence. This follows the approach to 'effective nationality' in *Koe v MIMA* (1997) 74 FCR 508 discussed above, under 'Dual or Multiple Nationality'. However, for reasons explained there, another approach may be that if the applicant could not obtain the protection of his country of nationality (in *SZAON's* case China) against persecution in another country (in *SZAON's* case Indonesia), then this would not mean he did not have a nationality, but that he may thereby satisfy Article 1A(2) in relation to his country of nationality.

<sup>111</sup> Section 36(3) is discussed in Chapters 7 and 9 of this Guide.

<sup>112</sup> Pursuant to s.36(2)(b) of the Act, discussed in Chapter 1 of this Guide.

<sup>113</sup> Note, however, that all applicants must be non-citizens. Generally, children born in Australia of parents who are both non-citizens and not permanent residents are not Australian citizens solely by virtue of that birth. Section 12(1) of the *Australian Citizenship Act 2007* provides that a person born in Australia is an Australian citizen by virtue of that birth if, and only if, a parent of the person was at the time of the birth an Australian citizen or permanent resident, or the person is 'ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born'. On the constitutional validity of Parliament treating children born in Australia as aliens, or non-citizens, see, eg, *Singh v Commonwealth* (2004) 222 CLR 322, and *Koroitamana v Commonwealth* (2006) 227 CLR 31.

<sup>114</sup> See eg *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *SZEAM v MIMIA* [2005] FMCA 1367 (Nicholls FM, 20 September 2005), *N05/52613* [2006] RRTA 9 (G Short, 3 January 2006).

<sup>115</sup> As was observed in the joint judgment in *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [23], 'Problems of interpretation of instruments may arise because, although a provision was not intended to be confined in its operation to a certain kind of case, such a case was in the forefront of the contemplation of the drafters, and dominated their choice of language. When that occurs, the provision may operate smoothly and coherently in its application to the paradigm case, but in other cases it may give rise, not to impossibility of application, but to difficulty.'

was born in Australia, has never left this country, and is stateless would be outside the parameters of the definition of a refugee in s.5H or Article 1A(2) or the test for complementary protection in s.36(2)(aa). Either there is no country of 'former' habitual residence, or alternatively the only possible relevant country for the purposes of the assessment must be Australia.<sup>116</sup> On either approach, regardless of the possible merits of the child's case, the application could not succeed, not only because the applicant would not be outside their country of former habitual residence as the Convention definition, s.5H(1) or s.36(2)(aa) require, but also because there would be no room, under that definition, to investigate the applicant's claims in relation to any other country.<sup>117</sup>

However, having regard to the humanitarian purpose of the Convention, the refugee definition in s.5H and the criterion in s.36(2)(aa) of the Act, it may be appropriate in such cases to assess the child's claims against the country of nationality or former habitual residence of his or her parent(s), at least where that country is specified in the visa application as the country to which the applicant does not want to return and in which it is claimed he or she would suffer persecution and where no other relevant country emerges from the facts. As Tamberlin J stated in *Koe v MIEA*, individuals should not be denied the protection of the Convention by an unnecessarily narrow reading of the definition of 'refugee'.<sup>118</sup> That approach was endorsed in *SZEOH v MIMIA*, where Nicholls FM held that, where the applicant daughter was born in Australia and had no nationality or country of former habitual residence, it was appropriate, sensible, practical and fair for the Tribunal to consider her claims against a return to Singapore, that being her mother's country of nationality and the country against which her claims of fear of harm were made.<sup>119</sup>

### **Refusal of country to accept return of citizen**

In rare circumstances a country may refuse to accept the involuntary return of its citizens. This has occurred historically in the case of Iran. If the decision-maker finds on the basis of the evidence before it that, for the reasonably foreseeable future, the applicant's country of nationality will not accept involuntary returnees and the applicant will not return voluntarily,

<sup>116</sup> See eg *SZEAM v MIMIA* [2005] FMCA 1367 (Nicholls FM, 20 September 2005).

<sup>117</sup> As explained earlier in this chapter, statelessness alone is not sufficient to attract refugee status. In *SZEAM v MIMIA* [2005] FMCA 1367 (Nicholls FM, 20 September 2005), it was claimed that the applicant child was stateless. However, relying on independent country information the Tribunal dealt with the applicant as a national of China. The Court remarked at [4] that '[i]n all the circumstances this was of benefit to the applicant because had the Tribunal dealt with the applicant as stateless pursuant to the definition of Refugee ... it would have led to the applicant's claims being assessed against the applicant's country of former habitual residence'. As the applicant had been born in Australia and had not lived outside of Australia, this would have meant that the applicant's claims could not succeed. The Tribunal's decision therefore, to treat the applicant as a national of China, meant that her claims of fear of persecution, if she were to go to China, would be investigated.' See also the discussion in *N05/52613* [2006] RRTA 9 (G Short, 3 January 2006).

<sup>118</sup> (1997) 78 FCR 289 at 296.

<sup>119</sup> *SZEOH v MIMIA* [2005] FMCA 1178 (Nicholls FM, 26 August 2005) at [8]-[9]. See also RRT decision *N06/53117* [2006] RRTA 82 (R Mathlin, 11 April 2006) for an example of a similar approach. Contrast *SZFJQ v MIMIA* [2006] FMCA 671 (Scarlett FM, 27 April 2006), where it was held that the Tribunal had erred by assuming, based on the applicant's claim, that the applicant child, born in Australia of Bangladeshi citizens, was a citizen of Bangladesh. The Court held that it is fundamental to the jurisdiction of the Tribunal to make a finding as to nationality and that an applicant's own assertion is not sufficient. His Honour rejected the argument that if the Tribunal had made an error of fact in this respect, it was an error in the applicant's favour because otherwise the applicant would appear to be stateless. As his Honour pointed out, if a person does not have a nationality and is outside the country of his or her former habitual residence, then a different set of criteria lie. However, the difference is generally not critical to the question as to whether an applicant is outside the country in

there is no need to consider the claim further.<sup>120</sup> In other words, there is no need to consider the hypothetical possibility as to whether the applicant has a well-founded fear of persecution or faces a real risk of significant harm *if* they were forcibly returned to their country of nationality.

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<sup>120</sup> question owing to a well-founded fear of being persecuted for a Convention reason.  
*CLS15 v Federal Circuit Court of Australia* [2017] FCA 577 (Charlesworth J, 26 May 2017) at [58]. In *CLS15*, the Court found that the Tribunal erred by making ambiguous findings as to whether the applicant would be forcibly returned to Iran or not. In *EYJ17 v MIBP* [2019] FCA 347 (Logan J, 14 February 2019) the Court distinguished *CLS15* in circumstances where the Tribunal made clear findings that the applicant would not be involuntarily returned to Iran, as per his claims: at [9]-[10] (despite finding that the Tribunal erred on another basis).