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INTRODUCTION

Article 1A(2) of the *Convention relating to the Status of Refugees* 1951 (the Convention) states that the term ‘refugee’ shall apply to 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 ... or country of former habitual residence ...

This aspect of the Convention definition has been the subject of much judicial commentary in this country. The leading cases are *Chan v MIEA*¹ and *MIEA v Guo*;² however other High Court cases also provide guidance.³

This element of the Convention definition is reflected in the codified definition of ‘refugee’ in s.5H(1) of the *Migration Act 1958* (the Act), which refers to a person being unable or unwilling to avail him or herself of the protection of their country of nationality or former habitual residence ‘owing to a well-founded fear of being persecuted’. Whereas the Convention definition applies to determination of protection visa applications made before 16 December 2014, the refugee definition in s.5H(1) applies to applications made on or after that date.⁴

The assessment of well-founded fear under both definitions shares common elements, but there are also substantial differences. The factual basis on which the assessment of well-founded fear under the Convention definition is made is subject to legislative qualifiers in the Act. For applications to which s.5H(1) applies, s.5J further qualifies not only the factual basis for the assessment of fear, but also the meaning of ‘well-founded fear of persecution’.

This chapter will first consider the concept of well-founded fear under the Convention, before discussing the definition in s.5J of the Act.

‘WELL-FOUNDED FEAR’ UNDER THE REFUGEES CONVENTION

The test for determining well-founded fear was enunciated by the High Court in *Chan v MIEA*.⁵ The Court held that ‘well-founded fear’ involves both a subjective and objective element. That is, the definition will be satisfied if an applicant can show genuine fear founded

¹ (1989) 169 CLR 379.

² (1997) 191 CLR 559.

³ See, in particular, *MIEA v Wu* (1996) 185 CLR 259, *Appellant S395/2002 v MIMA*; *Appellant S396/2002 v MIMA* (2003) 216 CLR 473 and *Applicant NABD of 2002 v MIMIA* [2005] HCA 29 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, 26 May 2005).

⁴ 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 Convention and instead refer to Australia having protection obligations in respect of a person because they are a ‘refugee’. ‘Refugee’ is defined in s.5H, with related definitions and qualifications in ss.5(1) and 5J-5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s.2 and item 28 of Schedule 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543).

⁵ (1989) 169 CLR 379 at 396.

upon a 'real chance' of persecution for a Convention stipulated reason. Justice Dawson stated in *Chan's* case:

The phrase "well-founded fear of being persecuted..." contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear.⁶

The subjective element

The subjective element of 'well-founded fear' concerns the state of mind of the applicant. Whether an applicant has a genuine fear is a question of fact. While the requirement of a genuine fear cannot be ignored, in many cases it will not be an issue. The decision maker is entitled to consider whether an applicant objectively has a well-founded fear of persecution before examining whether such a fear is subjectively held, or to proceed on the assumption that such a fear is held.⁷ However, if the decision maker finds on the evidence that the applicant does not have a Convention based subjective fear, there will be no need to consider whether there is an objective basis for the claimed fear, or indeed whether other aspects of the Convention definition are satisfied.⁸ Conversely, if the decision maker finds that there is no objective basis for a fear of persecution, there is no obligation to consider whether there is a subjective fear.⁹

The relevant question is whether the applicant has a present fear of a risk of harm in the reasonably foreseeable future. A past lack of fear or trepidation is not necessarily inconsistent with a well-founded present fear of future harm.¹⁰

⁶ (1989) 169 CLR 379 at 396. See also *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 263 per Brennan CJ, Toohey, McHugh and Gummow JJ.

⁷ *Emiantor v MIMA* (1997) 48 ALD 635. In that case, the Court concluded that the Tribunal had assumed that the applicants had a subjective fear and therefore did not err. On appeal, the Full Federal Court (*Emiantor v MIMA*, unreported, Federal Court of Australia, Olney, Sundberg and Marshall JJ, 20 July 1998) found that although there was no express finding, in disbelieving the applicants' evidence, the Tribunal must have concluded that they did not have a subjective fear. See also *Khan v MIMA* [2000] FCA 105 (Sundberg J, 15 February 2000) at [25], and *Melhem v MIMA* [2000] FCA 1617 (Goldberg J, 13 November 2000) at [22]. In *S273 of 2003 v MIMIA* [2005] FMCA 983 (Driver FM, 14 July 2005), the Court commented at [10] that an inquiry as to subjective fear is often unnecessary and difficult.

⁸ See *SZQNO v MIAC* [2012] FCA 326 (Katzmann J, 3 April 2012) at [48] and *Iyer v MIMA* [2000] FCA 52 (O'Connor J, 4 February 2000), at [32]-[34]. In *Iyer*, the Tribunal had concluded that certain return visits to Sri Lanka from Australia were voluntary and supported a conclusion that the applicant did not have the necessary fear of persecution required by someone seeking refugee status. The Court confirmed that the Tribunal had applied the correct principles concerning the applicant's fear of persecution and stated that it needed to go no further in its analysis of the basis of the claim. On appeal, the Full Federal Court affirmed that once the Tribunal rejects an applicant's claim that there is a subjective fear, it is not necessary to determine whether the non-existent fear was well-founded: *Iyer v MIMA* [2000] FCA 1788 (Heerey, Moore and Goldberg JJ, 15 December 2000). See also *SDAQ v MIMIA* (2003) 129 FCR 137 in which Cooper J, at [19], found that the question of objective fear does not even arise if no subjective fear arises on the facts of the case. Finkelstein J, dissenting, found at [38] that the Convention does not require an applicant to correctly specify the precise reasons as to why he or she has a well-founded fear of persecution, see also Carr J at [33]. However, in *Firuzibakhsh v MIMA* [2002] FCA 982 (Mansfield J, 9 August 2002) the Court expressed the view that the subjective fear should be identified by an applicant (although not necessarily expressed in the language of Article 1A(2) of the Convention) and that the Tribunal is not required to speculate about subjective fears of an applicant for a protection visa: at [56]. Even if the Tribunal does not make an express finding that an applicant has no subjective fear of harm, findings that an applicant's claims are not credible may 'lead to the conclusion that the Tribunal did not believe that the applicant had a subjective fear of harm', in which case the Tribunal is not required to go on to assess other aspects of the Convention definition: *SZSSQ v MIBP* [2013] FCCA 1762 (Judge Nicholls, 31 October 2013) at [38] and [48].

⁹ *SAAD v MIMIA* [2003] FCAFC 65 (Cooper, Carr and Finkelstein JJ, 11 April 2003) at [38]; *Selliah v MIMIA* [1999] FCA 615 at [40].

¹⁰ *SZDGB v MIAC* [2006] FMCA 341 (Driver FM, 24 March 2006) at [19]. The issue of a past lack of fear may arise in circumstances such as where an applicant leaves but then returns to the country where they claim to have a fear of persecution, as was the case in *SZDGB*. However, this may not necessarily be inconsistent with the existence of a

Note that although a well-founded fear in a subjective sense is necessary, it can, in the case of a child, be derived from the fear held by his or her parents. According to the courts, to conclude otherwise would be to exclude from Convention protection, those who may be most in need of its protection - children and the intellectually disabled.¹¹

The objective element

The phrase 'well-founded' adds an objective element to the requirement that an applicant must in fact hold a fear. For a fear to be well-founded, there must be a factual or objective basis for that fear.¹² Thus, 'a well-founded fear' requires an objective examination of the facts to determine whether the fear is justified.¹³

Assessment of the objective element will usually involve consideration of general information about conditions in an applicant's country, as well as an assessment of the applicant's own claims in light of any material provided in support of such claims.

The 'real chance' test

A fear of being persecuted is well-founded if there is a 'real chance' of being persecuted.¹⁴ In *Chan v MIEA* Mason CJ observed that various expressions have been used in other jurisdictions to describe 'well-founded fear' – 'a reasonable degree of likelihood', 'a real and substantial risk', 'a reasonable possibility' and 'a real chance'. His Honour saw no significant difference in these expressions, but preferred the expression 'a real chance' because it conveyed the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it was an expression that had been explained and applied in Australia.¹⁵ The High Court has also emphasised that although the expression 'real chance' clarifies the term 'well-founded', it should not be used as a substitute. It is important to return to, and apply, the language of the Convention.¹⁶

subjective fear, if, for example, the circumstances of the return were not such as to trigger the form of harm that he or she fears: see *SZQUP v MIAC* [2012] FMCA 276 (Raphael FM, 4 April 2012) at [40] where the applicant's claims related to a fear of discrimination on the basis of her HIV positive status, but at the time of her visit to the Ukraine she was asymptomatic. Note also *obiter* comments of Driver FM in *SZKMI v MIAC* [2007] FMCA 1140 (Driver FM, 17 July 2007) at [8] that the Convention requires fear be assessed in terms of an 'apprehension' of harm, rather than in the sense of 'trepidation'.

¹¹ *Chen Shi Hai v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998), per French J at 14. Approved by Kirby J in *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [77] ff.

¹² *Chan v MIEA* (1989) 169 CLR 379 per Gaudron J at 412; see also per Dawson J at 396, Toohey J at 406 and McHugh J at 429. As Dawson J stated at 396, 'Whilst there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear'.

¹³ *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429.

¹⁴ *Chan v MIEA* (1989) 169 CLR 379 per Mason CJ at 389, Toohey J at 406-7, Dawson J at 396-8, McHugh J at 428-9. Note that Gaudron J did not adopt the 'real chance' test.

¹⁵ *Chan v MIEA* (1989) 169 CLR 379 at 389.

¹⁶ *MIMA v Guo* (1997) 191 CLR 559 at 572-3. Federal Court authority has also confirmed that decision makers are on 'safer ground' if they apply the language of the Convention. In *NACB v MIMA* [2002] FCAFC 140 (Beaumont, Carr & Sackville JJ, 25 May 2002) Sackville J (Beaumont J agreeing), referring to *Guo*, found that 'decision-makers will be on very dangerous ground indeed if they employ an expression not found in the Convention ("so remote as to be fanciful") and assume that the negative ("not so remote as to be fanciful") is equivalent to the expression that is found in the Convention ("well-founded")': at [58]. Nevertheless, it has been recognised that any analysis or discussion of whether a person has a well-founded fear is likely to involve the use of words other than the words of the Convention. Although the use of other words should not have the effect of erecting a principle or test that does not conform with the Convention, nevertheless words or expressions such

What is 'a real chance'?

A 'real chance' is a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance. According to Mason CJ in *Chan v MIEA*, the expression 'a real chance':

... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring. ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.¹⁷

In the same case Dawson J stated:

... a fear can be well-founded without any certainty, or even probability, that it will be realized. ... A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent.¹⁸

and Toohey J stated:

A "real chance" ... does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial.¹⁹

Similarly, according to McHugh J:

[A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. ... an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be ... persecuted. Obviously, a far-fetched possibility of persecution must be excluded.²⁰

Thus, as the High Court confirmed in *MIEA v Guo, Chan* establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.²¹

'Unlikely' is not the correct test

A fear may be well-founded for the purpose of the Convention even though persecution is unlikely to occur.²²

as 'remote', 'insubstantial' or 'far fetched possibility' are not uncommonly used in determining whether a fear is well-founded: see *Puerta v MIMA* [2001] FCA 309 (Moore, Matthews and Stone JJ, 29 March 2001). In *SZRCI v MIAC* (2012) 214 FCR 584 at [47] the Federal Court reiterated that use of language other than that in the Convention, such as 'real chance' will not necessarily give rise to error, and that the ultimate question is whether the phrase 'well-founded fear of being persecuted' was correctly applied.

¹⁷ (1989) 169 CLR 379 at 389.

¹⁸ *Chan v MIEA* (1989) 169 CLR 379 at 397-398.

¹⁹ *Chan v MIEA* (1989) 169 CLR 379 at 407.

²⁰ *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429. However, this does not mean that the Tribunal must consider whether a 10 per cent chance of persecution has been established. In *Altintas v MIEA* (unreported, Federal Court of Australia, Nicholson J, 23 January 1997) the Court held at 10: 'The ratio decidendi of *Chan* did not require the Tribunal to consider whether a 10 per cent chance of persecution was established. Rather the Tribunal was required to consider whether, on all the evidence before it, a "real chance" was established'.

²¹ *MIEA v Guo* (1997) 191 CLR 559 at 572. It is important, however, that this should not be viewed as an alternative test that there must be a risk of persecution shown on the probabilities, as that would involve an incorrect and more onerous test: see *PW87/2001 v MIMA* [2001] FCA 1083 (Hely J, 10 August 2001) at [7].

²² *Chan v MIEA* (1989) 169 CLR 379 at 429; see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ; and *MILGEA v Che Guang Xiang* (unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994) where the Court stated at 17: 'The delegate may have thought it was unlikely that [the applicant's] fears would be realised but the question to be answered was whether the prospect of

However, the mere use of the term ‘likelihood’ in the course of making a decision will not constitute an error of law, where this is an indication of the decision maker’s process of reasoning in resolving disputed facts. It would however, constitute an error of law, if the standard of ‘likelihood’ was used as a substitute for the test of a well-founded fear of persecution.²³

No comparatively higher risk

There is no requirement that an applicant be particularly at risk of persecution above others who are also at risk, only that there can be said to be a real chance of the applicant being persecuted.²⁴

‘Well-founded’ means something more than plausible

The fact that an individual’s claims of persecution may be plausible or credible is not enough to establish a real chance of persecution. In *Chan v MIEA*, Dawson J stated:

“Well-founded” must mean something more than plausible, for an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him or her, to have no foundation.²⁵

Mere speculation cannot establish a well-founded fear

A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In *MIEA v Guo*, the Court said:

Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is “well-founded” when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.²⁶

The relevant time for determination

The relevant date at which to assess an applicant’s claims to refugee status is the time that the decision is made, and not the time the applicant left his or her country or the time that the application is lodged.²⁷

persecution was so remote as to demonstrate the fear to be groundless.’

²³ *MIEA v Wu Shan Liang & Ors* (1996) 185 CLR 259 at 293-94 per Kirby J; see also *MIEA v Guo* (1997) 191 CLR 559 at 576-6 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ. That reference to likelihood in the context of factual findings will not necessarily amount to legal error was demonstrated in *DZAAM v MIAC* [2013] FCA 128 (Mansfield J, 1 March 2013) at [24] where the Federal Court held that the reviewer’s characterisation of the risk to the applicant as ‘highly unlikely’ was a finding of fact from which the reviewer concluded that there was no real chance of harm to the applicant, rather than a misapplication of the real chance test.

²⁴ *Ponnunduraj v MIMA* [2000] FCA 91 (Burchett J, 11 February 2000) at [12], cited with approval by Heydon J in *SZQDG v The Honourable Nick Nicholls, Federal Magistrate & MIAC* [2012] HCATrans 96 (Heydon J, 27 April 2012).

²⁵ *Chan v MIEA* (1989) 169 CLR 379 at 397.

²⁶ *MIEA v Guo* (1997) 191 CLR 559 at 572; cf *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 293.

²⁷ *MIEA v Singh* (1997) 72 FCR 288.

Assessment of a real chance of persecution

There can be no set procedure in assessing whether there is a real chance of persecution. The process of establishing whether an applicant's fear is well-founded will involve making findings of fact based on an assessment of the applicant's claims and relevant country information, speculation as to the reasonably foreseeable future and a finding as to whether there is a real chance that persecution will occur.²⁸ It is for the applicant to provide evidence and argument sufficient to satisfy the decision maker of the relevant facts.²⁹ There is no onus on the decision-maker to make the applicant's case for him or her.³⁰ However, the decision-maker has an obligation to consider all substantial and clearly articulated claims, relying on established facts, expressly made or clearly arising from the circumstances.³¹ This must be understood as being claims to fear harm in the reasonably foreseeable future if the applicant were to return to his or her home country.³²

Reasonably foreseeable future

Failure by a decision-maker to have regard to the chance of harm in the reasonably foreseeable future, for example by considering only the present or immediate future, may amount to a legal error.³³ If a decision-maker concludes that there is no real chance of harm presently, it may be necessary to consider whether a change in circumstances that may readily be foreseen could result in a real chance of harm arising.³⁴

The Federal Court has commented that the use of the reasonably foreseeable future concept in this context indicates that the assessment is intended to be one which can be made on the basis of probative material, without extending into guesswork, and is intended to preclude predictions of the future that are so far removed in time from the life of the person concerned at the time they are returned to their home country as to bear insufficient connection to the reality of what that person may experience.³⁵

²⁸ *MIEA v Wu Shan Liang* (1996) 185 CLR 259 per Kirby J at 294: 'The process of determination involves the delegate's making findings as to primary facts, identifying the inferences which may properly be drawn from the primary facts, as so found, and then applying those facts and inferences to an assessment of the 'real chance' affecting the treatment of the applicant if he or she were to be returned to China'. As to the 'reasonably foreseeable future', see *Mok Gek Bouy v MILGEA* (1993) 47 FCR 1 at 66; and *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Brennan CJ, Toohey, McHugh and Gummow JJ at 279 where the High Court referred with approval to the test that the Tribunal had applied in *Chen Ru Mei v MIEA* (1995) 58 FCR 96.

²⁹ *MIMA v Lay Lat* (2006) 151 FCR 214 at [76].

³⁰ *Prasad v MIEA* (1985) 6 FCR 155 at [33]. However, findings of fact are not necessarily a preliminary step in every case to the consideration of whether the relevant level of satisfaction is reached. There may be cases where a paucity of evidence means that the decision-maker cannot be satisfied that the claimed fear is well-founded: *SZSMQ v MIBP* [2013] FCCA 1768 (Judge Nicholls, 31 October 2013) at [42]-[44].

³¹ *SZTOO v MIBP* [2015] FCCA 1631 (Judge Nicholls, 17 June 2015) at [27], citing *Dranichnikov v MIMA* [2003] HCA 26 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 8 May 2003).

³² *SZTOO v MIBP* [2015] FCCA 1631 (Judge Nicholls, 17 June 2015) at [27].

³³ See for example *MZYXR v MIAC* [2013] FCA 252 (North J, 19 February 2013) at [22]; *MIAC v SZQKB* [2012] FCA 1189 (Yates J, 30 October 2012) at [42].

³⁴ *SZQXE v MIAC* [2012] FCA 1292 (Flick J, 21 November 2012) at [7].

³⁵ *CPE15 v MIBP* [2017] FCA 591 (Mortimer J, 26 May 2017) at [60].

The role of past events in establishing a ‘well-founded fear’

In most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past. Such findings provide a rational basis from which to assess whether an applicant’s fear of being persecuted for a Convention reason is well-founded.

The extent to which past events can be a guide to the future was explained in *Guo’s* case. As the High Court observed:

Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence.³⁶

Usually, therefore, in the process of determining the chance of something occurring in the future, conclusions will need to be formed concerning past events:

In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.³⁷

Assessing what is likely to happen in the future on the basis of past events involves questions of degree. The Court in *Guo* explained:

The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.³⁸

If an applicant is relying on his or her own past experiences, then the logical starting point for the decision maker is whether the events happened as claimed, and if so, whether they constituted persecution for a Convention reason.³⁹ Evidence that the applicant had been persecuted in the past would give powerful support to the conclusion that the claimed fear is well-founded.⁴⁰ In *Chan’s* case the High Court observed that although the date of decision is the relevant date for assessing whether the Convention test is satisfied, the circumstances in which an applicant fled his or her country will ordinarily be the starting point in ascertaining his or her present status. If at that time the applicant satisfied the relevant test, the absence

³⁶ *MIEA v Guo* (1997) 191 CLR 559 at 574.

³⁷ *MIEA v Guo* (1997) 191 CLR 559 at 575.

³⁸ *MIEA v Guo* (1997) 191 CLR 559 at 574-5.

³⁹ *Abebe v The Commonwealth* (1999) 197 CLR 510 per Gleeson CJ and McHugh J at [82]. See also per Gummow and Hayne JJ at [192]: ‘If a person has been persecuted in the past for a Convention reason, this history may ground an inference that the person subjectively fears repetition of persecution and an inference that this fear is well founded’. In *SZRCJ v MIAC* [2012] FMCA 605 (Smith FM, 24 July 2012) at [34], the Court confirmed that consideration of whether there is a well-founded fear of persecution in the future necessarily involves a determination as to what happened in the past, both as to whether past harms happened and whether they had a Convention character. The Court found no error in the Tribunal’s characterisation of the past harms encountered by the applicant by reference to the requirements in s.91R(1) for the purpose of assessing persecution.

⁴⁰ *Abebe v The Commonwealth* (1999) 197 CLR 510 per Gleeson CJ and McHugh J at [82].

of any material or substantial change in circumstances, such as a new government, will point to a continuation of his or her original status.⁴¹

However, simply making a finding about what occurred in the past is not enough to satisfy the real chance test; the essence of that test is the process of looking to the future.⁴² Clearly, while past events will often provide a reliable means of predicting future persecution, that will not always be the case. For example, where there has been a substantial change in country conditions, the past will be a less reliable guide for the future.⁴³ Similarly, the fact that an applicant did not suffer harm over a limited past period may not be a reliable guide as to whether there is a risk of harm in the future.⁴⁴

An applicant does not have to show past persecution in order to demonstrate a well-founded fear of being persecuted.⁴⁵ For example, depending on the circumstances, an applicant who belongs to a persecuted group might establish a well-founded fear even though the applicant has not personally suffered harm in the past.⁴⁶ Consideration of whether such an applicant has a well-founded fear of harm may be necessary even if their account of past events is entirely disbelieved.⁴⁷

An applicant who has not been persecuted in the past might also establish a well-founded fear because his or her own circumstances have changed or because circumstances have changed in the applicant's country during his or her absence.⁴⁸

Cumulative effect of past experiences

In assessing whether an applicant's fear is well-founded it is necessary to consider the totality of the circumstances. For example, an applicant may assert a number of past

⁴¹ *Chan v MIEA* (1989) 169 CLR 379 per Mason CJ at 391, Dawson J at 399 and Toohey J at 406. In the same case, Gaudron J expressed the view that if an applicant's past experiences produced a well-founded fear of being persecuted, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. However, that does not represent the majority view of the Court in *Chan*: see *MIMA v Eshetu* (1999) 197 CLR 611 per Gummow J at [150] and also *SZRKN v MIAC* [2012] FMCA 1021 (Smith FM, 2 November 2012) at [22]-[28].

⁴² *DZADC v MIAC (No.2)* [2012] FMCA 778 (Raphael FM, 3 September 2012) at [16] applying *Chan v MIEA* (1989) 169 CLR 379 and *MIEA v Wu Shan Liang* (1996) 185 CLR 259. The Court found error in that case because the reviewer did not take the extra step of explaining why the finding that nothing had happened in the past meant that nothing would happen in the future. A similar error was identified in *SZSTZ v MIBP* [2015] FCCA 93 (Judge Driver, 24 February 2015) at [42].

⁴³ However, as Dowsett J stated in *B90 of 2003 v RRT* [2004] FCA 1557 at [28], 'where circumstances are said to have changed for the better since any incident testified to by an applicant, the Tribunal should exercise care in ensuring that such changed circumstances relate to the circumstances in which the incident occurred and recognize that change is, almost inevitably, relatively gradual, incremental and unlikely to take effect in a uniform way throughout any particular geographical region'. Likewise, if circumstances in the country are fluid and rapidly changing, the Tribunal might be required to consider those circumstances in determining whether a fear is well founded: *SZWCI v MIBP* [2015] FCCA 1809 (Judge Smith, 6 July 2015) at [26].

⁴⁴ In *SZSZO v MIBP* [2014] FCCA 242 (Judge Driver, 28 April 2014) the Court found that the Tribunal's observation about the applicant's past lack of harm over the several months he had worked as a taxi driver could not have provided any 'guide' about the risk of future harm, the future being an indefinite period rather than a short, closed one: at [32].

⁴⁵ In *Abebe v The Commonwealth* (1999) 197 CLR 510, Gummow and Hayne JJ at [192] observed that '[r]egrettably, cases can readily be imagined where an applicant's fear is entirely well founded but the particular applicant has never suffered any form of persecution in the past'.

⁴⁶ See *Ponmudurai v MIMA* [2000] FCA 91 (Burchett J, 11 February 2000) at [13] and [15] where the Court held that the Tribunal had erred in finding that there was no real chance of future harm on the basis of its rejection of the applicant's claims of past harm, without considering whether the material before it as to the mistreatment of Tamils in Colombo showed the applicant's fears to be well-founded in the future. This issue is discussed further below, under the heading 'Consideration of general information about country conditions'.

⁴⁷ *MZZJO v MIBP* (2014) 239 FCR 436 in *obiter* at [40].

experiences, none of which by themselves would give rise to a well-founded fear of being persecuted, but considered together may well give rise to such fear. In *MILGEA v Che Guang Xiang*, the Court stated:

To establish whether there was a real, as opposed to a fanciful, chance that Che would be subject to harassment, detention, interrogation, discrimination or be marked for disadvantage in future employment opportunities by reason of expression of political dissent, it was necessary to look at the totality of Che's circumstances.⁴⁹

Thus, it would be wrong to simply consider the individual circumstances put forward by an applicant, and accepted by the decision maker, as being grounds for a well-founded fear of persecution in the future, without considering those circumstances cumulatively.⁵⁰ This is particularly so where an applicant claims that the aggregation of past incidents suggests that he or she was targeted for harm.⁵¹ In a complex case where an applicant faces multi-faceted risks which may interact and interrelate, a cumulative assessment requires an active intellectual engagement with the issues when considered cumulatively.⁵²

'What if I am wrong?'

Assessing whether an applicant has a well-founded fear of being persecuted for one of the Convention reasons involves questions of degree. The decision maker is entitled to weigh the material before it and make findings before it considers whether or not an applicant's fear of persecution on a Convention ground is well-founded.⁵³ If a finding is not made with sufficient confidence, the decision maker may need to consider the possibility that that finding is incorrect when determining whether an applicant has a well-founded fear.⁵⁴

The High Court in *MIEA v Guo*⁵⁵ and *Abebe v The Commonwealth*⁵⁶ explained the way the real chance test should be applied to the facts as found. The Court in *Guo* explained that in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant. Thus, for example, if

⁴⁸ A person in this situation is called a refugee *sur place*, discussed later in this chapter: [Refugees 'sur place'](#).

⁴⁹ [1994] FCA 1259 (Jenkinson, Spender and Lee JJ, 12 August 1994) at [40].

⁵⁰ See eg *WAFH v MIMIA* [2002] FCAFC 429 (Lee, Hill and Tamberlin JJ, 20 December 2002) at [50], *W352 v MIMA* [2002] FCA 398 (French J, 5 April 2002) at [21], and *MZZEO v MIBP* [2013] FCCA 1570 (Judge Riley, 16 October 2013) at [28]. However, it may not be necessary to consider the claims together if they do not interrelate in such a fashion as to be cumulative or if they have been expressly rejected: *MZYPA v MIAC* [2012] FMCA 43 (Burchardt FM, 30 January 2012) at [58] (upheld in *MZYPA v MIAC* [2012] FCA 581 (Bromberg J, 5 June 2012) although this point was not considered on appeal), *MZYQZ v MIAC* [2012] FMCA 265 (Burchardt FM, 13 April 2012) at [39] (this aspect undisturbed on appeal in *MZYQZ v MIAC* [2012] FCA 948 (Dodds-Streeton J, 31 August 2012)), and *MIBP v DDK16* [2017] FCAFC 188 (Gilmour, Markovic and O'Callaghan JJ, 27 November 2017) at [34].

⁵¹ *SZSTR v MIBP* [2014] FCCA 2554 (Judge Nicholls, 7 November 2014) at [58]. In that case the Court found that although the Tribunal indicated that it had considered the applicant's claims cumulatively, it had not considered what it found to be an additional claim, being that the accumulation of incidents faced by the applicant revealed she possessed a risk profile above that of the average Fijian.

⁵² *DDK16 v MIBP* [2017] FCCA 353 (Judge Driver, 31 May 2017) at [103]. Although the error identified by the Federal Circuit Court related to the decision-maker's complementary protection findings, the principle would apply equally to an assessment of 'well-founded fear' for refugee purposes. Further, although this judgment was overturned on appeal in *MIBP v DDK16* [2017] FCAFC 188 (Gilmour, Markovic and O'Callaghan JJ, 27 November 2017), the Full Federal Court did not disagree with this statement of principle.

⁵³ *MIEA v Guo* (1997) 191 CLR 559 at 575.

⁵⁴ See *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220.

⁵⁵ (1997) 191 CLR 559.

the decision maker finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a well-founded fear of future persecution.⁵⁷ This is commonly known as the ‘what if I am wrong?’ approach to the real chance test.⁵⁸

The ‘what if I’m wrong’ test was further explained by the Full Federal Court in *MIMA v Rajalingam*.⁵⁹ Justice Sackville (North J agreeing) held that it followed from *Guo* and *Abebe* that there may be circumstances in which the decision maker must take into account the possibility that alleged past events occurred even though it finds that those events probably did not occur.⁶⁰ The Court held:

When the RRT is uncertain as to whether an alleged event occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question. Depending on the significance of the alleged event to the ultimate question, a failure to consider the possibility that it occurred might constitute a failure to undertake the required reasonable speculation in deciding whether there is a “real substantial basis” for the applicant’s claimed fear of persecution.⁶¹

However, if a decision maker has no real doubt that its findings as to past events are correct, it is not bound to consider whether its findings might be wrong.⁶² Similarly, the ‘what if I am wrong’ approach is not engaged in circumstances where a decision maker is unable to reach a sufficient state of satisfaction on the evidence to make any factual findings, due to a lack of detail and substance in the applicant’s claims or where the evidence before the decision-maker is insufficient or inadequate to establish the relevant facts.⁶³

⁵⁶ (1999) 197 CLR 611.

⁵⁷ *MIEA v Guo* (1997) 191 CLR 559, at 576, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at [83], where Gleeson CJ and McHugh J emphasised that even if the Tribunal is not affirmatively satisfied that the events deposed to by an applicant have occurred, that does not necessarily mean that the applicant’s claim for refugee status must fail. The degree of probability of the occurrence or non-occurrence of the events claimed is a relevant matter in determining whether an applicant has a well-founded fear of persecution.

⁵⁸ *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Kirby J at 293.

⁵⁹ (1999) 93 FCR 220.

⁶⁰ *MIMA v Rajalingam* (1999) 93 FCR 220 at 239.

⁶¹ *MIMA v Rajalingam*, (1999) 93 FCR 220 at 240. See also per Kenny J at 255. The principle in *Guo* and *Abebe* was followed in *N1202/01A v MIMA* [2002] FCA 403 (Lee, Moore and Madgwick JJ, 8 April 2002) where the Full Federal Court held that a statement that the Tribunal was ‘not satisfied’ as to the truth of asserted facts was not a finding that the assertions were false or that the claimed events did not occur and that only if the Tribunal has reached a positive conclusion that events claimed did not occur may it refuse to consider at all material that would otherwise be relevant to the assessment of whether the applicant had a well-founded fear of persecution. In the circumstances, the Court held that it was not a case where, on probative material, the Tribunal had found that claimed events had not occurred, thereby permitting the Tribunal, in making its ultimate decision, to disregard the possibility that such events had occurred.

⁶² In *MIEA v Guo* (1997) 191 CLR 559, the High Court stated that the Tribunal appeared to have no real doubt that its findings as to the past and the future were correct and held that ‘[g]iven its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong’: at 576. Although the Court referred to findings both as to the past and the future, the Court’s reasoning, and the subsequent consideration of that reasoning in *MIMA v Rajalingam* (1999) 93 FCR 240 (see particularly 240 per Sackville J) makes clear that the ‘what if I am wrong’ approach applies to findings on alleged past events. For applications of this approach, see for example *Somanader v MIMA* [2000] FCA 1192 (Merkel J, 24 August 2000); *Kumar v MIMA* [2000] FCA 402 (Tamberlin J, 30 August 2000); *Nizam v MIMA* [2000] FCA 1199 (North J, 28 July 2000); and *S v MIMA* [2000] FCA 735 (Heerey J, 6 June 2000); *SZQJB v MIAC* [2013] FCA 10 (Rares J, 15 January 2013) at [22] (application for special leave to appeal dismissed: *SZQJB v MIAC* [2013] HCASL 109 (Hayne and Crennan JJ, 26 June 2013)); *SZRIE v MIAC* [2012] FMCA 940 (Nicholls FM, 18 October 2012) at [50] (upheld on appeal, although this point was not considered: *SZRIE v MIAC* [2013] FCA 99 (Bennett J, 12 February 2013) and application for special leave to appeal dismissed: *SZRIE v MIAC* [2013] HCASL 111 (Hayne and Crennan JJ, 26 June 2013)).

⁶³ See *SZSMQ v MIBP* [2013] FCCA 1768 (Judge Nicholls, 31 October 2013) at [58]-[60] and *DAT17 v MIBP* [2018] FCCA 3750 (Judge Smith, 19 December 2018) at [30]-[31], citing *MIMIA v VSAF of 2003* [2005] FCAFC 73 (Black CJ, Sundberg and Bennett JJ, 10 May 2005) at [16]-[17].

The expression ‘what if I’m wrong’ should not be regarded as a separate question to be answered in each case. Further, it is not necessary for a decision maker to ask such a question in relation to each finding and conclusion it makes or reaches.⁶⁴ Nor must findings as to whether alleged past events occurred be expressed in a manner that makes explicit the decision-maker’s degree of conviction or confidence that they are correct.⁶⁵ Rather, it should be seen as simply an aspect of the obligation to apply correctly the principles for determining whether an applicant has a ‘well-founded fear’ of persecution. The reasonable speculation in which the decision maker must engage may require it to take account of the possibility that past events might have occurred, even though it thinks that they probably did not.⁶⁶ But, as Heerey J has held in a number of decisions, when the decision maker approaches its task in accordance with the approach explained in *Guo* and *Rajalingam*, there is no room for the application of a further doubt-generating test such as ‘what if I am wrong?’.⁶⁷ His Honour noted that the question as to the likelihood of future persecution could be based on considerably less than a fifty-one per cent satisfaction that a particular past event had occurred, so that the risk of error was already allowed for and built into the approach mandated by the authorities.⁶⁸

‘Benefit of the doubt’

In *SZLVZ v MIAC*, the Federal Court commented that ‘in assessing credibility, the Tribunal must be sensitive to the difficulties often faced by applicants and should give the benefit of the doubt to those who are generally credible, but are unable to substantiate all of their claims’.⁶⁹ A similar approach is endorsed in the Department’s Refugee Law Guidelines⁷⁰ and in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (‘UNHCR Handbook’).⁷¹

⁶⁴ See *Wang v MIMA* [2000] FCA 963 (Goldberg J, 19 July 2000) at [28]; *SZCOS v MIAC* [2008] FCA 570 (Bennett J, 2 May 2008) at [51]-[52]. However, it is important that if the Tribunal is considering ‘what if I am wrong?’ it does not fail to address all aspects of the applicant’s claims. If there are firmly rejected claims about which the Tribunal is not considering ‘what if I am wrong?’, those claims need to be clearly identified: see for example *Applicant NAKB v MIMIA* [2003] FCA 534 (Tamberlin J, 30 May 2003).

⁶⁵ *MIMA v Rajalingam* (1999) 93 FCR 240, per Sackville J at 239 (North J agreeing at 253). Note, however, it is not sufficient for a decision maker to ‘simply “mouth” an assertion as a certainty if it is apparent from the reasons, when read as a whole, that there was some doubt’: *Mchinangome v MIMA* [2001] FCA 1089 (Tamberlin J, 6 August 2001) at [6], *Yakubu v MIMIA* [2002] FCAFC 57 (Beaumont, Branson and Dowsett JJ, 14 March 2002). While the inclusion of alternative reasoning using the words ‘If I am wrong...’ in a decision may be found to indicate doubt (see for example *SZLAN v MIAC* (2008) 171 FCR 145 at [85]) the use of such language and alternative reasoning does not necessarily lead to the inference that the Tribunal had doubts, see for example *SZJZV v MIAC* [2007] FMCA 2013 (Nicholls FM, 11 December 2007) upheld on appeal, *SZJZV v MIAC* [2008] FCA 628 (Gilmour J, 8 May 2008).

⁶⁶ *MIMA v Rajalingam* (1999) 93 FCR 220, per Sackville J at 239 (North J agreeing at 253).

⁶⁷ *S v MIMA* [2000] FCA 735 (Heerey J, 6 June 2000) at [25]-[30]; *Thevendram v MIMA* [2000] FCA 868 (Heerey J, 15 June 2000), at [38]; *Candyah v MIMA* [2000] FCA 869 (Heerey J, 28 June 2000), at [45].

⁶⁸ *S v MIMA* [2000] FCA 735 (Heerey J, 6 June 2000) at [28].

⁶⁹ *SZLVZ v MIAC* [2008] FCA 1816 (Middleton J, 18 November 2008) at [25]. The Court in *SZLVZ* referred to *Rhandawa v MILGEA* (1994) 52 FCR 437, which appears to refer to Beaumont J’s reasons at 451 (under the heading ‘(b) Proof of persecution’), where his Honour acknowledged a need for decision-makers to have a liberal attitude in the proof of refugeehood, as claimants may have difficulties proving their allegations. That passage drew upon the UNHCR Handbook, *The Status of Refugees in International Law* by A Grahl-Madsen at 145-146, and *Chan v MIEA* (1989) 169 CLR 379, including at 413 where Gaudron J acknowledged that questions of refugee status usually need to be decided in circumstances which don’t permit facts as they exist in the country of nationality to be precisely ascertained.

⁷⁰ Department of Home Affairs, ‘Policy – Refugee and humanitarian – Refugee Law Guidelines’, section 15.4, as re-issued 1 July 2017 (Refugee Law Guidelines). Note that Ministerial Direction No. 84, made under s.499 of the Act, requires the Tribunal to have regard to those Guidelines, where relevant (for further discussion, see Chapter 12 of this Guide).

⁷¹ UNHCR, re-issued February 2019 at [203]-[204]. Note that the Handbook is not binding on decision-makers; for further

While it appears logical and sensible for decision makers to follow such an approach in considering the claims of applicants who are generally credible, the courts have not endorsed a free standing 'benefit of the doubt' obligation and various judgments have expressed doubts as to its existence under Australian law.⁷² In particular, it is questionable whether such an approach is consistent with the statutory requirement for a decision-maker to be 'satisfied' of the matters set forth in s.65 of the Act.⁷³

What remains if an applicant is affirmatively disbelieved?

In assessing whether an applicant's fear is well-founded it is necessary to consider the totality of the circumstances. As discussed above, if the decision maker is not affirmatively satisfied that the events claimed by an applicant have occurred, the degree of probability of their occurrence is a relevant matter in determining whether the applicant has a well-founded fear.

Even if elements of an applicant's case are positively disbelieved, the decision maker must still consider any other basis on which it is claimed that a fear of persecution is well-founded.⁷⁴ The extent to which further consideration is required will depend upon the circumstances. For example, if the sole substantial basis for an applicant's case is information provided by the applicant as to his or her past history, and that history is properly rejected, there will be no factual basis on which to apply the test of whether he or she has a well-founded fear of persecution. But where the rejection of the applicant's evidence leaves a substratum of facts on which it is said that the applicant's fear is well-founded, then the decision maker must deal with them.⁷⁵

Consideration of general information about country conditions

While it is clearly permissible to assess whether an applicant's fear is well-founded by reference to general information about people in a similar position to the applicant,⁷⁶ great care is needed in doing so. When considering how persons like the applicant have been or

discussion see Chapter 1 of this Guide.

⁷² See *SZNRZ v MIAC* [2010] FCA 107 (Flick J, 22 February 2010) at [19]–[21]; *SZLPN v MIAC* [2010] FCA 202 (Flick J, 9 March 2010) at [16]–[17]; *MZAKQ v MIBP* [2016] FCCA 1186 (Judge Jones, 17 May 2016) at [50]–[61]; *SZRGE v MIAC* [2013] FMCA 18 (Nicholls FM, 22 January 2013) at [52]–[60]; *SZQMB v MIAC* [2012] FMCA 24 (Nicholls FM, 12 January 2012) at [48]–[51].

⁷³ See *SZNRZ v MIAC* [2010] FCA 107 (Flick J, 22 February 2010) at [20].

⁷⁴ *Abebe v The Commonwealth* (1999) 197 CLR 611 per Gummow and Hayne JJ at [190]–[193]. See also Kirby J at [211] where his Honour agreed that, even if an applicant is disbelieved, the primary decision-maker and the Tribunal must still consider whether, on any other basis asserted, a fear of persecution exists which is well-founded so as to ground the protection claimed.

⁷⁵ For illustrations of this issue, see *Jit v MIMA* (unreported, Federal Court of Australia, Davies J, 15 May 1998); *Sellamuthu v MIMA* (1999) 90 FCR 287 at [23]–[24] per Wilcox and Madgwick JJ; *Rajalingam v MIMA* (1999) 93 FCR 220 per Kenny J at [139]; *Zaltni v MIMA* [1999] FCA 831 (Gyles J, 21 June 1999) and *Sivaram v MIMA* [1999] FCA 853 (von Doussa J, 25 June 1999). However, see also *SZINKO v MIAC* (2013) FCA 123 (Barker J, 25 February 2013) where the Court rejected the appellant's argument that the Tribunal's statement that it did not accept that the appellant supported a political party 'in the way claimed' required consideration of a cumulative claim arising out of his other circumstances together with some support for that party.

⁷⁶ See *Applicant NABD of 2002 v MIMIA* [2005] FCA 29 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, 26 May 2005) per Gleeson CJ at [8].

are being treated, the critical question is ‘how similar are the cases that are being compared’.⁷⁷ In *Appellant S395/2002 v MIMA*, McHugh & Kirby JJ explained that:

It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether *this individual applicant* has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group."⁷⁸

Thus, while it will usually be necessary to classify an applicant or his or her claims for the purpose of identifying the Convention reason for which he or she may face persecution, it is important that the categorisation is according to a feature of the applicant that makes him or her distinguishable from other persons, and that the potential persecutors also make that distinction.⁷⁹ In addition, where the evidence is that persons of a particular group ‘generally’ are or are not persecuted, it would be wrong to draw a conclusion about whether a particular applicant will be persecuted without paying close attention to the effect of the qualification provided by the word ‘generally’. The question is whether there is anything in the applicant’s circumstances to take him or her outside the ‘general’ situation.⁸⁰

While the decision maker may consider evidence relating to a group of which the applicant is a member, the decision maker’s factual inquiry should always be by reference to the applicant’s individual circumstances.⁸¹ In assessing the real chance of harm, it will not be adequate to simply conduct a numerical analysis of the risk of harm without consideration of the applicant’s particular circumstances.⁸² While a statistical or computational approach may have some probative value, it is inappropriate to confine the evaluative process on

⁷⁷ *Appellant S395/2002 v MIMA; Appellant S396/2002 v MIMA* (2003) 216 CLR 473 per Gummow and Hayne JJ at [75], *Applicant NABD of 2002 v MIMIA* [2005] FCA 29 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, 26 May 2005) per Hayne and Heydon JJ at [161].

⁷⁸ (2003) 216 CLR 473 per McHugh and Kirby JJ at [58]. Similarly, in *MIMA v S152/2003* (2004) 222 CLR 1, McHugh J explained at [82] that in determining whether an asylum seeker has a well-founded fear of persecution, the decision maker usually needs to know a good deal more than that other persons holding similar beliefs, opinions or membership of races, nationality or particular social groups have been persecuted. It will ordinarily be necessary to know whether the circumstances of those persons were similar in all material respects to those the asylum seeker is likely to face. Only then will the experience of other members of the relevant category throw light on whether there is a real chance that the asylum seeker will be persecuted.

⁷⁹ *Applicant NABD of 2002 v MIMIA* [2005] FCA 29 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, 26 May 2005) per McHugh J at [35].

⁸⁰ *Applicant NABD of 2002 v MIMIA* [2005] FCA 29 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, 26 May 2005) per McHugh J at [35].

⁸¹ *NBKT v MIMA* [2006] 156 FCR 419 per Young J at [75] (Gyles and Stone JJ agreeing). However, it is not correct to say that there *must be* evidence pertaining to the applicant personally, as a particular applicant may face a real chance of persecution even though he or she has suffered no harm in the past: *MZXQU v MIAC* [2008] FMCA 15 (Riley FM, 7 February 2008) at [47].

⁸² *DZADQ v MIBP* [2014] FCA 754 (Mansfield J, 24 July 2014) at [65]. Finding error in the Tribunal’s approach, the Court stated that it will not be adequate for a decision-maker to reason that although a significant number of a group will be harmed, because the group is numerous, the chances of any particular member of the group being harmed is not a real one. Note, however, that a statistical approach will not necessarily be erroneous where an applicant does not claim to be at particular risk based on his or her specific circumstances. In *SZURA v MIBP* [2015] FCCA 1539 (Judge Smith, 5 June 2015) at [26] and [29] the Court found no error in the Tribunal’s conclusion that attacks on Christians in Indonesia were not occurring on a scale and frequency that indicated the risk to the applicant was anything more than remote. It stated that there was a logical connection between the probability of an event occurring to a member of a group and both the size of the group and the frequency with which other members of the group had been harmed in the past, particularly where there was nothing to distinguish the applicant from other members of the group. Similarly, in *SZTWQ v MIBP* [2015] FCA 950 (Davies J, 28 August 2015), the Court found no error in the Tribunal making an assessment based on the population of Shia Muslims relative to the total population of Pakistan, where he made no claim to be at particular risk other than on the basis of claims which had been rejected.

assessing ‘real chance’ to only such a data set or quantitative analysis.⁸³ Similarly, confining the evaluative process to a comparative analysis will also not suffice.⁸⁴

Well-founded fear and state protection

Whether a fear of harm for a Convention reason is well-founded will usually involve questions as to the willingness and ability of the State to discharge its obligation to protect its citizens.

In cases where the State inflicts the harm or is complicit in the sense that it encourages, condones or tolerates the harm, a conclusion may readily be drawn that the fear is well-founded.

If the feared harm is from a non-state entity or group, and the State is prepared to act against the individual or group such that the threat is likely to be eliminated or greatly reduced, the proper conclusion may be that the fear is not well-founded because there is no real chance that the persecutory conduct will occur.⁸⁵

However, if the applicant’s country provides a level of protection which the applicant is entitled to expect according to international standards, then the applicant will not satisfy the elements of Article 1A(2), even if there remains a well-founded fear of harm.⁸⁶

Thus, while a ‘well-founded fear’ is an essential element of the Convention definition, it will not be sufficient to establish a well-founded fear of harm from a non-State entity or group in the absence of evidence that the applicant’s country fails in its duty to protect its citizens.⁸⁷

Refugees ‘Sur Place’

Persons who are outside their countries of origin may become refugees due to changes in circumstances in their home countries or as a result of their own actions. Thus, a well-founded fear of persecution which exists at the time of determination may not have existed

⁸³ *MZAAD v MIBP* [2015] FCA 1031 (Beach J, 18 September 2015) at [43], with reference to *MIMA v S152/2003* (2004) 222 CLR 1 per McHugh J at [80] and *DZADQ v MIBP* [2014] FCA 754 (Mansfield J, 24 July 2014). In *MZAAD* the applicant argued that the Tribunal had erred by making a numerical calculation of risk based on the appellant’s having twice safely travelled on a road on which he claimed to fear harm, and his brother having travelled on that road over a longer period without incident. The Court rejected that argument, finding that the Tribunal considered other information and did not rely solely upon a statistical or qualitative analysis. Although considering ‘real risk’ for the purpose of s.36(2)(aa), the Court’s observations are equally applicable to ‘real chance’.

⁸⁴ In *CID15 v MIBP* [2017] FCA 780 (Moshinsky J, 12 July 2017) the Court held that Tribunal erred by adopting a relative, rather than an objective, approach in applying the real chance test by reasoning that the applicant could safely relocate to elsewhere in Pakistan where it was ‘relatively free’ from violence. See also *SZVJE v MIBP* [2016] FCCA 594 (Judge Driver, 18 April 2016) at [28]-[30] where the Court held the Tribunal erred when it reasoned that because the level of violence was less severe in Lahore compared to other parts of Pakistan, there was not a real chance of harm, rather than analysing the degree of risk in Lahore itself.

⁸⁵ *MIMA v S152/2003* (2004) 222 CLR 1 per McHugh J at [76].

⁸⁶ See *MIMA v S152/2003* (2004) 222 CLR 1 per Gleeson CJ, Hayne and Heydon JJ at [26], [28]. Justice McHugh disagreed. His Honour stated at [83] that once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the State and its agencies have taken all reasonable steps to eliminate the risk. Justice Kirby’s discussion of the issue at [115] and [117] appears to be consistent with the joint judgment.

⁸⁷ State protection is discussed in detail in Chapter 8 of this Guide.

at the time a person departed his or her country of nationality. The UNHCR Handbook states:

94. ... A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "*sur place*".

95. A person becomes a refugee "*sur place*" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

96. A person may become a refugee "*sur place*" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.⁸⁸

The concept of refugee *sur place* has been recognized by Australian courts. In the Full Federal Court in *Somaghi v MILGEA*, Gummow J stated:

Article 1A (2) of the Convention, as construed in *Chan*, requires the decision maker, as regards an individual then outside the country of his nationality, to determine whether that person then is unwilling to avail himself or herself of the protection of the country of nationality owing to a well-founded fear of persecution which now exists for, inter alia, reasons of political opinion or membership of a particular social group. It follows that the well-founded fear of persecution which now exists may have arisen at a time when the person in question was already outside the country of nationality.⁸⁹

Becoming a refugee sur place through voluntary actions

It has been recognised that a person may become a refugee *sur place* as a result of voluntarily participating in activities which would give rise to a well-founded fear of persecution in his or her country of origin. The types of activity which might be engaged in by persons outside their countries of origin include:

- actions undertaken out of genuine political motives;
- actions committed unwittingly or unwillingly (e.g. as a result of provocation), but which nevertheless may lead to persecution 'for reasons of (imputed) political opinion'; or
- actions undertaken for the purpose of creating a pretext for invoking fear of persecution.

What is the effect of actions taken in bad faith? – Section 91R(3)

In determining whether actions taken in Australia are relevant in considering the well foundedness of an applicant's claims to fear persecution, regard must be had to the provisions of s.91R(3) of the Act.⁹⁰ Section 91R(3) provides that:

⁸⁸ UNHCR, re-issued February 2019.

⁸⁹ (1991) 31 FCR 100 at 116.

⁹⁰ Inserted by *Migration Legislation Amendment Act (No.6) 2001*, No. 131 of 2001, with effect from 1 October 2001. The

For the purposes of the application of this Act and the regulations to a particular person:

- (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

- (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

Section 91R(3) requires evidence of conduct in Australia contrived to strengthen a claim to be a refugee to be disregarded from the assessment of well founded fear where the evidence is supportive of the claim.⁹¹

Both the Second Reading Speech and Revised Explanatory Memorandum to the Bill that introduced s.91R(3) make it clear that the provision was introduced to overcome the effect of Federal Court decisions that had recognised the claims of applicants who deliberately set out to contrive claims for refugee status after they had arrived in Australia.⁹²

According to the Revised Explanatory Memorandum, the provision

maintains the integrity of Australia's protection process by ensuring that a protection applicant cannot generate sur place claims by deliberately creating circumstances to strengthen his or her claim for refugee status.⁹³

Importantly, where conduct in Australia is an issue, the applicant bears the responsibility or onus of satisfying the Minister (or Tribunal) that the conduct was otherwise than for the purpose of strengthening his or her claims to be a refugee.⁹⁴ Before considering any consequences that may flow from the conduct, decision makers should first consider whether that conduct was engaged in otherwise than for the purpose of strengthening the applicant's claim to be a refugee.⁹⁵ If the applicant does not satisfy the decision maker that it

constitutional validity of s.91R(3) was upheld by the Full Federal Court in *SAAS of 2001 v MIMIA* [2002] FCAFC 340 (Hill, Branson and Stone JJ, 5 November 2002) at [15], agreeing with reasons of Mansfield J at first instance: *SAAS v MIMIA* (2002) 124 FCR 182.

⁹¹ *MIAC v SZJGV* (2009) 238 CLR 642, per French CJ and Bell J at [12], per Crennan and Kiefel JJ at [64]. French CJ and Bell J delivered a joint judgment which in practical terms is consistent with the joint judgment delivered by Crennan and Kiefel JJ. Hayne J dissented on the basis that the wording of s.91R(3) required the decision-maker to disregard relevant conduct no matter whether they would work for or against an applicant: at [23] – [24].

⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2001, 30420-24 (Philip Ruddock, Minister for Immigration and Multicultural Affairs); and Migration Legislation Amendment Bill (No. 6) 2001. The history of s.91R(3) is discussed in *MIAC v SZJGV* (2009) 238 CLR 642, at [38]-[45], per Crennan and Kiefel JJ.

⁹³ Migration Legislation Amendment Bill (No. 6) 2001, Revised Explanatory Memorandum, at [29]. In the Second Reading Speech it was similarly stated that action 'deliberately seeking to attract hostile attention from a home country government, makes a mockery of an applicant having a real fear of persecution. ... The convention was not intended to provide protection to applicants who contrive claims in second or third countries and who have no other basis for claims to refugee status': Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2001, 30421 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

⁹⁴ *NBKT v MIMA* (2006) 156 FCR 419 per Young J (Giles and Stone JJ agreeing) at [89]; *SZKOZ v MIAC* [2007] FCA 1798 (Ryan J, 20 November 2007) at [28]-[29]; *SZKHD v MIAC* [2008] FCA 112 (Collier J, 19 February 2008) at [31]; *SZMZA v MIAC (No.2)* [2008] FMCA 1418 (Smith FM, 21 October 2008) at [16]-[17] and *SZMPJ v MIAC* [2008] FMCA 1640 (Smith FM, 17 December 2008) at [25]-[27].

⁹⁵ In *SZRWG v MIAC* [2013] FMCA 53 (Driver FM, 26 March 2013) the Tribunal had not considered the applicant's motivation in engaging in certain conduct, but instead assessed whether a well-founded fear of persecution arose from that conduct, finding that it did not. The Court, applying *SZOZT v MIAC* [2011] FCA 1245 (Foster J, 3 November 2011), held that a decision-maker cannot embark upon the chain of reasoning in s.91R(3) unless satisfied that the conduct was otherwise than for the purpose of strengthening the applicant's claim to be a refugee. In *SZOZT* the Federal Court had criticised the reasoning of the Federal Magistrate in *SZOZT v MIAC* [2011] FMCA 411 (Driver FM, 1 June 2011), who had held the judgment of the High Court in *MIAC v SZJGV* (2009) 238 CLR 642 required the decision-maker, when considering s.91R(3), to apply a three-step process: identify the conduct, determine the motive for the conduct and, if it was for the

was, the conduct must be disregarded when determining whether the applicant has a well-founded fear. If the decision maker is satisfied that the conduct was engaged in otherwise than for the purpose of strengthening the claims, regard should be had to the conduct when determining whether the applicant has a well-founded fear of being persecuted.⁹⁶

What is conduct?

Not all conduct undertaken in Australia by an applicant falls within the ambit of s.91R(3). Only conduct which may strengthen the person's claim to be a refugee is relevant to the consideration of s.91R(3). Section 91R(3) has no application in relation to those aspects of a person's daily routine in Australia which have no relevance to a refugee claim.

Section 91R(3) can only arise for consideration where it is found that the applicant has engaged in relevant conduct in Australia. If the decision maker finds the conduct has not occurred, there will be nothing to disregard pursuant to s.91R(3).⁹⁷

A lack of action (inaction) in Australia can constitute 'conduct' within the meaning of s.91R(3).⁹⁸ However, it would be rare that inaction would have the relevant quality of strengthening the applicant's claim such as to enliven s.91R(3). In any case, it is unlikely that a lack of action by the applicant, for example, not taking any steps in relation to the practice of a claimed religion in Australia, would meet the motivational element such that the conduct must be disregarded. Generally inaction of this kind would not be 'engaged in' for the sole purpose of strengthening the applicant's refugee application.⁹⁹

Conduct in making a protection visa application and review application does not come within the intended scope of s.91R(3).¹⁰⁰

purpose of strengthening the applicant's claims to be a refugee, determine whether the applicant was successful in that objective, only disregarding the conduct if that were the case. The Federal Court held that the High Court's reasoning had not included the third step postulated by the Federal Magistrate (determination of whether the applicant was successful in strengthening the claim to be a refugee).

⁹⁶ Whether or not any consequences flowing from the conduct arise for consideration will depend upon the claims made by the applicant and the evidence before the decision-maker. For example, in *SZQYB v MAIC* [2012] FMCA 647 (Driver FM, 10 August 2012) the Tribunal rejected that the applicant was a Christian but (implicitly) accepted he had attended church in Australia for reasons other than strengthening his claims. The Court rejected the applicant's argument that the Tribunal therefore ought to have considered whether he would be persecuted on return to China as a result of that attendance itself, finding that no such claim was made by the applicant and nor was there any evidence before the Tribunal that the fact of the applicant's church attendance in Australia had or would become known to the Chinese authorities.

⁹⁷ *SZJGV v MIAC* (2008) 170 FCR 515 at [22]. This judgment was overturned on appeal by the High Court in *MIAC v SZJGV* (2009) 238 CLR 642, but this part of the Court's reasoning was undisturbed and is not inconsistent with the High Court's reasoning.

⁹⁸ *SZJGV v MIAC* (2008) 170 FCR 515 at [22]. This judgment was overturned on appeal by the High Court in *MIAC v SZJGV* (2009) 238 CLR 642. While the issue may have lost significance in light of the High Court's judgment on appeal, the High Court did not specifically disagree with this statement.

⁹⁹ The Courts have not necessarily required an express finding as to the motivational element of s.91R(3) in this respect although the basis for this has differed. In some instances the inaction was found not to come within s.91R(3) - see *SZIMY v MIAC* [2007] FCA 249 (Conti J, 26 February 2007) at [11], where the applicant's failure to communicate with Falun Gong practitioners or join public practice sessions in Australia was held plainly not 'conduct engaged in to support her claims'; and, in similar terms, *SZJAL v MIAC* [2007] FMCA 17 (Cameron FM, 25 January 2007) at [30] and *SZHIU v MIAC* [2008] FMCA 1154 (Lloyd-Jones FM, 15 August 2008). In other instances the Court has been prepared to imply a finding by the Tribunal that the inactivity was not engaged in for the purposes of strengthening the refugee claim: see *SZMDC v MIAC* [2008] FMCA 1282 (Smith FM, 1 September 2008) at [29]-[31].

¹⁰⁰ *SZMTJ v MIAC (No.2)* (2009) 232 FCR 282 at [21] and *SZMCH v MIAC* [2008] FMCA 1181 (Smith FM, 13 August 2008) at [44], both citing *SZJGV v MIAC* (2008) 170 FCR 515 at [22]. Contrast *obiter* comments of Gray J in *MZXQS v MIAC* [2009] FCA 97 (Gray J, 17 February 2009) at [27].

In considering s.91R(3), the full extent of conduct in Australia should be clearly identified. In this regard the term ‘engaged in’ has been construed as meaning ‘carried on’ rather than ‘commenced’.¹⁰¹ For example, a person may commence engaging in religious practice in Australia to support their protection visa claims, but over time may become a genuine adherent such that they are carrying on the conduct for different reasons.¹⁰² Furthermore, conduct in this context is not limited to that occurring after the making of a protection visa application, although the courts have closely scrutinised findings that certain conduct was engaged in to strengthen a claim for protection where the conduct occurred some time prior to the applicant applying for the visa.¹⁰³

Whilst a distinction between beliefs, knowledge and conduct has previously been drawn for the purposes of s.91R(3), such a distinction has no practical significance in the application of the provision. As discussed below, the critical issue when applying s.91R(3) is whether the expression of belief or acquisition of knowledge was engaged in otherwise than for the purpose of strengthening a refugee claim. If the relevance of any manifestation of knowledge or belief were that an adverse inference could be drawn from it, it would not need to be disregarded under s.91R(3), regardless of whether it were characterised as conduct or otherwise.¹⁰⁴

Whose conduct is relevant?

The language of s.91R(3) makes it clear that the conduct towards which the provision is directed is the applicant’s own and it would be incorrect to apply it to the independent actions of third parties.¹⁰⁵ For example, where an applicant or group has attracted media attention, it is important to distinguish the actions of third parties (such as the media) done merely with the knowledge and agreement, or complicity, of the applicant, where the conduct of the third party cannot be imputed to the applicant.

However, it may be appropriate to disregard a third party’s conduct under s.91R(3) if that conduct is meaningless without reference to the conduct in Australia of the applicant.¹⁰⁶ This

¹⁰¹ *SZGYT v MIAC* [2007] FMCA 883 (Driver FM, 6 June 2007) at [12]. Compare with *SZJNG v MIAC* [2009] FMCA 530 (Driver FM, 4 June 2009) at [36]. The Court reiterated that the entirety of the conduct must be considered, however, no breach of s.91R(3) occurred as the applicant asserted no more than having ‘joined a Falun Gong practice group in Australia’.

¹⁰² *SZGYT v MIAC* [2007] FMCA 883 (Driver FM, 6 June 2007).

¹⁰³ *SZOFD v MIAC* [2010] FMCA 357 (Nicholls FM, 26 May 2010); *SZQFA v MIAC* [2011] FMCA 794 (Lloyd-Jones FM, 14 October 2011); *SZQLJ v MIAC* [2011] FMCA 932 (Driver FM, 2 December 2011); *SZQWM v MIAC* [2012] FMCA 310 (Driver FM, 13 April 2012); *SZQOJ v MIAC* [2012] FMCA 298 (Driver FM, 17 May 2012). In *SZQOJ v MIAC* [2012] FMCA 298 (Driver FM, 17 May 2012) the Court commented at [45] that the longer the gap between the commencement of the relevant conduct and the making of a claim for protection, the more difficult it would be to demonstrate the logic of reasoning that the conduct was engaged in solely for the purpose of strengthening the claim for protection. Similarly, in *SZRSE v MIAC* [2013] FCA 213 (Buchanan J, 15 March 2013) at [22]-[23] the Federal Court questioned the logical support for the Tribunal’s finding that the applicant contrived church attendances in order to support an eventual claim for a protection visa years later, but held that it was ultimately a finding within jurisdiction and was not irrational.

¹⁰⁴ Following *MIAC v SZJGV* (2008) 170 FCR 515, it is clear that s.91R(3) does not prevent regard being had to motives for conduct in Australia for all purposes, and for practical purposes any such distinction has no significance.

¹⁰⁵ *SZMCT & SZNCU v MIAC* [2009] FMCA 233 (Nicholls FM, 20 March 2009) at [86] (upheld on appeal: *SZMCT v MIAC* [2009] FCA 907 (Flick J, 21 August 2009, although this point was not considered). The Court noted at [92] that s.91R(3) does not contemplate a situation where children who are sole applicants but are dependent entirely on the consequences of claims made by their parent/s that such conduct should be treated as conduct of the children: followed in *SZREM v MIBP* [2014] FCCA 129 (Judge Barnes, 30 January 2014) at [81]-[82].

¹⁰⁶ *MZXQU v MIAC* [2008] FMCA 15 (Riley FM, 7 February 2008) at [40], although in that case the Court found the conduct of

includes where the third party is acting as the applicant's *alter ego* under principles of agency or in some other representative capacity.¹⁰⁷ If a third party's conduct (for example, media attention to an applicant or group) is at the behest or direction of the applicant and can be seen as an immediate consequence of the applicant's own conduct, those actions may fall within the terms of s.91R(3). Whether relevant conduct of a third party could be sufficiently linked to the applicant's conduct is a finding of fact for the decision maker.¹⁰⁸

A similar consideration arises in the context of applicants who make combined applications for protection visas. Section 91R(3) is limited in its effect to the determination of well-founded fear of persecution in relation to the claims of the person who engaged in the conduct in Australia. To the extent that one applicant is seeking to rely upon the circumstances of another applicant as the basis for having a well-founded fear of persecution, for example, a husband and wife with related claims, the first applicant's conduct ought to be disregarded pursuant to s.91R(3) only in respect of determining whether the first applicant's fear of persecution is well-founded and not in respect of the second applicant's claim.¹⁰⁹

Purpose of the conduct

Section 91R(3) requires the decision maker to disregard conduct engaged in by an applicant in Australia unless satisfied that the conduct has been engaged in 'otherwise than for the purpose of strengthening the person's claim to be a refugee'. This means that where conduct in Australia could strengthen a person's refugee claim, the decision maker must consider the applicant's motivation for engaging in the conduct before considering the consequences that may flow from that conduct.¹¹⁰

For s.91R(3) to be enlivened the conduct must have been engaged in for the *sole* purpose of strengthening the refugee claim.¹¹¹ If the decision maker is satisfied that relevant conduct was engaged in for some other concurrent purpose, then it cannot be disregarded.

the third party who was overseas stood alone and the Tribunal was not entitled to disregard it. However, *SZSEE v MIMAC* [2013] FCCA 1026 (Judge Nicholls, 6 August 2013) provides an example of circumstances where the Court found that conduct of a third party overseas could be properly disregarded. The applicant sought to draw a distinction between his conduct in sending articles he authored to family members overseas and the conduct of his family who caused the articles to be published. Agreeing with *MZXQU*, the Court concluded at [62] that once the Tribunal had formed the view that the applicant's conduct was for the sole purpose of strengthening his refugee claim pursuant to s.91R(3), the conduct of his family in arranging publication of the articles also had to be disregarded.

¹⁰⁷ *SZLWA v MIAC* [2008] FMCA 952 (Smith FM, 30 June 2008) at [60] (upheld on appeal in *SZLWA v MIAC* [2009] FCA 952 (Greenwood J, 26 August 2009).

¹⁰⁸ See *SZMLD v MIAC* [2008] FMCA 1606 (Scarlett FM, 4 December 2008) in which the Court commented at [76] on the 'generous' nature of the Tribunal's finding of fact, distinguishing the conduct of a third party in publishing photographs of the applicant at a public Falun Gong event on a website from the applicant's conduct in attending the public Falun Gong event, where the latter conduct had been disregarded under s.91R(3). The Court found no breach of s.91R(3) as it was a finding of fact for the Tribunal.

¹⁰⁹ *SZLSP v MIAC* [2008] FMCA 950 (Cameron FM, 17 July 2008) at [19]. The Tribunal in this case did not consider the conduct of the applicant husband which had been disregarded pursuant to s.91R(3) in relation to the applicant wife, however, the Court found no jurisdictional error as no claim to fear persecution arising from the applicant husband's practise of Falun Gong in Australia was made by either applicant so the Tribunal was not obliged to consider it. It appears this principle would also apply so as to prevent the dishonest motive of a parent from being imputed to a child applicant: see *CAH17 v MIBP* [2018] FCCA 3573 (Judge Driver, 21 December 2018) at [31].

¹¹⁰ *SZOZT v MIAC* [2011] FCA 1245 (Foster J, 3 November 2011); *SZRWG v MIAC* [2013] FMCA 53 (Driver FM, 26 March 2013).

¹¹¹ *MIAC v SZJGV* (2009) 238 CLR 642, per French CJ and Bell J at [13], per Crennan and Kiefel JJ at [59]–[60].

Findings as to whether an applicant has engaged in activities for the purpose contemplated by s.91R(3) are findings of fact.¹¹² The onus is on the applicant to satisfy the decision maker as to the motivation.¹¹³ For this reason consideration of s.91R(3) should focus on the language of the section and whether the decision maker is satisfied that the person has engaged in the conduct in Australia for a purpose otherwise than to strengthen a refugee claim.

When must the conduct be disregarded?

Section 91R(3) does not require conduct in Australia engaged in solely to strengthen a claim to refugee status to be disregarded for *all* purposes.¹¹⁴ If the conduct could strengthen the applicant's claim, it is to be disregarded; if it would not strengthen the claim, it may be taken into account.¹¹⁵ It does not require that such conduct be disregarded where it is adverse to an applicant's credibility.¹¹⁶

In *MIAC v SZJXO*¹¹⁷, the applicant had provided photographs of himself at demonstrations in Australia. The Tribunal was not satisfied that the applicant participated in the demonstrations otherwise than to strengthen his claim to refugee status, and accordingly disregarded the participation at the demonstrations when determining whether the applicant had a well-founded fear of persecution. The High Court held that the Tribunal did not contravene s.91R(3) by concluding, based on its findings about the motives for the applicant's relevant conduct in Australia, that the applicant would not participate in similar activities on his return to his home country.¹¹⁸ In this way, s.91R(3) did not prevent the decision maker from taking into account evidence of relevant conduct in assessing the *reliability* or *credibility* of the applicant's evidence.

In contrast, conduct such as that in *SZJXO* must be disregarded where it could support the applicant's claim to a well-founded fear of persecution. If the applicant's conduct could give rise to a well-founded fear where none previously existed, s.91R(3) precludes the decision maker from reasoning based on that conduct that the applicant does have a well-founded fear. Section 91R(3) requires that evidence of conduct not be applied for the purpose for which it was intended by the person, to strengthen that person's claim to refugee status where it would have that effect.¹¹⁹

¹¹² *SZKHD v MIAC* [2008] FCA 112 (Collier J, 19 February 2008) at [31].

¹¹³ See *SZMZA v MIAC (No.2)* [2008] FMCA 1418 (Smith FM, 21 October 2008) at [16]-[17], finding an erroneous application of s.91R(3) where the Tribunal took account of conduct in Australia where it was left in doubt about the applicant's motives for engaging in the relevant activities. See also *SZMPJ v MIAC* [2008] FMCA 1640 (Smith FM, 17 December 2008) at [25]-[27].

¹¹⁴ *MIAC v SZJGV* (2009) 238 CLR 642.

¹¹⁵ *MIAC v SZJGV* (2009) 238 CLR 642, per Crennan and Kiefel JJ at [64].

¹¹⁶ *MIAC v SZJGV* (2009) 238 CLR 642, per French CJ and Bell J at [9].

¹¹⁷ Heard jointly with, and cited as, *MIAC v SZJGV* (2009) 238 CLR 642.

¹¹⁸ *MIAC v SZJGV* (2009) 238 CLR 642, per Crennan and Kiefel JJ at [67].

¹¹⁹ *MIAC v SZJGV* (2009) 238 CLR 642, per Crennan and Kiefel JJ at [63].

Conclusions

Whether a fear is well-founded is a question to be determined on the whole of the evidence. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct.¹²⁰ Nevertheless, a decision maker must not 'foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material. Evaluation of chance, as required by *Chan*, cannot be reduced to scientific precision'.¹²¹ Ultimately, the decision maker must look back at the entirety of the material placed before it and consider it against a test of what the 'real', as distinct from fanciful, 'chance' would bring.¹²² In this respect, 'the Tribunal is required to do no more than to satisfy itself in accordance with commonsense and the ordinary experience of mankind'.¹²³ Where the feared harm is from a non-state entity or group, and the applicant's country takes reasonable measures to protect the lives and safety of its citizens, then the applicant may not satisfy the elements of Article 1A(2), even if there remains a well-founded fear of harm. Finally, any conduct of the applicant in Australia will need to be considered in relation to s.91R(3) and if the decision maker is not satisfied that it was done otherwise than for the purposes of strengthening a claim for refugee status, such conduct must be disregarded to the extent that it supports a claim that the person has a well-founded fear.

'WELL-FOUNDED FEAR' UNDER SECTION 5J OF THE ACT

For protection visa applications made on or after 16 December 2014, the meaning of 'refugee' is defined in s.5H(1) of the Act. That section, and other related provisions, are intended to codify Article 1A(2) of the Convention.¹²⁴

Under s.5H(1), a person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country; or, in the case of a person without a nationality, they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to it. The relevant country of nationality or former habitual residence is referred to as a 'receiving country'.¹²⁵

The concept of 'well-founded fear of persecution' is further defined in s.5J of the Act. It provides that a person has a well-founded fear of persecution if:

¹²⁰ *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282.

¹²¹ *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 293-295.

¹²² *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 293-295.

¹²³ *MIMA v Rajalingam* (1999) 93 FCR 220 at [140] per Kenny J.

¹²⁴ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.170 at [1169].

¹²⁵ 'Receiving country' is defined in s.5(1) of the Act and discussed in greater detail in Chapter 2 of this Guide.

- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;¹²⁶ and
- there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned above; and
- the real chance of persecution relates to all areas of a receiving country.

In addition to these threshold requirements, s.5J qualifies the concept of ‘persecution’ and prescribes circumstances in which a person will be taken not to have a well-founded fear of persecution. Furthermore, it prevents a decision-maker from having regard to certain factual matters in determining an applicant’s well-founded fear of persecution.

Together, these elements of s.5J form the meaning of ‘well-founded fear of persecution’. With the exception of ‘receiving country’ and the requirement that the persecution be for one of five specified reasons (examined, respectively, in Chapters 2 and 5), each of the elements in s.5J will be discussed in turn below, although some are dealt with in greater detail in other chapters of this Guide.

A fear of being persecuted

Section 5J(1)(a) requires that the person ‘fears being persecuted’ for one of the stated reasons. This appears to incorporate the need for subjective fear, consistent with the Australian courts’ interpretation of ‘well-founded’ fear in Article 1A(2) of the Convention.

As noted above (see ‘The subjective element’), a subjective fear concerns the state of mind of the applicant (or where the applicant lacks capacity to hold such a fear, another person on their behalf) and in many cases, will not be in issue. To the extent that it does arise in a particular case, the discussion above relating to the subjective fear requirement in the Convention appears equally applicable to s.5J(1)(a).

For reasons of race, religion, nationality, membership of a particular social group or political opinion

Consistently with Article 1A(2) of the Convention, under s.5J(1)(a) a person will not meet the definition of ‘refugee’ if the persecution is not for one of five specified reasons – race, religion, nationality, membership of a particular social group or political opinion.¹²⁷ For detailed discussion of this element of the definition, see Chapter 5 of this Guide.

¹²⁶ The requirement that the persecution be ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ is discussed in Chapter 5 of this Guide.

¹²⁷ As discussed in Chapter 5 of this Guide, the concept of ‘particular social group’ is defined and qualified by ss.5K and 5L.

A real chance of persecution

For a person's fear of persecution to be well-founded, there must be 'a real chance that, if the person returned to the receiving country, the person would be persecuted...'. Consistent with the interpretation of 'well-founded fear' under the Convention, this 'real chance' requirement, contained in s.5J(1)(b), provides an objective element to that concept; not only must a person fear persecution, there must be a prospect of that fear being realised.

The concept of 'real chance', as relevant to the assessment of well-founded fear under Article 1A(2) of the Convention, was explained by the High Court in *Chan v MIEA* as a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance.¹²⁸ The 'real chance' requirement in s.5J(1)(b) is the same as the 'real chance' threshold for the assessment of well-founded fear that was identified in *Chan*.¹²⁹

For further discussion of the real chance test and its application, see the discussion above in relation to the Convention definition ('The objective element').

The real chance of persecution must relate to all areas of the receiving country

It will not be sufficient that a person has a real chance of being persecuted only in a particular part of the receiving country. Under s.5J(1)(c), the real chance of persecution must relate to all areas of the relevant receiving country.

This requirement is intended to codify the 'internal relocation' principle, arising from Article 1A(2) of the Convention, that a fear of persecution is not well-founded if it only relates to some parts of the country.¹³⁰ However, although the consideration of that internal relocation principle under the Convention requires an assessment of whether it would be *reasonable* for an applicant to relocate to another part of the country, no such consideration arises under the codified definition of refugee.¹³¹

The starting point for assessment of the chance of an applicant being persecuted will depend upon the case put by the applicant, but will generally commence with consideration

¹²⁸ (1989) 169 CLR 379 per Mason CJ at 389, Toohey J at 406-7, Dawson J at 396-8, McHugh J at 428-9. Note that Gaudron J did not adopt the 'real chance' test.

¹²⁹ *DLB17 v MIBP* [2018] FCCA 1299 at [16] (an appeal on different grounds was dismissed: *DLB17 v MHA* [2018] FCAFC 230 (McKerracher, Barker and Banks-Smith JJ, 18 December 2018); application for special leave to appeal dismissed: *DLB17 v MHA* [2019] HCASL 110 (Nettle and Gordon JJ, 17 April 2019)). See also the Explanatory Memorandum to the Bill introducing s.5J: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.171 at [1180].

¹³⁰ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.171 at [1182].

¹³¹ *DFE16 v MIBP* [2017] FCCA 308 (Judge Smith, 10 March 2017) at [26] (undisturbed on appeal: *DFE16 v MIBP* [2018] FCAFC 177 (Reeves, Rangiah and Colvin JJ, 16 October 2018)). See also the Explanatory Memorandum to the Bill which introduced the definition (referred to in *DFE16* at [23]) which stated that the Government's intention is that the statutory implementation of the internal relocation principle not encompass a reasonableness test: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, pp.10-11 and pp.171-172 at [1183]. This is also reflected in the Department of Home Affairs' Refugee Law Guidelines, section 8.3, as re-issued 1 July 2017.

of whether there is a real chance of persecution in the area of the receiving country in which they will return or be returned.¹³² If a decision-maker finds that such a chance exists, s.5J(1)(c) will require consideration of whether the risk is localised to that particular area or exists elsewhere.

Depending on the circumstances of the case, the question may be approached in various ways. Firstly, by delimiting a local area of risk, that is, a finding that the chance of persecution is localised to a particular area, which results in the conclusion that the rest of the country is safe.¹³³ Alternatively, particular safe localities may be identified, that is, finding that there is no real chance of the feared persecution in a specific locality or localities. Some of the case law developed in the concept of ‘well-founded fear’ under the Convention, discussed below, may provide guidance on this inquiry.

The Department’s Refugee Law Guidelines suggest that an ‘area’ may be particularised by naming a township, province or broader internal border, or identifying a broad region where there is safety.¹³⁴

Whether the real chance of persecution is localised

As the High Court observed, in some cases different treatment in matters like race or religion may be encountered in various parts of a country so that in some parts there is insufficient basis for a real chance of persecution; but in other cases the conduct or attribute of the individual which attracts the apprehended persecution may not be susceptible of a differential assessment based upon matters of regional geography.¹³⁵

When considering whether the apprehended persecution can properly be regarded as localised, it will often be relevant to have regard to whether the source of the persecution feared is the state, or by contrast, a non-state agent.

Where the persecutor is the state, relocation will not be an option in many cases. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely that a victim of persecution in one place will be similarly vulnerable in another place within the state. However, there is no absolute rule, and each case must be considered in the light of its own particular facts.¹³⁶

Where the persecutor is a non-state agent, internal relocation will not be an option if there is a risk that the non-state actor will persecute the applicant in other areas of the country.

¹³² See *CSO15 v MIBP* [2018] FCAFC 14 (Tracey, Mortimer and Moshinsky JJ, 7 February 2018) at [42].

¹³³ In the context of the Convention, in *SZSEW v MIMAC* [2013] FCCA 1181 (Judge Cameron, 27 August 2013) at [26] the Court upheld a finding by a reviewer that while there was a real chance that the applicant might suffer serious harm by non-state agents in the Kurram Agency, he could safely relocate to a variety of locations in Pakistan away from the Kurram Agency.

¹³⁴ Department of Home Affairs, Refugee Law Guidelines, section 8.3, as re-issued 1 July 2017.

¹³⁵ *SZATV v MIAC* (2007) 233 CLR 18 at [26].

¹³⁶ *Januzi v SSHD* [2006] 2 AC 426 at [21] per Lord Bingham. See also at [48]-[49] per Lord Hope.

This will depend on a determination of whether the persecutor is likely to pursue the applicant elsewhere and if so, whether protection from the harm feared is available there.¹³⁷

Where an applicant has a real chance of being persecuted on more than one basis, it would be necessary to establish that each of those chances are localised.¹³⁸ It should also be remembered that the issue of whether an applicant's real chance of being persecuted is localised may extend beyond consideration of the initial basis, to whether the applicant would be exposed to other and different risks of being persecuted in the area of relocation.¹³⁹ If so, the real chance of being persecuted could not be said to be localised in the relevant sense.

A finding that the real chance of persecution relates to all areas of the country is not conclusive of whether the applicant has a 'well-founded fear of persecution'. It will remain necessary for the decision-maker to consider whether the other requirements of s.5J are satisfied in relation to the real chance of persecution, particularly if the nature of the persecution, or matters such as availability of state protection, vary throughout the country.

Considerations of access and safety

The Explanatory Memorandum to the Bill which introduced s.5J states that when determining whether a person can relocate to another area of the country where they do not have a real chance of persecution, a decision-maker should take into account whether the person can safely and legally access the area.¹⁴⁰ Consistently with the intention in the Explanatory Memorandum, the Departmental Refugee Law Guidelines interpret s.5J(1)(c) as requiring consideration of those factors, stating that:

It would seem logical to establish that the applicant would be able to safely and lawfully access the *safe area* on return under s5J(1)(c). Otherwise it would be difficult to conclude that the real chance of persecution does not exist in relation to all areas of the receiving country.¹⁴¹

The Guidelines outline factors to consider in determining safe and lawful access and recommend a broad interpretation of 'safety', which would encompass non-persecutory harm. The Guidelines also state that decision-makers should consider personal circumstances going to the question of whether an applicant has safe and lawful access to a safe area, including those relevant to their ability to travel.¹⁴²

However, such considerations appear beyond the plain terms of s.5J(1)(c), and in *CDZ16 v MIBP* the Federal Circuit Court held that there was no basis for reading into s.5J(1)(c) a

¹³⁷ UNHCR *Guidelines on international protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 23 July 2003, at [7]. For discussion of state protection, see Chapter 8 of this Guide.

¹³⁸ See, for example, *NABM of 2001 v MIMIA* (2002) 124 FCR 375 at [19]-[21], *SZQLM v MIAC* [2011] FMCA 921 (Smith FM, 9 December 2011) at [45]-[46] and also *MZYKW v MIAC* [2011] FMCA 630 (Whelan FM, 18 August 2011) at [104].

¹³⁹ UNHCR *Guidelines on international protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 23 July 2003, at [7].

¹⁴⁰ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.171 at [1182].

¹⁴¹ Department of Home Affairs, Refugee Law Guidelines, section 8.3, as re-issued 1 July 2017.

requirement to determine whether a particular place is a safe area that could be accessed safely and legally.¹⁴³ On appeal, the Federal Court did not reach a concluded view on this question but made *obiter* comments that it was inherently likely that the sweeping terms of s.5J(1)(c) ought to be construed as admitting of some qualification, which may be wider than the concept of safe and legal access.¹⁴⁴ It is likely that this provision will be subject to further judicial consideration.

Availability of effective protection measures

A person will be taken *not* to have a well-founded fear of persecution if effective protection measures are available to the person in the receiving country. This qualification to ‘well-founded fear of persecution’ is contained in s.5J(2) of the Act, and the circumstances in which effective protection measures are available to a person are set out in s.5LA, both of which are discussed in detail in Chapter 8 of this Guide.

Insofar as it is relevant to well-founded fear, the effect of this qualification is, despite there being a real chance of persecution, a person will not have a well-founded fear of persecution for the purposes of the Act because protection measures are available to them.

Modification of behaviour so as to avoid a real chance of persecution

Further qualifying the concept of ‘well-founded fear of persecution’, s.5J(3) provides that a person will *not* have a well-founded-fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution, other than particular types of modifications. The Federal Court has held that in considering a claim relating to modification of behaviour, a decision-maker must first consider whether paragraphs (a), (b) and (c) of s.5J(1) are satisfied. If they are, then the person ‘has a well-founded fear of persecution’ and the decision-maker must then go on to consider s.5J(3).¹⁴⁵

Section 5J(3) seems to have its origin in the principle developed under the Convention definition of refugee, as interpreted by the High Court in *Appellant S395/2002 v MIMA*, that an applicant cannot be required to take steps, reasonable or otherwise, to avoid offending his or her persecutors, or to modify some attribute or characteristic to avoid persecution.¹⁴⁶ According to *S395*, where an applicant would act discreetly or modify their behaviour upon return, it would be an error for a decision-maker to fail to ask *why* they would do so, and what would happen to them if they did not do so. If the reason for the modification is the

¹⁴² Department of Home Affairs, Refugee Law Guidelines, section 7.3, as re-issued 1 July 2017.

¹⁴³ *CDZ16 v MIBP* [2017] FCCA 356 (Judge Street, 28 February 2017) at [26].

¹⁴⁴ *CDZ16 v MIBP* [2017] FCA 967 (Logan J, 18 August 2017) at [26]–[29]. However, as the Federal Court did not disapprove of the primary judge’s finding, it appears the primary judgment in *CDZ16 v MIBP* [2017] FCCA 356 (Judge Street, 28 February 2017) remains binding.

¹⁴⁵ *ESD17 v MIBP* [2018] FCA 1716 (Rangiah J, 14 December 2018) at [24]–[25].

¹⁴⁶ *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40] and per Gummow and Hayne JJ at [80]. See also the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.174 at [1194].

applicant's fear of persecution, and that fear is well-founded, then the person may be a refugee within the meaning of Article 1A(2).¹⁴⁷ This approach to the Convention is discussed further in Chapters 4 and 11 of this Guide. The principle in S395 has been held to continue to apply under the codified refugee provisions, specifically whether an applicant faces a real chance of being persecuted under s.5J(1)(b).¹⁴⁸

The Explanatory Memorandum to the Bill which introduced s.5J into the Act states that s.5J(3) is intended to clarify that an assessment of a person's well-founded fear of persecution should take into account what a person *could* do to avoid a real chance of persecution in contrast to the Court's ruling in S395 that an assessment under the Convention concerns what a person *would* do.¹⁴⁹ The Explanatory Memorandum further states that as s.5J(3) allows consideration of reasonableness and sets out certain modifications which cannot be required, it is not inconsistent with S395.¹⁵⁰

The purpose of s.5J(3) is to confine the scope of the application of S395 to Convention-like reasons for modifying behaviour.¹⁵¹ It appears that s.5J(3) will arise for consideration in any case where the Tribunal finds that an applicant could avoid a real chance of persecution by modifying their behaviour, regardless of whether or not the Tribunal finds that they *would* modify their future behaviour (e.g. act discreetly).

Section 5J(3) essentially requires that the decision-maker consider whether steps that the person could take to modify their behaviour are 'reasonable'. As the Refugee Law Guidelines highlight, it will be important for decision-makers to clearly identify the relevant behaviour and the steps that could be taken.¹⁵² The Guidelines further indicate that what is 'reasonable' is to be determined objectively, although with regard to the applicant's particular circumstances and the situation in the receiving country.¹⁵³

The terms of s.5J(3) suggest that the modification need not eliminate any possibility of persecution. Rather, it must reduce the chance of persecution to something less than a real one. If a decision-maker finds that there are reasonable steps that *could* be taken by an applicant to modify their behaviour so as to bring the risk of persecution to below that of a real chance, then the applicant will be taken not to have a well-founded fear of persecution, even if they would not, in fact, modify their behaviour on return to the receiving country. If, as a result of the modification of behaviour of the kind required by s.5J(3), there is either no

¹⁴⁷ See the section in Chapter 11 headed 'Self expression and suppression of opinions, beliefs and identity' for further discussion of this issue.

¹⁴⁸ *ESD17 v MIBP* [2018] FCA 1716 (Rangiah J, 14 December 2018) at [28]–[29]. See also *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) where the Full Federal Court proceeded on the basis that the principle in S395 applied to the codified refugee provisions but did not expressly engage with this question (see, e.g. [82]).

¹⁴⁹ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.174 at [1194].

¹⁵⁰ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.174 at [1194]. See also *ESD17 v MIBP* [2018] FCA 1716 (Rangiah J, 14 December 2018) at [29] where the Court considered that there was no indication in the EM of any intention that the principles in S395 should not apply in considering whether s.5J(1)(b) is satisfied.

¹⁵¹ *AWL17 v MIBP* [2018] FCA 570 (Bromwich J, 27 April 2018) at [50] (application for special leave to appeal dismissed: *AWL17 v MIBP* [2018] HCASL 279 (Bell and Nettle JJ, 12 September 2018)).

¹⁵² Department of Home Affairs, Refugee Law Guidelines, sections 10.2 and 10.4, as re-issued 1 July 2017.

harm at all, or harm falling short of serious harm, then no further inquiry is required on that aspect of a claim of a well-founded fear of persecution.¹⁵⁴ Conversely, s.5J(3) will not apply to a person if there remains a real chance of the person being persecuted despite taking reasonable steps to reduce that risk, or if the modified behaviour would itself attract a real chance of persecution.¹⁵⁵

However, there are certain modifications that an applicant cannot be required to make, as discussed below.

Modifications that cannot be required

In determining whether a person could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution, a decision-maker cannot require that person to modify their behaviour in one of the ways set out in s.5J(3)(a) - (c).¹⁵⁶ These are modifications that would:

- conflict with a characteristic that is fundamental to the person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- without limiting the paragraphs above, require the person to do any of the following:
 - alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - conceal his or her true race, ethnicity, nationality or country of origin;
 - alter his or her political beliefs or conceal his or her true political beliefs;
 - conceal a physical, psychological or intellectual disability;
 - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

It appears that a positive finding to the effect that the relevant modifications do not fall within s.5J(3)(a)-(c) is required before it can be concluded that an applicant does not have a well-founded fear of persecution under s.5J(3).¹⁵⁷

¹⁵³ Department of Home Affairs, Refugee Law Guidelines, section 10.4, as re-issued 1 July 2017.

¹⁵⁴ *AWL17 v MIBP* [2018] FCA 570 (Bromwich J, 27 April 2018) at [50] (application for special leave to appeal dismissed: *AWL17 v MIBP* [2018] HCASL 279 (Bell and Nettle JJ, 12 September 2018)).

¹⁵⁵ See Department of Home Affairs, Refugee Law Guidelines, section 10.5, as re-issued 1 July 2017.

¹⁵⁶ In *AWL17 v MIBP* [2018] FCA 570 (Bromwich J, 27 April 2018) the Court observed that there was no suggestion that the applicant surrendering part of his fishing catch to members of the Sri Lankan navy amounted to modifying conduct that conflicted with any characteristic fundamental to his identity or conscience, concealed any innate or immutable characteristic or required him to do any of the things listed in s.5J(3)(c). An application for special leave to appeal this decision was dismissed: *AWL17 v MIBP* [2018] HCASL 279 (Bell and Nettle JJ, 12 September 2018).

¹⁵⁷ Without determining this question, the Court in *DCL17 v MIBP* [2018] FCA 1361 (Markovic J, 6 September 2018) nonetheless found no error in a finding that a decision-maker was *not satisfied* that the modificatory behaviour *would* conflict with, or conceal, a relevant characteristic, or constitute any other modification contemplated by s 5J(3)(c). It found

The first two modifications set out in s.5J(3)(c), which relate to characteristics fundamental to identity or conscience or that are innate or immutable, are similar to some of the characteristics of a particular social group as defined in s.5L and would also appear relevant to other grounds such as religion, political opinion, race or nationality. Most of the specific examples set out in s.5J(3)(c) are also clearly linked to the grounds set out in s.5J(1)(a) and there appears to be some overlap between the various categories. It would seem unlikely that these modifications would be considered ‘reasonable steps’ in any event.

Modification conflicting with a characteristic fundamental to identity or conscience

Under s.5J(3)(a), a decision-maker cannot require a person to modify their behaviour in a way that would conflict with a characteristic that is fundamental to the person’s identity or conscience. The Refugee Law Guidelines indicate that this exception does not preclude all modifications related to matters of identity or conscience, only those which *conflict* with a characteristic fundamental to identity or conscience.¹⁵⁸

According to the Explanatory Memorandum to the Bill that introduced this provision, the reference to ‘conscience’ encompasses aspects such as religion, political opinion and moral beliefs. Further, not all modifications in behaviour contrary to any aspect of a person’s conscience will necessarily fall within this provision; only those that are fundamental to a person’s conscience.¹⁵⁹ The Refugee Law Guidelines suggest that ‘identity’ relates to features or qualities of the person which may include things such as culture.¹⁶⁰ However, it will generally be unnecessary to draw a clear distinction as to whether the relevant characteristic is an element of identity or conscience.¹⁶¹

The requirement in s.5J(3)(a) that the characteristic is fundamental to *the person’s* identity or conscience, implies that the decision-maker will need to have regard to the importance or centrality of the characteristic to the personal beliefs of the applicant in question. The Explanatory Memorandum and Refugee Law Guidelines, however, suggest a more objective assessment.¹⁶²

that there was no relevant difference between this expression and that urged by the appellant, being that the decision-maker was *satisfied* that the modificatory behaviour would *not* conflict with, or conceal, a relevant characteristic.

¹⁵⁸ Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017.

¹⁵⁹ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.173 at [1191].

¹⁶⁰ Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017.

¹⁶¹ Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017.

¹⁶² An example in the Explanatory Memorandum states that in considering whether a person could avoid persecution by not continuing to evangelise, the person would be assessed as having a well-founded fear of persecution if evangelism was ‘a fundamental part of the person’s religion and therefore fundamental to their conscience’: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.173 at [1192]. It is unclear whether this is intended to imply that whether or not a characteristic is ‘fundamental’ is to be assessed objectively rather than by reference to the person’s own beliefs. If that is what is intended, it does not appear consistent with the words of s.5J(3)(a), and may prove difficult to apply in cases where the characteristic arises from an applicant’s moral, rather than political or religious, beliefs. The Departmental Guidelines indicate that determination of what is fundamental will involve consideration of what is core or central to the religion: Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017.

Modification requiring an applicant to conceal an innate or immutable characteristic

A decision-maker is prohibited by s.5J(3)(b) from requiring an applicant to modify their behaviour so as to conceal an innate or immutable characteristic. ‘Innate’ in this context is intended to include inborn characteristics, which could include aspects such as the colour of a person’s skin, a disability, or a person’s gender. ‘Immutable’ encompasses a background which cannot be changed, which could be an attribute that a person has acquired at some stage of his or her life.¹⁶³ Examples may include the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking.¹⁶⁴ However, it has been held that an applicant’s employment and residential history were not ‘immutable characteristics’ as they were not fundamental to the applicant’s identity or conscience.¹⁶⁵

According to the Refugee Law Guidelines, while consideration of steps to modify behaviour that mask or hide the characteristics (even for a brief period) will not be reasonable, decision-makers may nonetheless consider modification in respect of innate or immutable characteristics if the modification does not *conceal* those characteristics.¹⁶⁶

Modification of a specified type

Section 5J(3)(c) identifies specific modifications that cannot be required of an applicant. Specifically, those that would require a person to:

- alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;¹⁶⁷
- conceal his or her true race, ethnicity, nationality or country of origin;
- alter his or her political beliefs or conceal his or her true political beliefs;
- conceal a physical, psychological or intellectual disability;¹⁶⁸

¹⁶³ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.173-4 at [1193].

¹⁶⁴ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.174 at [1193].

¹⁶⁵ *AYY17 v MIBP* [2017] FCCA 2886 (Judge Vasta, 28 November 2017) at [42]-[46]. The Court reached this finding by reference to the non-exhaustive list of characteristics in s.5J(3): at [44]. However, as characteristics fundamental to a person’s identity or conscience are covered in s.5J(3)(a), it is unclear why these elements should also be imported into a consideration of what is immutable under s.5J(3)(b). This issue may be the subject of further judicial consideration, however it was not considered on appeal by the Federal Court in *AYY17 v MIBP* [2018] FCAFC 89 (Collier, McKerracher and Banks-Smith JJ, 18 June 2018), and an application for special leave to appeal was subsequently dismissed: *AYY17 v MIBP* [2018] HCASL 334 (Gordon and Edelman JJ, 7 November 2018).

¹⁶⁶ Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017.

¹⁶⁷ According to the Refugee Law Guidelines, while this provision appears to require consideration of a person’s subjective beliefs, to construe it in such a way would potentially leave s.5J(3)(a) (which the Department considers to require an objective assessment of what is central to the religion in question) with little work to do. The Department therefore advises decision-makers to consider whether the action professed to be part of the religion is, in fact, part of that religion: Department of Home Affairs, Refugee Law Guidelines, section 10.3, as re-issued 1 July 2017. However, as discussed above, it is unclear that s.5J(3)(a) does in fact require an objective assessment. It may be that s.5J(3)(c)(i) does no more than illustrate a potential circumstance in which the exception in s.5J(3)(a) will apply.

¹⁶⁸ The Refugee Law Guidelines note that if a person is voluntarily receiving treatment for a disability which masks its observable signs, decision-makers should consider why the person is undertaking the treatment, as it may be a step to improve quality of life rather than to avoid persecution: Department of Home Affairs, Refugee Law Guidelines, section 10.3,

- enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;¹⁶⁹
- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

These specific categories of modifications were described in Parliament as ‘self-evident’ and were included so as to more closely define the modifications that cannot be required.¹⁷⁰

The concept of persecution

As it relates to the compound concept of ‘well-founded fear of persecution’, s.5J is relevant to consideration of whether the harm that an applicant may suffer amounts to persecution. Sections 5J(4) qualifies the concept of persecution by requiring that:

- one or more of the reasons set out in s.5J(1)(a) are the essential and significant reason or reasons for the persecution;
- the persecution involves serious harm to the person; and
- the persecution involves systematic and discriminatory conduct.

Non-exhaustive examples of what constitutes serious harm are set out in s.5J(5).

Sections 5J(4) and (5) are virtually identical to similar qualifications which apply to consideration of ‘persecution’ under the Convention, and are discussed in detail in Chapter 4 of this Guide.

Conduct engaged in for the purpose of strengthening the application

Under the Convention, a person may become a refugee after leaving their country of origin, either because of events that have taken place since their departure, or because of some action that they or others have taken. Such a person is referred to as a refugee *sur place*.

However, s.5J(6) of the Act prevents a decision-maker from taking into account certain conduct by applicants when determining whether there is a well-founded fear. Section 5J(6) provides that:

In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the

as re-issued 1 July 2017.

¹⁶⁹ It is unclear whether the reference to ‘child’ is limited to a person under 18, or whether it would encompass a parent opposed to the forced marriage of an adult child. This is unlikely to be of any import, as accepting any forced marriage may not be a ‘reasonable’ step.

¹⁷⁰ Commonwealth, *Parliamentary Debates*, Senate, 4 December 2014, 10363-4 (Senator Kim Carr). Note that s.5J(3)(c) was inserted during parliamentary debate and is not referenced in any of the Explanatory Memoranda to the Bill.

purpose of strengthening the person's claim to be a refugee.

This qualification is identical to that in s.91R(3), which applies to pre 16 December 2014 visa applications. Therefore the discussion above (see 'Refugees 'Sur Place'' and particularly the section titled 'What is the effect of actions taken in bad faith? – Section 91R(3)') is also applicable to s.5J(6).