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INTRODUCTION

Before a protection visa can be granted to a person who satisfies either the refugee or complementary protection criteria in s.36(2) of the *Migration Act 1958* (the Act), consideration must be given to whether that person may not be entitled to the visa because they have ceased to be a 'refugee' or because they are excluded from protection because, for example, they have committed certain crimes or are a danger to Australia's security.¹

The exclusion and/or cessation provisions applicable to an applicant seeking to satisfy the refugee criterion in s.36(2)(a) vary depending upon when the applicant applied for the protection visa. For applications made prior to 16 December 2014, the relevant exclusion and cessation criteria are those in the 1951 *Convention relating to the Status of Refugees* (the Convention)² as amended by the 1967 *Protocol relating to the Status of Refugees* (the Protocol)³ (although some statutory exclusions are also applicable). For applications made on or after that date, the definition of a refugee and applicable exclusion provisions are codified in the Act.⁴ There are additional statutory exclusions applicable to the

¹ Ministerial Direction No.75 – Refusal of Protection visas relying on section 36(1C) and section 36(2C)(b), made under s.499 of the Act (on 6 September 2017), requires Departmental decision-makers to consider a Protection visa applicant's refugee and complementary protection claims under s.36(2)(a) and (aa) before considering any character or security concerns.

² United Nations Treaty Series (UNTS) vol. 189, at 137; Australian Treaty Series (1954) No.5.

³ UNTS vol. 606, p.267; Australian Treaty Series (1973) No.37.

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

complementary protection criterion in s.36(2)(aa), which apply regardless of the application date.

This chapter focuses on exclusion and cessation in the Convention context, but also briefly considers the exclusion provisions which apply to the complementary protection criterion and the post 16 December 2014 codified refugee definition.

There are also statutory exclusions relating to third country protection which are applicable to all protection visa applications. These are discussed in Chapter 9 of this Guide.

Exclusion and cessation in relation to refugee status

The Convention excludes from refugee status persons who, despite falling within the terms of Article 1A(2), are not in need of protection (because they have ceased to require that protection, are presently receiving protection from certain United Nations organs, have acquired certain rights in a third country), or who are not considered to be deserving of protection because they have committed certain very serious crimes.⁵ While not all of these provisions have been carried over into the codified definition of refugee, those that have largely replicate the terms of the Convention.

Articles 32 and 33(2) of the Convention relate to expulsion of refugees on the grounds of national security or public order, or danger to the community. However, these do not form part of the definition of 'refugee' and, in the context of the pre 16 December 2014 refugee criterion, have no role to play.

Protection visa applications made prior to 16 December 2014

The phrase 'in respect of whom ... Australia has protection obligations under the Refugees Convention' in s.36(2)(a) of the Act describes a person who is a refugee within the meaning of Article 1 of the Convention. Whether Australia has protection obligations under s.36(2)(a) depends upon whether a person satisfies the definition in Article 1A(2), in the context of other provisions of Article 1.⁶ The relevant clauses are:

- **Article 1C** - which sets out circumstances in which refugee status will cease to apply to a refugee.
- **Article 1D** - which excludes from the Convention persons presently receiving assistance or protection from a United Nations organ other than the United Nations High Commissioner for Refugees (UNHCR).

⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, (Handbook), reissued 2019 at [140].

⁶ *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [33], [43]; *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ at [37], [48]; per Kirby J at [68], [82].

- **Article 1E** - which excludes from Convention protection persons who have the rights and obligations of a national of a third country.
- **Article 1F** - which excludes persons who have committed certain types of crime.

As the clauses in Article 1 of the Convention together comprise the definition of refugee, it is permissible to determine whether an applicant is a person in respect of whom Australia has protection obligations by considering Article 1D, 1E or 1F, and in some cases 1C, without first undertaking a separate inquiry as to whether the applicant meets the requirements of Article 1A(2). If any of these provisions are found to apply, then that will be the end of the inquiry.⁷

Protection visa applications made on or after 16 December 2014

For protection visa applications made on or after 16 December 2014, the refugee criterion in s.36(2)(a) does not contain any link to the Convention. Rather, to satisfy that criterion, an applicant must be a 'refugee' within the meaning of s.5H of the Act. Section 5H(1) sets out the substantive meaning of 'refugee', which includes that an applicant has a well-founded fear of persecution. However, that section is qualified by the exclusion clause in s.5H(2) which provides that s.5H(1) will not apply if the Minister has serious reasons for considering that an applicant:

- has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- has committed a serious non-political crime before entering Australia; or
- has been guilty of acts contrary to the purposes and principles of the United Nations.

These grounds are substantively the same as those in Article 1F of the Convention and parliament's intention was for s.5H(2) to be interpreted consistently with existing Australian case law on Article 1F.⁸ Therefore the discussion of Article 1F below will be of direct relevance.

In contrast, the additional grounds for exclusion and cessation in Articles 1C, D and E of the Convention have no direct statutory equivalent under the codified definition of 'refugee' in s.5H. As such, the discussion below relating to those articles does not apply to post 16 December 2014 applications.

⁷ See *MIMA v Thiyagarajah* (1998) 80 FCR 543 at 555, *MIMA v Singh* (2002) 209 CLR 533 at [5]. These cases concerned Articles 1E and 1F respectively, but the principle would equally apply to Article 1D. Article 1C is in a somewhat different category as it involves cessation rather than exclusion of refugee status.

⁸ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.170 at [1173].

Exclusion from complementary protection

As with the assessment of refugee status under the Convention, and the obligations surrounding the expulsion of refugees under Article 33 of Convention, the Act imposes restrictions on the grant of a protection visa in respect of persons who have committed certain serious crimes or are considered to be a danger to the community. These restrictions are intended to provide the same exclusion to the complementary protection regime as applies to those claiming protection under the Convention.⁹ Relevantly, s.36(2C) provides that a person will be taken not to satisfy the complementary protection criterion if:

- the Minister has serious reasons for considering that the applicant:
 - has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations (s.36(2C)(a)(i));
 - has committed a serious non-political crime before entering Australia (s.36(2C)(a)(ii)); or
 - has been guilty of acts contrary to the purposes and principles of the United Nations (s.36(2C)(a)(iii)); or
- the Minister considers, on reasonable grounds, that the non-citizen:
 - is a danger to Australia's security (s.36(2C)(b)(i)); or
 - is a danger to the Australian community, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence) (s.36(2C)(b)(ii)).

Section 36(2C)(a) essentially imports Article 1F of the Convention into the consideration of whether a person is owed complementary protection, whilst s.36(2C)(b) imports Articles 32 and 33.

For further information on s.36(2C) see Chapter 10 of this Guide. This chapter focuses on exclusion and cessation in the context of the Convention; however, given the stated intention of parliament to create a 'mirror' regime for the complementary protection criterion, the discussion below of concepts relating to Article 1F and Article 33, will be of direct relevance.¹⁰

Security risk criteria for the grant of a protection visa

Separate to the exclusion and cessation provisions that qualify the refugee and complementary protection criteria, there are a number of additional bases on which a person may be excluded from being granted a protection visa. These additional criteria – ss.36(1B)

⁹ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [87]-[88].

¹⁰ For Article 1F, see in particular the sections dealing with 'Serious reasons for considering', 'War crimes', 'Crimes against

and (1C) – relate to security specific matters. Whether or not these criteria are applicable depends upon the date of the protection visa application.

Unlike Articles 1C-1F of the Convention or ss.5H(2) or 36(2C) of the Act, ss.36(1B) and (1C) do not prevent an applicant from meeting the definition of a ‘refugee’ or the complementary protection criterion. Rather, they operate to prevent a person who may otherwise meet the definition of ‘refugee’ or the complementary protection criteria from being granted a protection visa.

Adverse ASIO assessment – s.36(1B)

Section 36(1B) provides that a criterion for the grant of a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of s.4 of the *Australian Security Intelligence Organisation Act 1979*).¹¹

Danger to security or the community – s.36(1C)

For protection visa applications made on or after 16 December 2014, the further criterion in s.36(1C) also applies.¹² Section 36(1C) is in terms similar to Articles 32 and 33 of the Convention and s.36(2C) of the Act. It provides that a criterion for the grant of a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

- is a danger to Australia’s security; or
- having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community (‘particularly serious crime’ is defined in s.5M to include a crime that consists of the commission of a serious Australian offence or serious foreign offence).

While s.36(1C) applies to all applicants who make a protection visa application on or after 16 December 2014, in practice it is of greater relevance to applicants who satisfy the refugee criterion in s.36(2)(a). This is because s.36(2C)(b) already has the effect that an applicant who falls within grounds similar to those in s.36(1C) will be taken not to satisfy the complementary protection criterion in s.36(2)(aa). In that sense, the provisions perform a duplicate role.

peace, ‘Crimes against humanity’ and ‘Acts contrary to the purposes and principles of the UN’.

¹¹ Subsection 36(1B) was inserted by the *Migration Amendment Act 2014* (No. 30 of 2014), applying to visa applications made on or after 28 May 2014, or made before, but not finally determined as at that date.

¹² Subsection 36(1C) was inserted by item 9, Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135). It commenced on 18 April 2015 and applies 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).

As s.36(1C) is intended to codify Article 33(2) of the Convention,¹³ the discussion below on that Article will be relevant to its interpretation.

JURISDICTIONAL ISSUES

Most decisions to refuse or cancel a protection visa are reviewable in the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT).¹⁴ These include matters involving Articles 1C, 1D and 1E. However, decisions to refuse or cancel a protection visa relying upon ss.5H(2), 36(1C), 36(2C) or Article 1F of the Convention are not reviewable by the MRD and are instead reviewed in the AAT's General Division.¹⁵ A decision relying on s.36(1B) is not reviewable by the AAT.¹⁶ The jurisdiction of the AAT is discussed in greater detail in Chapter 12 of this Guide.

ARTICLE 1C

The principal concern of the Convention is with the protection of a person against threats of certain kinds in another country. The Convention does not require that when the threat passes, protection should be regarded as necessary and continuing.¹⁷ Article 1C is broadly directed at persons who, having once required Convention protection, no longer do so. Based on the underlying principle that refugee status was not intended to be permanent, it was intended to allow a state to divest itself of the protection 'burden' when international protection is no longer needed.¹⁸ It states:

This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality he has voluntarily re-acquired it, or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

¹³ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, p.180 at [1236].

¹⁴ As per s.411.

¹⁵ Sections 411(1), 500(1), 500(4) and 500(4A).

¹⁶ Section 500(4A)(a).

¹⁷ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ at [36].

¹⁸ UNHCR, *Discussion Note on the Application of the 'ceased circumstances' Cessation Clauses in the 1951 Convention*, 20 December 1991 (EC/SCP/1992/CRP.1) ('*UNHCR Discussion Note on the Cessation Clauses, 1991*') at [1]; UNHCR *Note on the Cessation Clauses*, 30 May 1997 (EC/47/SC/CRP.30) ('*UNHCR Note on the Cessation Clauses, 1997*') at [4], [39]; N Robinson, *Convention Relating to the Status of Refugees - Its History, Contents and Interpretation, A Commentary by Nehemiah Robinson* (UNHCR, 1953) at 60. See also J Fitzpatrick, *Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article 1.4 of the 1969 OAU Convention*, Background Paper for UNHCR's Lisbon expert roundtable, May 2001; UNHCR '*Cessation of Status*' *Executive Committee Conclusion No. 69* (9 October 1992); UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03 ('*Ceased Circumstances Guidelines, 2003*').

- (6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Cessation of refugee status under one of these provisions may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1A(2).¹⁹

The first four clauses of Article 1C relate to changes in circumstances which are brought about by refugees themselves. Clauses (5) and (6) 'are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist'.²⁰

Article 1C has rarely been applied in practice and there is very little guidance to be obtained from the higher courts of the contracting states.²¹ In Australia, Article 1C has been considered and applied on a number of occasions in the context of further protection visa applications by previously recognised refugees.²² Judicial scrutiny of some of these decisions disclosed divided opinion as to its interpretation and operation.²³ The High Court has made it clear that in that context, in considering whether an applicant is a person in respect of whom Australia has protection obligations, it will not usually be necessary to give separate consideration to the cessation provisions, but rather whether a person satisfies the refugee definition in Article 1A of the Convention, albeit in the context of other relevant articles.²⁴

¹⁹ UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', *Refugee Survey Quarterly*, (2001) 20 (3) 77 ('*UNHCR Interpreting Article 1, 2001*') at [54]. See also Robinson, above n 18 at 58: 'Section C is the result of the conditions described in par. A for a person to become a "refugee" within the meaning of the Convention. Once any of the cumulative conditions disappear, the basis for his special status ceases to exist'; and *NBGM v MIMIA* (2006) 150 FCR 522 per Allsop J at [166], [202] in relation to Article 1C(5) and 1A(2). The reasons of the High Court majority in *QAAH* and *NBGM* indicate agreement with this view: *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ, Kirby J dissenting; *NBGM v MIMIA* (2006) 231 CLR 52 per Callinan, Heydon and Crennan JJ, Gummow ACJ generally agreeing, Kirby J dissenting. While the issue before the Court in both cases related to Article 1C(5), it is clear from the majority reasoning in *QAAH*, and the discussion during the hearing in that case ([2006] HCATrans 339 at lines 692-704, 726-7 and 742-758), that the proposition applies equally to Article 1C(1)-(4).

²⁰ UNHCR, *Handbook* above n 5 at [115]. While Article 1C(5) and (6) are usually regarded as contemplating changes in country conditions, there appears to be no reason why they might not apply because reasons relating solely to the refugee's own personal circumstances have ceased to exist.

²¹ See for example, G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edition, 2007) at 142; J Fitzpatrick and R Bonoan, 'Cessation of refugee protection' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (UNHCR, 2003) at 512, citing UNHCR *Refugee Protection: A Guide to International Refugee Law*, 2001; *Cessation of Refugee Status - Summary Conclusions*, Lisbon Expert Roundtable, 3-4 May 2001 (UNHCR/IOM/08/2002; UNHCR FOM/08/2002) ('*Summary Conclusions*') at [1], and referring specifically to Articles 1C(5) and (6); and Tim Eicke, Counsel for the Intervener, in UNHCR's Case for the Intervener in *R (Hoxha) v Special Adjudicator*, UNHCR Policy and Practice, 5 January 2005, at [8.1].

²² See discussion of temporary protection visas at n 26 below.

²³ Largely encapsulated in *QAAH of 2004 v MIMIA* [2004] FCA 1448 (Dowsett J, 11 November 2004) and on appeal *QAAH v MIMIA* (2005) 145 FCR 363 and *MIMIA v QAAH of 2004* (2006) 231 CLR 1; and *NBGM v MIMIA* [2004] FCA 1373 (Emmett J, 25 October 2004) and on appeal *NBGM v MIMIA* (2006) 150 FCR 522 and *NBGM v MIMIA* (2006) 231 CLR 52.

²⁴ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [37] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

Circumstances in which Article 1C issues may arise for consideration

Article 1C will only arise for consideration by Australian authorities in relation to a person who has already been recognised by Australia as a refugee.²⁵ Historically, this occurred in the context of temporary protection visa holders who applied for a further temporary protection visa.²⁶ The opening words of Article 1C indicate that the cessation provisions operate automatically according to their terms, and need not be triggered by a request for a visa, although in practice such a request ordinarily was the occasion for consideration of a person's right or otherwise to continuing protection.²⁷

In relation to review of decisions to refuse to grant further protection visas under the previous legislation, where the decision-maker was considering whether the applicant in such a case was a person to whom Australia had protection obligations, it was legitimate to inquire whether he or she has ceased to be a refugee by operation of one of the Article 1C cessation provisions.²⁸ However, the High Court made it clear that while this approach would not necessarily be wrong, the proper approach in these cases, as in other protection visa applications, is to apply the definition of 'refugee' in Article 1A(2).²⁹

Article 1C may still arise for consideration, indirectly, in relation to applications for review of certain visa cancellation decisions.³⁰ Under s.116(1) of the Act, a protection visa may be cancelled on various grounds, including because any circumstances which permitted the grant of the visa no longer exist, or because the visa holder has not complied with a visa condition.³¹ One of the circumstances which permit the granting of a protection visa is that the applicant is a person in respect of whom Australia has protection obligations.³² In

²⁵ In *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 432 and Toohey J at 405. Article 1C would not arise for the Tribunal's consideration where the applicant has been recognised as a refugee by UNHCR under its mandate, or by another country under the Convention: see *NBKS v MIMIA* [2005] FCA 1554 (Moore J, 10 November 2005) (although overturned on appeal in *NBKS v MIMIA* (2006) 156 FCR 205, no issue was taken by the Full Court in relation to this principle), and *SZCZJ v MIMIA* [2006] FMCA 1583 (Scarlett FM, 25 October 2006).

²⁶ There have been three distinct temporary protection regimes under the Act and Regulations. Initially, between 1999 and 2008, Class XA contained a Subclass 785 (Temporary Protection) (complemented by a Protection (Class XC) visa which was granted to certain persons holding a Subclass 785 (Temporary Protection) visa, who had made an application for a further Protection (Class XA) visa and whose application had not yet been determined). These visas were introduced by the Migration Amendment Regulations 1999 (No.12) (SR 1999 No. 243) from 20 October 1999 and repealed by the Migration Amendment Regulations 2008 (No.5) (SLI 2008, No.168) from 9 August 2008. Secondly, between 18 October 2013 and 2 December 2013, Class XA also contained the Subclass 785 (Temporary Protection) visa which was introduced by the Migration Amendment (Temporary Protection Visas) Regulation 2013 (SLI 2013, No.234) but was subsequently disallowed by the Senate on 2 December 2013 at 9:46pm: Commonwealth, *Parliamentary Debates*, Senate, 2 December 2013, 106-112, on motion by Senator Hanson-Young. The third and current regime, introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135), provides for Temporary Protection Class XD, Subclass 785 visas with effect from 16 December 2014 (although by operation of the 'conversion' regulation, some applications for a Class XA Protection visa, made prior to that date, are taken to instead be applications for a Class XD visa: r.2.08F). However, as the post 16 December 2014 criteria for a protection visa contain no equivalent of Article 1C, cessation within the meaning of the Convention will have no relevance to the determination of any further protection visa applications made by persons already found to be a refugee and granted temporary protection.

²⁷ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ at [44]. Their Honours were referring specifically to Article 1C(5) but their reasoning makes it clear that these observations would apply equally to the other provisions of Article 1C.

²⁸ See *NBGM v MIMIA* [2004] FCA 1373 (Emmett J, 25 October 2004) at [65].

²⁹ *MIMIA v QAAH of 2004* (2006) 231 CLR 1; *NBGM v MIMIA* (2006) 231 CLR 52. In each case, although not endorsing the Tribunal's reliance on Article 1C, the majority found no error in the Tribunal's decision.

³⁰ The Tribunal's jurisdiction to review cancellation decisions is contained in s.411(1)(b) and (d) of the Act, as limited by s.411(2) and (3).

³¹ Sections 116(1)(a) and (b) of the Act. Permanent protection visas cannot be cancelled under s.116(1) if the visa holder is in the migration zone and was immigration cleared on last entering Australia: s.117(2).

³² Sections 36(2)(a) and (aa) of the Act.

addition, protection visa holders are subject to a condition imposing a restriction on the visa holder's return to the country by reference to which they were found to be owed protection obligations.³³ Thus, there is obvious overlap between these grounds for cancellation and some of the provisions of Article 1C. For example, where a protection visa is cancelled on the basis that the circumstances which permitted the grant of the visa no longer exist, it may be that the evidentiary basis of the decision would also support cessation of refugee status under Article 1C(5) or (6). Similarly, return to the country from which the person was granted protection may support cessation under Article 1C(1) or (4). However, the statutory provisions should always remain the focus of the review. The relevant question for the Tribunal in the review of such a decision is whether the statutory ground for cancellation is made out and if so whether, as a discretionary matter and having regard to relevant statutory and policy considerations, the visa should be cancelled.

Changes in personal circumstances - Article 1C(1) - (4)

Article 1C(1) - Voluntary re-availment of the protection of country of nationality

Article 1C(1) applies to refugees possessing a nationality who remain outside their country of nationality and who voluntarily re-avail themselves of the protection of that country. 'Protection' in this context comprises the establishment of normal relations with the authorities of the country as a result of actions by the refugee, such as registration at consulates or application for, and renewal of, passports or certificates of nationality.³⁴ Article 1C(1) does not primarily refer to refugees who have returned to their country of nationality.³⁵

Commentators agree that there are three key requirements for the operation of Article 1C(1):

- the refugee must act voluntarily in requesting formal protection;
- there must be an intention to avail him or herself of the protection; and
- the refugee must actually obtain the protection.³⁶

An act that is not voluntary will not enliven Article 1C(1).³⁷ The emphasis on intention means that some purely practical forms of contact with the diplomatic mission of the refugee's

³³ See condition 8559, applicable to Protection (Class XA) Subclass 866 visa holders: cl.866.611 of Schedule 2 to the Migration Regulations 1994; and the more restrictive condition 8570 applicable to holders of Temporary Protection (Class XD) Subclass 785 or Safe Haven Enterprise (Class XE) Subclass 790 visas: cls.785.611 and 790.611.

³⁴ Goodwin-Gill and McAdam, above n 21 at 136. See also UNHCR, *Note on the Cessation Clauses 1997*, above n 18 at [12]. This is consistent with the opinion of the High Court as to the meaning of 'protection' in Article 1A(1): *MIMA v Khawar* (2002) 210 CLR 1 at [62], *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [19], [63], [109].

³⁵ Refugees who have returned to their country are governed by Article 1C(4), discussed below. See UNHCR *Handbook*, above n 5, at [118]. In this respect, Allsop J's comment in *Rezaei v MIMA* [2001] FCA 1294 at [52], that the protection to which Article 1C(1) refers 'is not limited to the protection brought about by physical presence within the relevant country ... but includes the re-availment of consular and diplomatic protections' (emphasis added) may be somewhat misleading.

³⁶ See e.g. UNHCR, *Handbook*, above n 5 at [119], JC Hathaway and M Foster, *The Law of Refugee Status*, (Cambridge University Press, 2nd edition, 2014), at 465-466, Goodwin-Gill and McAdam, above n 21 at 136, P Weis, 'The Concept of the Refugee in International Law' (1960) 87 *Journal du droit international* 928 at 976.

³⁷ Such as applying to a Consulate for a national passport on the instruction of the country of refuge. See UNHCR *Handbook*, above n 5 at [120]; Goodwin-Gill and McAdam, above n 21 at 136; Hathaway and Foster, above n 36, at 466. Commentators suggest that obtaining a national passport or renewal creates a presumption, in the absence of evidence to the contrary,

country will not usually come within the scope of Article 1C(1).³⁸ For there to be a re-availment under this provision there needs to be shown the voluntary and conscious choice of subjection to the government of the relevant country. In other words, there has to be shown the normalisation of the relationship between State and individual.³⁹

When considering Article 1C(1), all the circumstances of the contact between the individual and the country of origin should be taken into account. These might include the object to be attained by the contact, whether the contact was successful, whether it was repeated and what advantages were actually obtained.⁴⁰

While Article 1C(1) does not primarily apply to refugees who have returned to their country of nationality, visits to the country may be relevant. For example, renewing and making use of a national passport for travel to the country of nationality is likely to be persuasive evidence of cessation of refugee status.⁴¹ In *Rezaei v MIMA* the applicant husband and wife had sought review of a decision refusing to revoke cancellation of their protection visas on the basis of voluntary re-availment of protection of and voluntary re-establishment in their country of nationality, Iran.⁴² Three months after being granted protection visas the applicants had been issued with new Iranian passports, in which the Australian authorities had affixed protection visa labels. Some months later the applicants returned to Iran where they had remained. While in Iran they had adopted a child and subsequently applied to the Australian authorities to sponsor the child and return to Australia. In dismissing the application, Allsop J held that there was a clear evidential basis for coming to the conclusion that there was, by the time of entry into Iran, a re-availment of protection in the relevant sense.⁴³

Depending upon the circumstances, travel to the home country with a travel document issued by the country of residence, rather than a national passport, may constitute re-availment of protection for the purposes of Article 1C(1). However, the UNHCR cautions that cases of this kind should be judged on their individual merits:

Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than

that re-availment of protection is intended (see e.g. UNHCR, *Handbook*, above 5 at [121], Goodwin-Gill and McAdam, above n 21, at 136). However this may not be consistent with Australian law: see *Rezaei v MIMA* [2001] FCA 1294 (Allsop J, 14 September 2001) at [50], [51].

³⁸ Such as requests for educational or occupational certificates or access to personal birth, marital and other records. See UNHCR *Handbook*, above n 5 at [121], Hathaway and Foster, above n 36, at 465-466. The UNHCR *Handbook* also refers, for example, to the situation where a person may need to apply for a divorce in his home country because no other divorce may have international recognition. The Handbook states at [120] that 'such an act cannot be considered to be a 'voluntary reavailment of protection' and will not deprive a person of refugee status'.

³⁹ A Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff Leyden, 1966) at 384, cited with approval in *Rezaei v MIMA* [2001] FCA 1294 (Allsop J, 14 September 2001) at [51].

⁴⁰ Goodwin-Gill and McAdam, above n 21 at 137.

⁴¹ Goodwin-Gill and McAdam, above n 21 at 136.

⁴² [2001] FCA 1294 (Allsop J, 14 September 2001).

⁴³ *Rezaei v MIMA* [2001] FCA 1294 (Allsop J, 14 September 2001) at [53]. Justice Allsop rejected an argument that the applicants had assumed that they had the permission of the Australian authorities to return to Iran because they had placed protection visa labels in their passports, permitting them unrestricted travel in and out of Australia. His Honour further held at [60] that even if there was an error with respect to the applicability of Article 1C(1) the decision was equally open to be supported on the ground of re-establishment in Iran (Article 1C(4)).

regular visits to that country spent on holidays or for the purpose of establishing business relations.⁴⁴

This passage was cited with apparent approval in *A v MIMA*, a case relating to the deportation of a Vietnamese national, A, who had come to Australia as a refugee and had subsequently been convicted in Australia of importing heroin from Vietnam.⁴⁵ A had visited Vietnam, purportedly to visit his ill mother, using an Australian government travel document and a visa/permit obtained from the Vietnamese government for travel to Vietnam. Justice Katz considered that it would have been open on the evidence to conclude that his true purpose in travelling to Vietnam had been a business one (albeit illicit). His Honour expressed the view that if the Tribunal had so concluded, it could also have concluded, consistently with the UNHCR's approach to Article 1C(1), that by travelling to Vietnam as he had, A had voluntarily re-availed himself of Vietnamese protection within the meaning of that paragraph.⁴⁶

Article 1C(2) - Voluntary re-acquisition of nationality

The application of Article 1C(2) is limited to refugees who have previously lost their nationality, such as by an individual or collective measure by the authorities of the country of origin, and voluntarily re-acquire it.⁴⁷ As with Article 1C(1), it is essential that the refugee's act be voluntary. However, in some circumstances *inaction* may result in voluntary re-acquisition. The UNHCR Handbook states:

... The granting of nationality by operation of law or by decree does not imply voluntary re-acquisition, unless the nationality has been expressly or impliedly accepted. A person does not cease to be a refugee merely because he could have reacquired his former nationality by option, unless this option has actually been exercised. If ... former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality.⁴⁸

Thus, Article 1C(2) will only apply if re-acquisition is voluntary and complete. This may include circumstances where the refugee re-acquires his or her nationality by operation of law and knowingly and without good reason fails to exercise an option to opt out. It will not apply if re-acquisition is involuntary or if, for any reason, an opportunity for re-acquisition has not been exercised.

Article 1C(3) - Acquisition of new nationality

Article 1C(3) applies to refugees who acquire a new nationality, and enjoy the protection of the country of that nationality. It is based on the presumption that persons who enjoy

⁴⁴ UNHCR, *Handbook*, above n 5 at [125].

⁴⁵ [1999] FCA 227 (Burchett, Lee and Katz JJ, 16 March 1999).

⁴⁶ *A v MIMA* [1999] FCA 227 (Burchett, Lee and Katz JJ, 16 March 1999) at [38]-[39]. The Tribunal had not considered Article 1C. In the Full Court, only Katz J considered this issue, and his discussion of Article 1C was *obiter dicta*. On the facts of the case, his Honour's approach would suggest that return for criminal purposes that may attract criminal charges in the home country would not be an impediment to cessation under Article 1C(1).

⁴⁷ Goodwin-Gill and McAdam, above n 21 at 138 describe such action as constituting the 'supreme manifestation' of re-availing of protection.

⁴⁸ UNHCR, *Handbook*, above n 5 at [128].

national protection do not require international protection.⁴⁹ In contrast to Articles 1C(1), (2) and (4), Article 1C(3) does not expressly require an element of voluntariness.⁵⁰ The new nationality must, however, be effective. Goodwin-Gill states that this means the person must enjoy at least the fundamental features of nationality including the right to return and the right to residence.⁵¹

Article 1C(4) - Voluntary re-establishment in the country where persecution was feared

Article 1C(4) is the corollary of the requirement in Article 1A(2) that a refugee be outside the country of nationality or former habitual residence.⁵² It applies to both stateless refugees and refugees with a nationality, who voluntarily take up residence in the country from which they fled. Re-establishment in such circumstances is indicative that a refugee no longer seeks protection outside their country of origin.⁵³

Return alone is not sufficient to satisfy Article 1C(4). Similarly, a visit or mere presence may not demonstrate voluntary re-establishment. Settlement on a more permanent basis with no evident intention of leaving, or prolonged and frequent visits may constitute re-establishment, or at least indicate that the refugee is no longer in need of international protection.⁵⁴

The operation of Article 1C(4) was briefly considered by in *Rezaei v MIMA*.⁵⁵ The Federal Court held that the delegate's finding that the applicant husband had re-established himself was clearly open, having regard to the fact that the applicants had returned to Iran for a period of two years, and had adopted a child through the Iranian legal system.⁵⁶

⁴⁹ UNHCR, *Handbook*, above n 5, at [129]. UNHCR have stated that where a person claims a well-founded fear of persecution in relation to the new country of nationality, this creates a new situation calling for a fresh determination of refugee status (UNHCR *Handbook*, above n 5 at [132]; UNHCR *Note on the Cessation Clauses*, above n 18 at [18]). However the reference in Article 1C(3) to the *protection* of the new country of nationality suggests that, arguably, the provision could not be invoked in circumstances where the refugee has a well-founded fear of persecution in relation to that country.

⁵⁰ Hathaway and Foster, above n 36 at 497. Examples of non-voluntary acquisition of a new nationality include automatic acquisition by a woman of her husband's nationality upon marriage, even if she does not wish it and has taken no steps to acquire it other than the marriage itself, and acquisition by operation of law of the nationality of a successor state to the state of origin (see Fitzpatrick and Bonoan above n 21 at 527; DIMIA, 'The Cessation Clauses (Article 1C): An Australian Perspective - a paper prepared as a contribution to the UNHCR's expert roundtable series', in *Interpreting the Refugees Convention - an Australian Contribution* (2002) (*The Cessation Clauses*) at 13). In such cases, questions relating to 'the protection of the country' would need to be carefully considered.

⁵¹ Goodwin-Gill and McAdam, above n 21 at 138. This would involve a similar inquiry to the one posed by the second paragraph of Article 1A(2) as discussed in *Koe v MIMA* (1997) 74 FCR 508. A person to whom Article 1C(3) applied would also be caught by s.36(3) of the Act: see Chapter 9 of this Guide for details.

⁵² Grahl-Madsen, above n 39 at 370.

⁵³ Hathaway and Foster, above n 36 at 472.

⁵⁴ Hathaway and Foster, above n 36 at 475-476; Goodwin-Gill and McAdam, above n 21 at 139; UNHCR, *Handbook*, above n 5 at [134].

⁵⁵ [2001] FCA 1294 (Allsop J, 14 September 2001).

⁵⁶ [2001] FCA 1294 (Allsop J, 14 September 2001) at [60]. For further detail regarding the facts of this case refer to the discussion under Article 1C(1) above.

Changes in country circumstances – Article 1C(5) and (6)

The cessation provisions contained in Article 1C(5) and (6) are parallel clauses that apply to people with a nationality and stateless people respectively:

This Convention shall cease to apply to any person falling under the terms of section A if:

(5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

...

(6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

...

Thus, Article 1C(5) applies to nationals who, because of changed circumstances, can no longer continue to refuse to avail themselves of the protection of their country. Article 1C(6) applies to stateless refugees who, because of changed circumstances, are able to return to the country of their former habitual residence.

The words '[h]e can *no longer*' and 'the circumstances ... *have ceased to exist*' make it clear that the circumstances from time to time and not merely as a matter of history are the relevant circumstances, that is, that the 'status' of a person may change as circumstances in the country which he or she has left change.⁵⁷

The central issue presented by these provisions is whether the circumstances under which the applicant was recognised as a refugee have ceased to exist.⁵⁸ As to how that issue is to be addressed, there is extensive commentary by the UNHCR and other expert commentators.

There has also been some judicial consideration of that issue in Australia where opinion has been divided. However, the High Court majority in *MIMIA v QAAH of 2004* and *NBGM v MIMA* has made it clear that the test is the same as for Article 1A(2): whether the applicant has a well-founded fear of being persecuted for a Convention reason and is unable, or owing to such fear, is unwilling to avail himself or herself of the protection of his or her country.⁵⁹ As Emmett J stated at first instance in *NBGM*:

Articles ... 1A(2) and 1C(5) of the Refugees Convention turn upon the same basic notion; protection is afforded to persons in relevant need, who do not have access to protection, apart from the Refugees

⁵⁷ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ at [43].

⁵⁸ In contrast to Article 1C(1) to (4), which relate to specified changes in personal circumstances, Article 1C(5) and (6) are usually regarded as contemplating changes in country conditions; however there appears to be no reason why they might not apply to changes in a refugee's own personal circumstances, such as his or her religion or political opinion or sexual orientation. 'Changed circumstances' are also relevant to the initial assessment of refugee status under Article 1A, and consideration of country conditions at that stage may in all probability include the matters that would be relevant under Article 1C(5) and (6): see for example the discussion in *Chan v MIEA* (1989) 169 CLR 379 at 391, 399 and 406. However, while the relevant tests may be similar, Article 1C(5) and (6) specifically refer to the previous *recognition* of a person as a refugee and do not come into play during the initial assessment of refugee status: see for example *NBGM v MIMIA* (2006) 150 FCR 522 per Stone J at [132] and Allsop J at [166]-[168], referring to *R (Hoxha) v Special Adjudicator*; *R (B) v IAT* [2005] 1 WLR 1063.

⁵⁹ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ, Kirby J dissenting; *NBGM v MIMA* (2006) 231 CLR 52 per Callinan, Heydon and Crennan JJ, Gummow ACJ generally agreeing, Kirby J dissenting.

Convention. A person is relevantly in need of protection if that person has a well-founded fear of being persecuted, for Convention Reasons, in the country, or countries, in respect of which the person has a right or ability to access.⁶⁰

The High Court majority firmly rejected the majority opinions in the Full Federal Court, derived from statements by the UNHCR and other commentators, that the test is whether changes in the applicant's country are 'substantial', 'effective' and 'durable' and the like, and that there is an onus upon the decision maker to show that such changes have occurred.⁶¹ Nevertheless, the Court did comment that if a non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations.⁶² As was previously explained by the Federal Court, it may be difficult to reach a conclusion that the circumstances that gave rise to a previously existing well-founded fear have 'ceased to exist', if the change in circumstances were merely transitory and could not be described as fundamental and durable.⁶³

Consistently with the Article 1A(2) test, changes relevant to Article 1C(5) and (6) may not necessarily extend to the whole country: the possibility of safe relocation may mean that a previously recognised refugee no longer has a well-founded fear for the purposes of Article 1A(2), such that Article 1C will apply.⁶⁴

While there is generally no onus in administrative decision-making on either an applicant or the decision maker, it should be borne in mind that the decision-maker will sometimes, perhaps often, have a greater capacity to ascertain and speak to conditions existing in another country.⁶⁵

The provisos

Article 1C(5) and (6) contain exceptions to cessation where the refugee is able to invoke compelling reasons arising out of previous persecution for refusing to return to his or her country. These provisos are expressed to apply to refugees falling under Article 1A(1), that is, to refugees recognised under previous refugee instruments, or 'statutory refugees'.⁶⁶

⁶⁰ *NBGM v MIMIA* [2004] FCA 1373 (Emmett J, 25 October 2004) at [34], cited with approval in *NBGM v MIMIA* (2006) 231 CLR 52 per Callinan, Heydon and Crennan JJ at [44].

⁶¹ See *QAAH v MIMIA* (2005) 145 FCR 363 at [58]-[59], [71], [78], [110]; *NBGM v MIMIA* (2006) 150 FCR 522 per Allsop J, e.g. at [172], with Marshall J agreeing; Black CJ at [23] and Mansfield J at [41] similarly agreed with Allsop J's analysis of Article 1C(5) of the Convention. In terms of statements from the UNHCR and other commentators, see for example UNHCR, *Handbook*, above n 5 at [135], *UNHCR, Interpreting Article 1*, above n 19 at [54]; UNHCR, *Ceased Circumstances Guidelines, 2003*, above n 18; UNHCR, *Refugee Protection: A Guide to International Refugee Law*, 2001; JC Hathaway, *The Law of Refugee Status*, (Butterworths, 1991) at 200-203. See also Hathaway and Foster, above n 36 at 481.

⁶² *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [39]. Compare *Chan v MIEA* (1989) 169 CLR 379 at 391 per Mason CJ, 399 per Dawson J and 406 per Toohey J.

⁶³ *NBGM v MIMIA* (2006) 150 FCR 522 per Stone J at [133].

⁶⁴ See the passing comment on relocation in *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [12]. For further discussion of relocation, see Chapter 6 of this Guide.

⁶⁵ *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [40].

⁶⁶ According to Weis, 'They only were regarded as having been subject to "previous persecution": Weis, above n 36 at 980, referring to Robinson, above n 18 at 61. Compare the discussion of 'at present receiving' in Article 1D in *MIMIA v WABQ* (2002) 121 FCR 251. Article 1D is discussed later in this chapter.

They do not apply to refugees falling under Article 1A(2) and therefore do not apply to modern day refugees.⁶⁷

It has generally been accepted that the exceptions should be applied more broadly, reflecting as they do a more general humanitarian principle that persons traumatised by persecutory treatment or loss of family members cannot reasonably be expected to return to the country where such acts took place.⁶⁸ However, as stated in *Applicant A v MIEA*, it would be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.⁶⁹ As the provisos are clearly and unambiguously expressed to be limited to refugees falling under Article 1A(1), and in the absence of any subsequent agreement or state practice sufficient to override the express words of limitation contained in the provisos, it would not be open to the Tribunal to apply them more generally.⁷⁰ Although the Tribunal is not at liberty to apply the provisos, it should be noted that the Australian migration regime contains other mechanisms for achieving their general humanitarian purpose.⁷¹

ARTICLE 1D

Article 1D of the Refugees Convention operates to exclude from the Convention persons receiving protection or assistance from a United Nations organ or agency other than the UNHCR. Article 1D states:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations, other than the United Nations High Commission for Refugees, protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

⁶⁷ *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063; *QAAH v MIMIA* (2005) 145 FCR 363 per Lander J at [230]; *SZCDM v MIMIA* [2006] FMCA 258 (Emmett FM, 24 February 2006).

⁶⁸ The limitation has been described as 'glaring' and 'perverse'. See Goodwin-Gill and McAdam, above n 21 at 143-144; Fitzpatrick and Bonoan above n 21 at 518. See also UNHCR *Discussion Note on the Cessation Clauses*, 1991, above n 18 at [15(ii)]; UNHCR, *Handbook*, above n 5 at [136]; UNHCR *Ceased Circumstances Guidelines*, 2003, above n 18 at [20], [21].

⁶⁹ (1997) 190 CLR 225 per Dawson J at 248.

⁷⁰ See *Vienna Convention on the Law of Treaties* s.31. In *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 the House of Lords, in dismissing appeals from a decision of the Court of Appeal [2003] 1 WLR 241, held that the appellants' 'state practice' argument as to the applicability of the Article 1C(5) proviso was unsustainable. The former Refugee Review Tribunal adopted this restrictive view of the proviso in V96/05249 (Dr R Hudson, 11 May 1998). The New Zealand Refugee Status Appeals Authority has also adopted this view: see, for example, Refugee Appeal 70366/96 *Re C* (22 September 1997). By contrast, the AAT has had regard to the Article 1C provisos in a number of criminal deportation cases, including *Re Todea and MIEA* (1994) 34 ALD 639, affirmed by the Federal Court in *Todea v MIEA* [1994] FCA 1579 (Sackville J, 22 December 1994). However, that case is of limited use as the issue was not raised in argument and therefore not considered by the Court. Further, the General Division cases relate to the exercise of a discretion and not to the satisfaction of statutory criteria.

⁷¹ The Minister retains a residual discretion under s.417 of the Act, and the kinds of circumstance contemplated by the Article 1C(5) and (6) provisos are expressly recognised in the departmental guidelines relating to that discretion. Specifically, Department of Home Affairs, 'Policy: Minister's guidelines on ministerial powers (s.345, s351, s391, s417, s 454 and s501J)' refers at [4] 'Unique or Exceptional Circumstances' to the following as factors that may be relevant: 'particular circumstances or personal characteristics of a person [which] provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa. For example ... the person has experienced torture or trauma in their country of origin and is likely to experience further trauma if returned to that country.' (as re-issued 29 March 2016).

Almost every element of Article 1D is ‘pregnant with ambiguity’ and its correct interpretation has been the source of ongoing debate.⁷² The contentious issues have now been resolved in Australian law.

Article 1D has not been expressly incorporated into the codified definition of refugee applicable to post 16 December 2014 applications. However, issues relevant to Article 1D may arise indirectly as part of the consideration of whether there are effective protection measures available to an applicant.⁷³

Historical background to Article 1D and relevant UN agencies

In construing Article 1D, the Full Federal Court in *MIMA v WABQ* (*WABQ*) had regard to a range of material relating to the circumstances leading up to the ratification of the Convention.⁷⁴ According to that material, Article 1D was inserted to deal with a specific problem – namely the Palestinian refugees resulting from the partition of Israel. It appears to have been generally accepted that during the period leading up to the finalisation of the Convention, the Palestinians could be excluded from the operation of the protective provisions of the Convention because of the support that was then intended to be provided by the United Nations. It appears that the only relevant organs or agencies are the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency in the Near East (UNRWA).⁷⁵

The UNCCP was established in December 1948 by UN General Assembly Resolution 194(III). The Committee was given a number of functions, including those given to the United Nations Mediator on Palestine,⁷⁶ negotiations with a view to a final settlement of the problem, the protection of and access to Holy Places, the formulation of proposals for a special international status for Jerusalem, the facilitation of economic development of the area, assistance to refugees who wished to return home and live at peace with their neighbours with compensation for those choosing not to, and the resettlement and economic and social rehabilitation of refugees.⁷⁷ During its early years of operation, the UNCCP

⁷² *MIMA v WABQ* (2002) 121 FCR 251 at [18] and [68] (overturning the judgment in *MIMA v Quiader* [2001] FCA 1458 (French J, 16 October 2001)). See *Abou-Loughod v MIMA* [2001] FCA 825 (Heerey J, 26 June 2001), *Kouraim v MIMA* [2001] FCA 1824 (Carr J, 17 December 2001), *Jaber v MIMA* (2001) 114 FCR 506 and *Al-Khateeb v MIMA* (2002) 116 FCR 261. For commentary on Article 1D see L. Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998); Goodwin-Gill and McAdam, above n 21 at 151-153, 436-438; Hathaway and Foster, above n 3618 at 509-523; Grahl-Madsen, above n 39, at 140-2, 262-5; UNHCR, *Handbook*, above n 5 at [142]-[143]. A number of states party to the 1951 Convention (Canada, Austria, Switzerland and the United States) have chosen not to incorporate Article 1D as they consider that as UNRWA is only operational in certain areas of the Near East and only provides its assistance in these areas, it is only there that the first sentence of Article 1D is applicable. These states do not apply Article 1D at all (see Takkenberg, at 101-103).

⁷³ See ss.5J(2) and 5LA, discussed in Chapters 3 and 8 of this Guide.

⁷⁴ The following overview of the historical background to Article 1D is drawn in part from *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [21]-[51], Moore J at [98], [108], Tamberlin J at [136]-[157]. See also Goodwin-Gill and McAdam, above n 21 at 153-157.

⁷⁵ Although the UNHCR, *Handbook*, above n 5 at [142] refers to the former UN Korean Reconstruction Agency (UNKRA) in the context of Article 1D, there is no such reference in its *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* (December 2017) available at <https://www.refworld.org/docid/5a1836804.html> (accessed 10/09/19).

⁷⁶ Under UNGA Resolution 186 (S-2) of 14 May 1948, the UN Mediator was empowered to arrange for services necessary to the safety and well-being of the population of Palestine.

⁷⁷ *MIMA v WABQ* (2002) 121 FCR 251, per Hill J at [23]-[24]. See also per Tamberlin J at [141]-[142].

attempted to provide legal, diplomatic and physical protection for the refugees, in addition to efforts to facilitate durable solutions. By the early 1950s it determined that it was unable to fulfil its mandate. Since this period, the UNCCP has not provided Palestinian refugees with the basic international protection accorded to other refugees. Today the UNCCP still exists in name and produces an annual one-page report on its activities.⁷⁸

The UNRWA was established in December 1949 by UN General Assembly Resolution 302 (IV) to carry out direct relief and works programmes for Palestine refugees.⁷⁹ The agency began operations on 1 May 1950. Its services encompass education, health care, relief and social services, camp infrastructure and improvement, microfinance and emergency assistance, including in times of armed conflict, to registered Palestine refugees in Jordan, Lebanon, Syria, the West Bank and the Gaza Strip. In the absence of a solution to the Palestine refugee problem, the General Assembly has repeatedly renewed UNRWA's mandate, most recently extending it until 30 June 2020. Today, UNRWA is the main provider of basic services to over 5 million registered Palestine refugees in the Middle East.⁸⁰

According to the UNRWA website, it has in recent years significantly strengthened its capacity to provide protection to Palestine refugees through various initiatives, with a focus on vulnerable groups – women, children and persons with disabilities. It adopted a protection policy in 2012 and conducts internal protection audits every two years. It states that UNRWA undertakes a broad range of activities within the scope of its protection mandate which is acknowledged by the UN General Assembly, and that the Agency's Medium Term Strategy for 2016-2022 requires it to work to ensure Palestine refugees' rights under international law are protected and promoted.⁸¹

Under UNRWA's operational definition, Palestine refugees are persons whose normal place of residence was Palestine between June 1946 and May 1948, who lost both home and means of livelihood as a result of the 1948 Arab-Israeli conflict. UNRWA's services are available to all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance. UNRWA's definition of a refugee also covers the descendants on the male side of persons who became refugees in 1948.⁸²

⁷⁸ UNCCP's 73rd report, covering the period 1 September 2017 to 31 August 2018 (A/73/296) simply noted its 72nd report of 15 August 2017 (A/72/332) and observed that it had nothing new to report. Reports since 1992 have been to similar effect. A UN General Assembly Resolution on the Report of the Special Political and Decolonization Committee (Fourth Committee) (A/73/523): Assistance to Palestine Refugees (A/RES/73/92), noted at [1] and [2] that 'Palestine refugees continue to require assistance to meet basic health, education and living needs' and the UNCCP 'has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III)'. It requested the UNCCP 'to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly as appropriate, but no later than 1 September 2019'.

⁷⁹ Overview information about UNRWA is drawn from <www.unrwa.org> (accessed 12/09/19).

⁸⁰ See <www.unrwa.org>.

⁸¹ <www.unrwa.org/what-we-do/protection>. It has also been noted that with the beginnings of the intifada movement in 1989, UNRWA came in practice also to exercise a significant, if limited, protection role on behalf of Palestinians against the occupying forces, as well as its role as provider of assistance: Goodwin Gill and McAdam, above n 21 p.438 referring to L Takkenberg, 'The Protection of Palestine Refugees in the Territories Occupied by Israel', (1991) 3 *International Journal of Refugee Law*, 414.

⁸² <www.unrwa.org>. See also *MIMA v WABQ* (2002) 121 FCR 251, per Hill J at [30], Goodwin-Gill and McAdam, above n 21, at 437, Takkenberg, above n 72 at 30, 77, 80, L Takkenberg, 'The Protection of Palestine Refugees in the Territories Occupied by Israel' (1991) 3 *International Journal of Refugee Law* 414, at 419-420, C Cervenak, 'Promoting inequality:

Exclusion under Article 1D

According to the first paragraph of Article 1D, the Convention does not apply to ‘persons’ who are ‘at present’ receiving from organs or agencies of the United Nations other than UNHCR ‘protection or assistance’. The second paragraph deals with the situation should such protection or assistance cease for any reason.

Persons who are at present receiving protection or assistance – the first paragraph

Under Australian law ‘persons’ refers to a class of persons and not to individuals; ‘at present’ refers to circumstances in 1951 and not to the time that a particular matter is being determined; ‘receiving’ means what it says, and not ‘entitled to receive’; and ‘protection or assistance’ is to be construed in the disjunctive, and not in the conjunctive sense.

Persons

The Full Federal Court in *WABQ* held that ‘persons’ in both paragraphs of Article 1D refers to a class of persons, and not particular individuals. The Court emphasised that if a class of persons received protection or assistance, then the first paragraph will apply to all members of the class, even though an individual member is not actually receiving that protection or assistance.⁸³

At present

The Full Court has held that the expression ‘at present’ refers to the circumstances in July 1951 when the Convention was signed.⁸⁴ However, the Article was not intended to fix the class of persons as an aggregation of individuals fixed in 1951. Rather, the words ‘persons at present receiving’ are intended to identify the group or community to whom Article 1D would apply in 1951 and into the future.⁸⁵

Receiving

The Court in *WABQ* held that the word ‘receiving’ should be read as meaning actually receiving, and not ‘entitled to receive’. However, as Article 1D is concerned with groups, and not with individuals, the distinction loses its significance:

Gender-based discrimination in UNRWA’s approach to Palestine refugee status’ (1994) 16 *Human Rights Quarterly* 300. Whether a particular applicant falls within UNRWA’s operational definition will not usually be an issue, as entitlement to its assistance depends on registration. Therefore, if it is established that a Palestinian is registered with UNRWA, then Article 1D will arise for consideration.

⁸³ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](1), Moore J at [91], Tamberlin J at [162], [165]. Tamberlin J (at [162], [170]) specified ‘Palestinians’ as the relevant group; however his Honour’s reasons suggest that he intended to refer only to those Palestinians who were receiving protection or assistance at the relevant time. The scope of UNCCP’s mandate is not clear. While the Resolution establishing UNRWA did not define the persons eligible for the benefits which UNRWA was to provide, the body itself has produced definitions from time to time which it includes in reports to the General Assembly. To the extent that no comment appears to have been made by the General Assembly concerning those definitions it may be said that they have been tacitly approved: see *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [30].

⁸⁴ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](2); Moore J at [92]; Tamberlin J at [163]. Justice Hill suggests as an alternative possibility 1954 when the Convention was ratified. His Honour stated that nothing turns on the difference between the two dates; however it is not easy to reconcile this with his opinion as to the factual findings that must be made in relation to the second paragraph in any particular case.

⁸⁵ *MIMA v WABQ* (2002) 121 FCR 251 per Moore J at [92], Hill J at [69](2), Tamberlin J at [163].

Once the view is taken that the word “persons” refers to Palestinians as a **group** rather than to **individual** Palestinians the distinction sought to be made between receiving and being entitled to receive largely disappears. If the “group” receives protection or assistance then all persons who comprise [sic – comprise] that group must be taken to be receiving assistance or protection even though an individual member is not actually receiving that assistance.⁸⁶

Protection or assistance

The Full Federal Court has held that the expression ‘protection or assistance’ should be construed as it reads, namely, that assistance and protection are alternatives. The word ‘or’ should not be construed as ‘and’.⁸⁷

Summary of first paragraph of Article 1D

If Palestinians as a group were, as at 28 July 1951, receiving protection (for example by UNCCP) or assistance (for example by UNRWA), a member of that group can be described as ‘at present receiving protection or assistance’.

It is uncontroversial that Palestinians as a group were at least receiving assistance at that time. Therefore, for the purposes of the first paragraph of Article 1D, the Convention would not apply to an applicant who is a member of the group. The question would then be whether the circumstances attracted the second paragraph of Article 1D.

Cessation of protection or assistance – the second paragraph

The second paragraph of Article 1D provides:

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

Under Australian law this paragraph, like the first, is concerned with a class of persons, and it is sufficient if either protection **or** assistance has ceased for any reason in respect of the class (without their position being definitively settled). The phrase ‘*ipso facto* be entitled to the benefits of this Convention’ means that such persons are entitled to be *assessed* under Article 1A(2) and not that protection obligations automatically arise.

Protection or assistance has ceased for any reason

This expression is concerned not with individuals, but with the class of individuals referred to in the first paragraph.⁸⁸ Further, ‘protection or assistance’ has the same disjunctive meaning here as in the first paragraph.⁸⁹ Thus, the expression ‘protection or assistance has ceased’ relates to whether protection or assistance has ceased in respect of the class and not in

⁸⁶ *MIMA v WABQ* (2002) 121 FCR 251, per Tamberlin J at [164]-[165] (original emphasis). See also Hill J at [69](3).

⁸⁷ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](4), Moore J at [103], Tamberlin J at [166].

⁸⁸ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](5), Moore J at [99], Tamberlin J at [162], [170].

⁸⁹ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](4), Moore J at [96], Tamberlin J at [170].

respect of a particular individual just because, for example, the individual had left the area in which protection or assistance was being provided.⁹⁰

Similarly, Tamberlin J in *WABQ* made clear that protection or assistance might cease for the class, rather than the individual:

... the first paragraph proposes to exclude Palestinians who do not need protection or assistance because they were then [as at 28 July 1951] receiving those benefits from UN agencies. However, it was foreseen that those agencies, namely UNRWA and UNCCP [sic], might cease to provide such assistance or protection and if this occurred Palestinians would be entitled to the benefits of the Convention. This explains the wording of the second paragraph.⁹¹

It would therefore be incorrect to find that Article 1D had no application to a Palestinian who had been resident in an area where a UN agency or organ provided protection or assistance simply because the Palestinian was presently in Australia or because he or she had not actually sought protection or assistance that was available.⁹²

'Ipso facto' entitled to the benefits of the Convention'

The Full Federal Court has held that the expression '*ipso facto*' in the second paragraph of Article 1D of the Convention does not mean that protection obligations automatically arise in relation to a Palestinian asylum seeker in circumstances where the asylum seeker is not a refugee within the meaning of Article 1A.⁹³

Whether protection or assistance has ceased: Factual issues

Based on the material before it, the Court in *WABQ* concluded that *in the broadest sense* it could be said that at the relevant time UNCCP provided protection to Palestinian Refugees, and that UNRWA provided assistance but not protection.⁹⁴ However, in light of the more recent information about UNRWA's current protection mandate and activities referred to [above](#), it is not clear whether the latter finding remains open.

If, as a matter of fact, either protection or assistance was provided to the relevant group at the relevant time in 1951, the factual issue that arises is whether protection **or** assistance has ceased. The judgments in *WABQ* disclose some divergence of opinion as to how this issue is to be resolved.

Justice Hill held that in order to determine whether protection has ceased it is necessary to know whether protection was provided at the time of ratification. His Honour reasoned that if no agency had provided protection at that time, then there would be no agency which had

⁹⁰ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](5). See also per Moore J at [92], [102], [108], and Tamberlin J at [163], [170].

⁹¹ *MIMA v WABQ* (2002) 121 FCR 251 per Tamberlin J at [163], Moore J generally agreeing. See also Moore J at [102], [108].

⁹² In *MIMA v WABQ* (2002) 121 FCR 251, Moore J held that the Tribunal had erred in finding that Article 1D did not apply as the applicant was in Australia: at [93].

⁹³ *WACG v MIMA* [2002] FCAFC 332 (Hill, Moore and Tamberlin JJ, 8 November 2002), *WAED v MIMA* [2002] FCAFC 333, *WAEI v MIMA* [2002] FCAFC 334 (Hill, Moore and Tamberlin JJ, 8 November 2002) and *WACH v MIMA* [2002] FCAFC 338 (Hill, Moore and Tamberlin JJ, 8 November 2002).

⁹⁴ The majority in *MIMA v WABQ* (2002) 121 FCR 251 observed that UNRWA had never had the function of providing protection to Palestinian refugees, as distinct from assistance, and that the Tribunal had erred in finding otherwise: per Hill

'ceased' to do so.⁹⁵ Although it was clear that those who framed the Convention intended the reference to protection to be a reference to UNCCP, it was not easy to deduce whether it ever actually embarked on the 'protection' part of its mandate, or whether it was thought that such activities as it in fact performed were sufficient to constitute the provision of protection.⁹⁶ Further, his Honour held that it is a factual matter for the Tribunal to determine whether there ever was a UN agency which provided protection.⁹⁷

Justice Moore held that it was **not necessary** to know whether protection was provided at the relevant time in order to determine whether protection has ceased. In his view, the framers of the Convention proceeded on the basis that protection was being provided in 1951 and it was on that footing that the complementary provisions in the two paragraphs of Article 1D were adopted. Thus, the question to be addressed under the second paragraph relates to whether protection has ceased in the sense that it is no longer provided.⁹⁸

Justice Tamberlin held that Palestinians **were** receiving protection at the relevant time, on the basis that the work of UNCCP could properly be characterised as the taking of protective measures for the benefit of Palestinians, designed to implement the objectives set out in the UNCCP mandate.⁹⁹ For example, the setting up of an active mediation process designed to provide protection to Palestinians was, in his Honour's view, a way of affording protection.¹⁰⁰

It is therefore difficult to extract a common view as to whether a factual finding regarding the provision of protection in 1951 is essential before a finding can be made as to whether protection or assistance has ceased.

Justice Tamberlin's factual finding as to the provision of protection in 1951 does not seem to have found favour with the other members of the Court.¹⁰¹ However, Tamberlin and Moore JJ were in general agreement and both appear to have regarded it as sufficient that the framers of the Convention would have been aware of the functions of UNCCP and UNRWA and proceeded on the basis that protection was then being provided.¹⁰² Further, Tamberlin J's opinion that it is enough that UNCCP had the function of providing protection and was, in 1951, taking steps to do so is broadly consistent with Moore J's approach.

J at [11], [72], Tamberlin J at [140], [173], Moore J declining to express an opinion: at [94].

⁹⁵ *MIMA v WABQ* (2002) 121 FCR 251 at [69](5).

⁹⁶ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [69](4). His Honour observed at [52]-[59], as did Moore J at [104], that little or no reference is made to UNCCP by text book writers in the context of Article 1D. His Honour remarked that perhaps this is because they formed the view that it had never embarked on a protection function with the consequence that there was never a class of persons who received protection from it: at [69](4). Goodwin-Gill and McAdam stated that by December 1950 there were already doubts as to whether UNCCP was *effective*: Goodwin-Gill and McAdam, above n 21 at 438.

⁹⁷ *MIMA v WABQ* (2002) 121 FCR 251 at [72].

⁹⁸ *MIMA v WABQ* (2002) 121 FCR 251 at [108]. His Honour expressed the opinion that it introduces a measure of artificiality to say that the operation of the second paragraph of Article 1D at some point in the future, and the scope of application of the Convention to dispossessed Palestinians, was intended to depend on a factual determination (after the event and probably well after) as to whether protection was provided by UNCCP (or any other organ or agency of the UN) in 1951 in order to determine whether protection has ceased.

⁹⁹ *MIMA v WABQ* (2002) 121 FCR 251 at [155]-[157], [169]. His Honour's reasoning appears to give a wider scope to the concept of 'protection' than does the reasoning of Hill J.

¹⁰⁰ *MIMA v WABQ* (2002) 121 FCR 251, per Tamberlin J at [156].

¹⁰¹ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [72], per Moore J at [107]-[108].

¹⁰² *MIMA v WABQ* (2002) 121 FCR 251 per Moore J at [74], Tamberlin J at [157] and [175].

Accordingly, the legal position appears to be that when assessing whether protection has ceased, it may be accepted as a starting point that protection (in the broad sense discussed by Tamberlin J) was being provided in 1951.¹⁰³

The factual question that will then need to be addressed relates to whether protection has ceased. Although the Court made it quite clear that the material before it indicated that such protection as was provided by UNCCP had ceased by the end of 1951¹⁰⁴ or at least by 1964,¹⁰⁵ it also made it clear that this is a factual matter for the Tribunal to determine on the basis of all the material before it at the time of its decision.¹⁰⁶

The current information available in relation to the ‘protection’ related mandate and activities of UNRWA pose several questions that may be the subject of further judicial consideration. Firstly, do UNRWA’s current activities properly constitute ‘protection’ as that term appears in Article 1D? According to the broad interpretation given to the term by Tamberlin J in *WABQ*, it would appear so, although as noted above this approach did not find favour with the other members of the Federal Court. Also, unlike UNCCP, UNRWA does not have a mandate to seek durable solutions for Palestinian refugees.¹⁰⁷

A further question that arises is whether ‘has ceased’ should be interpreted as meaning protection has ceased *at any time* in the past, or that protection has ceased as at the time a decision on a protection visa application is made (i.e. presently). Although it is not entirely clear, the natural meaning of the words appears to suggest the latter is the preferred interpretation, which is supported by Moore J’s description of ‘ceased’ as meaning ‘is no longer provided’ in *WABQ*.¹⁰⁸ Also, there may be a question as to whether the resumption of protection by a *different UN agency* (i.e. UNRWA) many years after the cessation of protection by the UNCCP (e.g. in 1951 or 1964) has a bearing on whether ‘such protection...has ceased’. Although not free from doubt, if the cessation and recommencement of protection does not fall within the meaning of this term, it appears unlikely that the change in UN agency would of itself result in ‘such protection...ceasing’, given the language of Article 1D overall appears to be focussed on the protection or assistance and not on the source (other than it being from UN organs or agencies other than UNHCR).

¹⁰³ If the Tribunal were to reach this conclusion as a matter of fact, on the basis of the material before it, then as a practical matter the differences between the approaches in the three judgments largely disappears.

¹⁰⁴ *MIMA v WABQ* (2002) 121 FCR 251 per Tamberlin J at [146]-[151].

¹⁰⁵ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J [27]; see also per Tamberlin J at [149].

¹⁰⁶ *MIMA v WABQ* (2002) 121 FCR 251 per Hill J at [72], Moore J at [110] and Tamberlin J at [168]. To the extent that the Department’s Refugee Law Guidelines indicate that the Court in *WABQ* held that Palestinian refugees, as a class of persons, do not fall within the scope of Article 1D, this appears to be inconsistent with this aspect of the judgment: see Department of Home Affairs, ‘Policy: ‘Refugee and Humanitarian - Refugee Law Guidelines’, section 2.4, as re-issued 1 July 2017.

¹⁰⁷ Bartholomeusz, L. *The Mandate of the UNRWA at Sixty* (Refugee Survey Quarterly, Vol. 28, Issue 2-3, 2009).

¹⁰⁸ *MIMA v WABQ* (2002) 121 FCR 251 at [108].

Summary: the application of Article 1D under Australian law

If Palestinians **as a group**, or a sub-class or sub-classes of Palestinians as a group, were **as at 28 July 1951** receiving protection **or** assistance from organs or agencies of the United Nations, other than UNHCR (such as UNCCP or UNRWA or some other body created after 1951 to take over their functions), then members of the group can be described as 'at present receiving protection or assistance' and, subject to the operation of the second paragraph, are excluded from the benefits of the Convention.

However, if such protection **or** assistance has ceased for any reason **in respect of the group** (without their position being definitively settled in accordance with the relevant resolutions of the UN General Assembly), these persons are *ipso facto* entitled to be assessed against Article 1A(2) of the Convention. It appears clear that as at 28 July 1951 UNRWA was providing assistance to Palestine refugees and continues to do so to this day. Further, on the majority view in *WABQ*, an assessment as to whether protection has ceased may proceed on the basis that protection was being provided in 1951. However, while it appears clear that UNCCP ceased providing protection to Palestine refugees many years ago, more recent information concerning UNRWA's mandate and activities suggest that it may in fact be providing protection to Palestine refugees, which poses the question whether 'such protection has...ceased'. These are ultimately questions of fact to be determined by the decision-maker and which may be the subject of further judicial consideration.

ARTICLE 1E

Article 1E of the Refugees Convention operates to exclude from Convention protection those persons who have the rights and obligations of a national of a third country.¹⁰⁹ Article 1E states:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

This clause was originally directed at ethnic German refugees from Eastern and Central Europe who had assumed residence in Germany during and after World War II. It was aimed at those persons who had 'effective nationality' in a third country.¹¹⁰ It has no direct correlation in the post 16 December 2014 protection visa scheme.

¹⁰⁹ The operation of Article 1E in Australian law is limited by s.36(3) of the Act which limits the scope of Australia's 'protection obligations' in respect of certain persons who have access to protection in a safe third country. Section 36(3) is discussed in Chapter 9 of this Guide.

¹¹⁰ Hathaway and Foster, above n 36 at 500; Goodwin-Gill and McAdam, above n 21 at 161.

The application of Article 1E

To be excluded by Article 1E, an applicant must be recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

‘Taken residence’

Article 1E requires that the applicant has ‘taken residence’ in the third country. ‘Taken residence’ is not defined in the Convention, nor has it been the subject of judicial consideration, but it implies continued residence and not a mere visit.¹¹¹ Some commentators have taken the view that Article 1E requires *de facto* nationality in a country where the person has previously resided, rather than an ability merely to enter and obtain protection from persecution.¹¹² UNHCR is of the view that the residence status must be secure and include the rights accorded to nationals to return to, re-enter and remain in the country concerned and the rights must be available in practice.¹¹³

Rights and obligations of a national

Article 1E also requires that the applicant be recognised by the authorities as having the rights and obligations of a national. Whether an applicant is recognised by the competent authorities of a country as having the relevant rights and obligations is a matter for the domestic law of the country concerned.¹¹⁴

While it is generally agreed that Article 1E applies in cases where the person concerned possesses something less than formal nationality, there is a divergence of opinion as to precisely what rights and obligations are necessary to satisfy Article 1E.¹¹⁵ The Federal Court has given limited consideration to this aspect of Article 1E, however the High Court does not regard the construction of Article 1E as settled.¹¹⁶

In *Barzideh v MIEA* Hill J held that the rights and obligations with which Article 1E was concerned must include *all* of the rights and obligations of a national, rather than some of them.¹¹⁷ His Honour considered that such rights and obligations could arise either under a

¹¹¹ See UNHCR, *Handbook*, above n 5 at [146].

¹¹² Hathaway and Foster, above n 36 at 509.

¹¹³ UNHCR *Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees*, March 2009. UNHCR RefWorld, available at < <https://www.refworld.org/docid/49c3a3d12.html> > (*Note on Article 1E*) at [10] (accessed 18/09/19).

¹¹⁴ *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200-201.

¹¹⁵ *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200; *Barzideh v MIEA* (1996) 69 FCR 417 at 426-429.

¹¹⁶ *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [48]-[53], referring to *Barzideh v MIEA* (1996) 69 FCR 417 and *MIMA v Thiyagarajah* (1997) 80 FCR 543. The joint judgment indicated that courts should not regard further consideration of the construction of Article 1E as limited by what was said respecting Article 1E in those cases. Also, the discussion of Article 1E in each of these cases is *obiter dicta*: in *Barzideh* the Court found there was no valid application for review before it; in *Thiyagarajah* the appeal was decided on other grounds.

¹¹⁷ *Barzideh v MIEA* (1996) 69 FCR 417.

general law or by application of a rule to a particular person.¹¹⁸ His Honour held that the proper question to ask is:

whether, either by force of a general law or by force of a recognition given by the relevant competent authorities on an individual basis, the person seeking to be classified as a refugee enjoys the same rights and comes under the same obligations as does a person who is a national without actually being a national of the territory.¹¹⁹

Nevertheless, his Honour suggested that certain political rights, of the kind that normally attach to nationality, may not be necessary:

I do not think that the Article is rendered inapplicable merely because a person who has de facto national status does not have the political rights of a national. That is to say, the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have de facto nationality. But short of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them.¹²⁰

The interpretation given to Article 1E in *Barzideh* was endorsed in *Thiyagarajah*, by both Emmett J at first instance and the Full Federal Court, with the qualification that 'some disability suffered by an alien might be so slight as to be negligible'.¹²¹

It is clear that Article 1E is narrowly confined. For example, the grant of refugee status in another country is insufficient for its application.¹²² As Olney J observed in *Nagalingam v MILGEA* the terms of the Convention show that refugees in a country which is a contracting state are, in some respects, to be accorded the same treatment as nationals, but in other respects the status of refugee confers only the same rights as an alien. Therefore the mere granting of refugee status in another country will not be sufficient to enliven Article 1E. Whether it does will depend upon the domestic law of the country in question.¹²³

Recourse to protection

Even if an applicant is found to have the same rights and obligations in a third country as those of a national of that country, it is appropriate to consider whether the applicant would have recourse to the protection of the authorities in the third country from persecution in that

¹¹⁸ *Barzideh v MIEA* (1996) 69 FCR 417 at 426-7, 429, expressing apparent agreement with what was said in the *Polish Refugee Compensation Case (case No IX ZR 33/69)* (1987) 72 ILR 647 at 648-9, as quoted in his Honour's judgment at 428-9.

¹¹⁹ *Barzideh v MIEA* (1996) 69 FCR 417 at 426-7.

¹²⁰ *Barzideh v MIEA* (1996) 69 FCR 417 at 429. In *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [52] the High Court raised a question as to whether Hill J's reference to 'de facto nationality' as sufficient was in accordance with the literal meaning of the text of Article 1E. Earlier in the judgment, at 428, Justice Hill had referred not just to 'de facto nationality' but 'de facto', as distinct from 'legal', rights: 'It is true, of course, that Art 1E is not concerned with the person to whom citizenship has been granted. Rather, it is concerned with de facto rights rather than legal rights'. However his Honour's reasoning overall, and particularly his repeated references to rights under 'a general law', would suggest that he had in mind legal rights.

¹²¹ *Thiyagarajah v MIMA* (1997) 73 FCR 176 at 185, *MIMA v Thiyagarajah* (1998) 80 FCR 654 at 568. See, however, the High Court's comments in *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [48]-[53]. Guidance in the *UNHCR Note on Article 1E* is generally consistent with this approach, stating that the rights and obligations need not be identical to those enjoyed by nationals, but divergences should be few in number and minor in character. However, it addresses the example of the denial of the right to vote in more limited terms than Hill J in *Barzideh*, stating that it might be minor in character if it is only of short duration, for example, after a reasonably short period of residence the person has the right to acquire nationality: UNHCR, *Note on Article 1E*, above n 113, at [13]-[15].

¹²² See *Thiyagarajah v MIMA* (1997) 73 FCR 176 at 185 and *Nagalingam v MILGEA* (1992) 38 FCR 191 at 198-199.

¹²³ *Nagalingam v MILGEA* (1992) 38 FCR 191 at 198-199. Refugee status in another country may be relevant to the question of whether the person has a right to enter and reside in a safe third country as per s.36(3) of the Act. For discussion of

country. In *Thiyagarajah* the Tribunal adopted such an approach and the Court at first instance found it did not involve an error in interpretation:

The Tribunal observed that although there is nothing in the words of Art 1E to suggest that it cannot apply if there is evidence of a failure of protection in the country of residence, such a result must be assumed. It was considered to be anomalous if a strict interpretation would preclude a third state ... from offering protection to a person at risk of persecution in both his country of nationality and that where he had taken residence.

Accordingly, the Tribunal considered that it was appropriate to consider whether the applicant would have recourse to the protection of the authorities in France should he fear or encounter persecution in France.¹²⁴

ARTICLE 1F

Article 1F of the Refugees Convention states that the Convention will not apply to persons if there are serious reasons for considering that they have committed certain types of crime, namely, crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations. It states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Parallel exclusionary provisions can be found in s.5H(2) of the Act, part of the codified refugee definition for post 16 December 2014 applications, and s.36(2C)(a) of the Act which applies to persons seeking a protection visa at any time on 'complementary protection' grounds. Section 36(2C) is considered in Chapter 10 of this Guide, although the discussion below on the scope and interpretation of Article 1F will be relevant when considering ss.5H(2) and 36(2C)(a).

The primary purpose of Article 1F is said to be to protect the order and safety of receiving states and to deprive undeserving persons of international protection. It is also considered to have been intended to prevent the rights created by the Convention from being abused by fugitives from justice.¹²⁵ Section 36(2C)(a) is intended to provide the same exclusion to the

s.36(3), see Chapter 9 of this Guide.

¹²⁴ *Thiyagarajah v MIMA* (1997) 73 FCR 176 at 179.

¹²⁵ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05, 4 September 2003 ('*Article 1F Guidelines 2003*') state at [2], that the primary purpose of the exclusion clauses 'is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts'. The Lisbon Expert Roundtable 3-4 May 2001 *Summary Conclusions – Exclusion from Refugee Status*, (EC/GC/01/2Track/1, 30 May 2001) state similarly at [1] that the drafters of the Convention 'contemplated certain types of crime to be so horrendous that they justified the exclusion of the perpetrators from the benefits of refugee status. In this sense, the perpetrators are considered "undeserving of refugee protection"'. The authors add that other reasons for exclusion include 'the need to ensure that fugitives from justice do not avoid prosecution by resorting to the protection provided by the 1951 Convention, and to protect the host community from serious criminals'. For

complementary protection regime as applies to those claiming protection under the Refugees Convention.¹²⁶

As mentioned earlier in this chapter, the Migration and Refugee Division of the AAT has no jurisdiction to review a primary decision which relies on Article 1F of the Convention,¹²⁷ or ss.5H(2) or 36(2C) of the Act, although the General Division does have such jurisdiction. It should be emphasised that the relevant law is complex and developing and beyond the scope of this Guide, which focuses primarily on the law relevant to the Migration and Refugee Division. However an overview of the elements of Article 1F is included in this chapter for completeness.

Serious reasons for considering

For all three subclauses of Article 1F (and for ss.5H(2) and 36(2C)(a)), there is the requirement that there be ‘serious reasons for considering’ that a person has committed the relevant crime or act. This does not require evidence of a formal charge or conviction,¹²⁸ or a positive or concluded finding about the commission of the crime or act; rather, it is sufficient that there be strong evidence of its commission.¹²⁹

Although the evidence needs to be ‘strong’, it need not be of such weight as to persuade the decision-maker beyond reasonable doubt, or even on the balance of probabilities, of the applicant’s guilt.¹³⁰

However, it should be emphasised that the absence of a requirement for a positive finding of the commission of conduct of the kind contemplated by Article 1F is not inconsistent with the need for ‘meticulous investigation and solid grounds’ in order to meet the standard of ‘serious reasons for considering that’ the conduct has been engaged in.¹³¹ For example, a

an Australian government perspective on Article 1F generally, see DIMIA, ‘Persons deemed unworthy of international protection (Article 1F): an Australian Perspective – a paper prepared as a contribution to the UNHCR’s expert roundtable series’, in *Interpreting the Refugees Convention – an Australian contribution* (DIMIA, 2002).

¹²⁶ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [87]-[88].

¹²⁷ There is some debate as to whether it is necessary to consider Article 1A before considering the applicability of Article 1F in any particular case. In *MIMA v Singh* (2002) 209 CLR 533 a majority of the High Court held that the Convention did not require the General Division of the AAT to determine whether the applicant was a ‘refugee’ within the meaning of Article 1A(2) before it considered exclusion under Article 1F. However, given the current jurisdictional arrangements whereby Article 1A(2) and Article 1F are considered by different Divisions of the AAT, this will not arise as an issue for the Tribunal.

¹²⁸ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Whitlam J at 179; *SRYYY v MIMIA* (2005) 147 FCR 1 at [79].

¹²⁹ *Dhayakpa v MIEA* (1995) 62 FCR 556 at 563, *Ovcharuk v MIMA* (1998) 88 FCR 173, *Arquita v MIMA* (2000) 106 FCR 465, *WAKN v MIMIA* (2004) 138 FCR 579; see also *SRYYY v MIMIA* (2005) 147 FCR 1 at [79].

¹³⁰ In *FTZK v MIAC* [2014] HCA 26 (French CJ, Hayne, Crennan, Bell and Gageler JJ, 27 June 2014), the High Court cautioned against using standards of proof in place of the wording of Article 1F. French CJ and Gageler J held at [15] that standards of proof are not substitutes for the application of the ordinary words of Article 1F(b) and there is a degree of risk in using them as parameters defining the necessary or sufficient conditions for the application of the Article; Crennan and Bell JJ at [79] and [81] observed that ‘serious reasons for considering’ does not derive from or replicate a standard of proof in any domestic legal system, but there is no error in simply referring to it as a standard of proof; Hayne J similarly noted at [33]-[36] that to describe ‘serious reasons for considering’ as providing a ‘standard of proof’ is apt to mislead, but it is not an error in itself. See also the observations of Gray J in *VWYJ v MIMIA* [2006] FCAFC 1 (Gray, Kiefel and Lander JJ, 16 March 2006), at [25] with Kiefel and Lander JJ agreeing; *Arquita v MIMA* (2000) 106 FCR 465 at [52]-[56] (Art 1F(b)); *SRYYY v MIMIA* (2005) 147 FCR 1 at [79] (Art 1F(a)). The English Supreme Court in *Al-Sirri (FC) v SSHD and DD (Afghanistan) (FC) v SSHD* [2013] 1 AC 745 (in the context of Art 1F(c)), draws together international consensus about the standard of satisfaction required to establish ‘serious reasons for considering’ which is not derived from domestic standards of proof, at [75].

¹³¹ *WAKN v MIMIA* (2004) 138 FCR 579 at [52]. See also *FTZK v MIAC* (2013) 211 FCR 158 per Kerr J in dissent at [159]. His

Tribunal should not, in an Article 1F case, merely extrapolate from the criminality of an organisation to that of an individual within it without undertaking any clear analysis of purpose or complicity.¹³² The matters relied on by the decision-maker must be rationally connected to or logically probative of the commission of the alleged crime or act.¹³³

The decision maker needs to precisely identify and address the elements of the relevant crime.¹³⁴ However it may be unnecessary, for a finding that the applicant committed a war crime or a crime against humanity, that there be a finding with respect to a specific incident, if there are findings of many such incidents and a finding that the applicant took steps knowing that such acts would be the consequence of his steps.¹³⁵

Whether there are serious reasons for considering that the crime has been committed will depend upon the whole of the evidence and other material before the decision maker.¹³⁶ While there is no requirement that there be evidence of a charge or conviction, such evidence may be strongly probative of serious reasons for considering that the person has committed the crime in question.¹³⁷ In other cases, even though a person has been charged with an offence, it may be clear that there are no serious reasons to consider that the person has committed the crime.¹³⁸

An applicant's own confession will normally suffice to establish serious reasons for considering that he or she has committed a relevant crime.¹³⁹ Where an applicant subsequently resiles from such a confession, the outcome will depend upon the circumstances. In *MIMA v Singh*¹⁴⁰ the AAT's General Division had rejected the applicant's evidence in which he had sought to resile from his own earlier accounts of criminal activities.

Honour held that the Deputy President of the AAT had correctly approved of the approach taken in *Al-Habr and MIMA* [1999] AATA 150 in which it was held that all of the evidence against an applicant in the position of FTZK had to be examined in minute detail bearing in mind the seriousness of the allegations against him (*FTZK and MIAC* [2012] AATA 312 (Constance DP, 23 May 2012) at [67]).

¹³² *SHCB v MIMIA* [2003] FCA 229 (Selway J, 24 March 2003) per Selway J at [17]. Complicity in crimes and exclusion under Art 1F has received judicial consideration in other jurisdictions. See, for example, *R (on the application of JS) (Sri Lanka) v SSHD* [2011] 1 AC 184, *Attorney-General (Minister for Immigration) v Tamil X* [2011] 1 NZLR 721, and *Ezokola v Canada (Citizenship and Immigration)* [2013] SCC 40.

¹³³ In *FTZK v MIAC* [2014] HCA 26 (French CJ, Hayne, Crennan, Bell and Gageler JJ, 27 June 2014), the High Court held that the expression 'serious reasons for considering' requires material that provides a rational foundation for an inference that an applicant has committed a serious non-political crime; in this case the evidence was not logically probative of the appellant's commission of the alleged crimes: per French CJ and Gageler J at [17]-[19], Hayne J at [39]-[40], Crennan and Bell JJ at [91], [96].

¹³⁴ The Full Federal Court in *SRYYY v MIMIA* (2005) 147 FCR 1 dealing with Art 1F(a), held at [106] and [109] that when considering whether there is evidence which suggests that a person has committed a particular offence, it is essential that the elements of the offence are correctly identified and addressed and given specific and careful consideration. This appears to supersede earlier dicta of Branson J in *Ovcharuk v MIMA* (1998) 88 FCR 173 at 186, who did not accept that every element of an offence must be able to be identified and particularised before Article 1F(b) may be relied upon.

¹³⁵ *SHCB v MIMIA* (2003) 133 FCR 561 at [23].

¹³⁶ *Ovcharuk v MIMA* (1998) 88 FCR 173, per Whitlam J at 179, per Branson J at 186, Sackville J agreeing at 187. See *ZYVZ and MIBP* [2018] AATA 3967 (Boyle DP, 23 October 2018) as an example of the Tribunal's consideration of the evidence in determining whether there were 'serious reasons for considering' that the applicant committed the serious non-political crimes of rape, abduction and people smuggling before entering Australia (under s.36(2C)(a)(ii)).

¹³⁷ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Whitlam J at 179. See, for example, '*WAT*' and *MIMIA* [2002] AATA 1150 (Hotop DP, 7 November 2002).

¹³⁸ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Whitlam J at 179. The AAT found *Al-Habr and MIMA* [1999] AATA 150 (Mathews J, 12 March 1999) to be such a case. See also *Arquita and MIMA* [1999] AATA 410 (Forrest DP, 11 June 1999).

¹³⁹ Grahl-Madsen, above n 39 at 175. Examples are *NADB v MIMA* [2002] FCA 200 (Hely J, 8 March 2002); *MIMA v Singh* (2002) 209 CLR 533 per Gleeson CJ at [6].

¹⁴⁰ (2002) 1209 CLR 533.

Chief Justice Gleeson held that the Tribunal was entitled to reject his later evidence and that once it had done so his own evidence provided serious reasons for considering that he was an accessory to the crimes in question.¹⁴¹ The applicant in *Shokar and MIMA*¹⁴² had similarly sought to resile from earlier evidence. In that case, however, the Tribunal was not satisfied that his evidence at the original interview, in which his overriding objective was to persuade the department that he was a refugee, was an accurate account. The Tribunal noted that apart from the applicant and his brother's unreliable and self-serving statements, there was *no* other evidence before it which could suggest that there were *any* reasons, let alone *serious* reasons, for considering that the applicant had committed any act that may be relevant for the purposes of Article 1F. The Tribunal regarded it as essential, in the circumstances of that case where the applicant's veracity was questionable, that there should be at least *some* evidence of an extrinsic and objective nature to assist it in its deliberations.¹⁴³

The phrase 'serious reasons for considering' applies only in relation to questions of fact.¹⁴⁴ Whether particular acts constitute a class of crime specified in Article 1F, and whether a defence is available which would absolve a person from criminal responsibility, are questions of law to which the 'serious reasons for considering' test does not apply.

Crimes against peace, war crimes, crimes against humanity

Article 1F(a) of the Convention excludes persons from the operation of the Convention if there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity. It states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

Sections 5H(2)(a) and 36(2C)(a)(i) provide for a similarly worded exclusion for consideration in matters where a person is seeking a protection visa on the basis of 'complementary protection' grounds or the post 16 December 2014 refugee definition.

¹⁴¹ *MIMA v Singh* (2002) 1209 CLR 533 per Gleeson CJ at [6]. See also, eg, *SRLLL and MIMIA* [2002] AATA 795 (Handley DP, 12 September 2002) and *SRNN and DIMA* [2000] AATA 983 (Chappell DP, 10 November 2000).

¹⁴² [1998] AATA 144 (Burns DP, 6 March 1998).

¹⁴³ *Shokar and MIMA* [1998] AATA 1039 (Burns DP, 6 March 1998) at [33]. In *W97/164 and MIMA*, [1998] AATA 618, Mathews P observed that there will always be cases where a witness's account, notwithstanding that it is given under oath, and notwithstanding that there is no contrary material, will be so inherently unsatisfactory that it will be insufficient to satisfy even the lowest standard of proof. Her Honour did not think the applicant's evidence in that case could be so categorised. (at [43]).

¹⁴⁴ *Moreno v Canada (MEI)* (1993) 21 Imm LR (2d) 221 (Court of Appeal), *Gonzalez v Canada (MEI)* (1994) 24 Imm LR (2d) 229 (Court of Appeal).

There has been some consideration of Article 1F in Australia by the General Division of the AAT¹⁴⁵ and limited consideration by the Federal Court.¹⁴⁶ It has also been the subject of judicial consideration in other jurisdictions, and extensive academic commentary.¹⁴⁷

Definition of crimes against peace, war crimes and crimes against humanity

In order to identify crimes against peace, war crimes and crimes against humanity it is necessary to have recourse to definitions contained in international instruments drawn up to make provision in respect of such crimes.¹⁴⁸ Article 1F(a) is not limited to those international instruments promulgated either in 1951 or in 1967 when the Protocol was agreed upon.¹⁴⁹ Nor need the relevant international instrument be in existence at the time the crime in question was committed.¹⁵⁰ Any international instrument drawn up to provide for, and which contains a definition of, 'a crime against peace, a war crime, or a crime against humanity' is an instrument that is potentially relevant to an Article 1F(a) decision.¹⁵¹ In contrast, ss.5H(2)(a) and 36(2C)(a) refer to international instruments prescribed by the regulations.¹⁵²

¹⁴⁵ See, eg *W97/164 and MIMA*, [1998] AATA 618 (Mathews P, 10 June 1998); *N96/1441 and MIMA* [1998] AATA 619 (Mathews P, 11 June 1998); *N1998/532 and MIMA* [1999] AATA 116 (Purvis DP, 5 March 1999); *SRL and MIMA* [2000] AATA 128 (Chappell DP, 22 February 2000); *VZL and MIMA* [2000] AATA 191 (McDonald DP, 10 March 2000); '*SRNN*' and *DIMA* [2000] AATA 983 (Chappell DP, 10 November 2000); *SAH and MIMIA* [2002] AATA 263 (Forgie DP, 18 April 2002); '*AXOIB*' and *MIMA* [2002] AATA 365 (Wright DP, 17 May 2002); *SRLLL and MIMIA* [2002] AATA 795 (Handley DP, 12 September 2002); *SAL and MIMIA* [2002] AATA 1164 (Forgie DP, 12 November 2002); '*VAG*' and *MIMIA* [2002] AATA 1332 (Forgie DP, 23 December 2002); '*SRYYY*' and *MIMIA* [2003] AATA 927 (Handley DP, 19 September 2003) upheld by Federal Court: *SRYYY v MIMIA* [2003] FCA 1588 (Lindgren J, 19 December 2003); *SRHHH and MIMIA* [2005] AATA 1020 (Walker DP, 14 October 2005); '*SRYYY*' and *MIMA* [2006] AATA 320 (Walker DP, 5 April 2006) upheld: *SZITR v MIMA* (2006) 221 FCR 583; *WBR and MIMA* [2006] AATA 754 (Hotop DP, 5 September 2006); *WBV and MIAC* [2007] AATA 2046 (Hotop DP, 12 December 2007); and *YYMT and MIAC and FRFJ and MIAC* (2010) 115 ALD 590.

¹⁴⁶ See, in particular, *SRYYY v MIMIA* (2005) 147 FCR 1 allowing an appeal from *SRYYY v MIMIA* [2003] FCA 1588 (Lindgren J, 19 December 2003), *SZCWP v MIMIA* [2006] FCAFC 9 (Wilcox, Gyles and Downes JJ, 20 February 2006), *VWYJ v MIMIA* [2006] FCAFC 1 (Gray, Kiefel and Lander JJ, 16 March 2006), *SZITR v MIMA* (2006) 221 FCR 583 and *MZYVM v MIAC* [2013] FCA 79 (Dodds-Streton J, 13 February 2013).

¹⁴⁷ See, for example, *R (on the application of JS) (Sri Lanka) v SSHD* [2010] UKSC 15 (Lord Hope DP, Lords Rodger, Walker, Brown, Kerr, 17 March 2010); N Weisman, 'Article 1F(a) of the 1951 Convention in Canadian Law', (1996) 8(1) *International Journal of Refugee Law*, at 111-143; J Pejic, 'Article 1F(a): The Notion of International Crimes', (2000) 12 *International Journal of Refugee Law*; PJ van Krieken (ed), *Refugee Law in Context: The Exclusion Clause*, (TMC Asser Press, 1999), Chapter 2. See also O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Nomos Verlagsgesellschaft, 1999); M Bassiouni, *Crimes Against Humanity in International Criminal Law*, (Kluwer Law International, 2nd Revised Edition, 1999); United Nations, *The United Nations and the development of international law, 1990-1999*, 2002, Chapter 1: International Criminal Law (at <http://www.un.org/law/1990-1999/>); M Zagor, *Persecutor or Persecuted: Exclusion Under Article 1F(A) and (B) of the Refugees Convention*, (2000) 23(3) *UNSW Law Journal* 164; European Council on Refugees and Exiles, 'Position on Exclusion from Refugee Status', in (2004) 16(2) *International Journal of Refugee Law* 257; J C Simeon, 'Exclusion Under Article 1F(a) of the 1951 Convention in Canada', (2009) 21(2) *International Journal of Refugee Law* 193.

¹⁴⁸ In the Article 1F context, the Full Federal Court has held that the term 'instrument' in Article 1F(a) can include non-binding instruments such as general assembly resolutions, draft instruments prepared by the International Law Commission (ILC) or non-binding declarations made by groups of states (such as the Universal Declaration of Human Rights) and treaties not yet in force: *SRYYY v MIMIA* (2005) 147 FCR 1 at [66].

¹⁴⁹ See for example, Goodwin Gill and McAdam, above n 21 at 166-167; UNHCR, *Summary Conclusions – Exclusion from Refugee Status*, Lisbon Expert Roundtable, 3-4 May 2001, (EC/GC/01/2Track/1, 30 May 2001) at [5]. See also the discussion in *SRYYY v MIMIA* (2005) 147 FCR 1 at [28]-[32], [72]. The AAT has accepted this approach on a number of occasions: see eg *VZL and MIMA* [2000] AATA 191 (McDonald DP, 10 March 2000); '*SRNN*' and *DIMA* [2000] AATA 983 (Chappell DP, 10 November 2000) and *SAL and MIMIA* [2002] AATA 1164 (Forgie DP, 12 November 2002).

¹⁵⁰ *SRYYY v MIMIA* (2005) 147 FCR 1 at [63]-[65].

¹⁵¹ *SRYYY v MIMIA* (2005) 147 FCR 1 at [67].

¹⁵² For the purposes of s.36(2C)(a)(i) and s.5H(2), each international instrument that defines a crime against peace, a war crime, and a crime against humanity is prescribed by r.2.03B of the Migration Regulations 1994. The regulation provides the following non-exhaustive list of instruments as examples: *Rome Statute of the International Criminal Court*, done at Rome on 17 July 1998; the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, signed at London on 8 August 1945; the *Charter of the International Military Tribunal*, signed at London on 8 August 1945; the *Convention on the Prevention and Punishment of the Crime of Genocide*, approved in New York on 9 December 1948; *The First Convention within the meaning of the Geneva Conventions Act 1957*; *The Second Convention within the meaning of the Geneva Conventions Act 1957*; *The Third Convention within the meaning of the Geneva Conventions Act*

Crimes falling under Article 1F(a) are defined in a wide variety of international instruments, notably, the 1945 London Agreement and Charter of the International Military Tribunal (the Nuremberg Charter),¹⁵³ the four Geneva Conventions of 1949 and Additional Protocols of 1977¹⁵⁴ and, more recently, the Statutes of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)¹⁵⁵ and the Rome Statute of the International Criminal Court (the Rome Statute), which was adopted in Rome in July 1998 and came into force on 1 July 2002.¹⁵⁶

In view of the range of relevant international instruments, it is clear that there is no one accepted definition of the Article 1F(a) crimes and a difficult question may arise as to the definition to be applied where these instruments contain inconsistent definitions of the relevant crimes.¹⁵⁷ Without definitively settling this question, the Federal Court has held that it is open to a decision maker to select the instrument that is appropriate to the circumstances of the case.¹⁵⁸ In general, the more recent documents are considered to carry weight as a consequence of the more recent analysis made for their preparation.¹⁵⁹

1957; *The Fourth Convention within the meaning of the Geneva Conventions Act 1957; The Protocol I within the meaning of the Geneva Conventions Act 1957; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), done at Geneva on 8 June 1977; the *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted by the United Nations Security Council on 25 May 1993; and the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, adopted by the United Nations Security Council on 8 November 1994.

¹⁵³ Also known as the London Charter, annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (the London Agreement), 59 Stat. 1544, 82 UNTS 279. The relevant definitions are contained in Article 6 which is set out in the UNHCR, *Handbook*, above n 5, Annex V.

¹⁵⁴ *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

¹⁵⁵ *The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* and the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994* respectively.

¹⁵⁶ For commentary on the Rome Statute, see Triffterer, above n 147. Australia is a party to the Rome Statute but the United States of America is not. The USA Government signed the treaty in 2000, but in May 2002 it informed the Secretary-General that it did not intend to become a party: See <<http://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf>> (accessed 21/11/16), end note 11. Other well known, relevant international instruments are listed in Annex VI to the UNHCR, *Handbook*, above 5, and Annexes to UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Geneva, 4 September 2003 ('*Background Note Article 1F 2003*'); Control Council Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes Against Humanity, Control Council for Germany, December 20, 1945 (Control Council Law No. 10) is often mentioned in the context of Article 1F(a); however Grahl-Madsen argues that it is not an international instrument in the relevant sense: Grahl-Madsen, above n 39, at 275-6. The *Draft Code of Crimes against the Peace and Security of Mankind*, prepared by the International Law Commission (ILC) pursuant to UNGA Resolution 177(II) of 1947 and provisionally adopted in 1991, contains definitions of, inter alia, war crimes and crimes against humanity. Commentary on the definitions is contained in the 1996 Report of the ILC to the General Assembly. However, in *Re W97/164 and MIMA* (1998) 51 ALD 432 President J Mathews stated at 443-4 that the Draft Code of the ILC lacks the status of an international instrument and therefore cannot be used to provide an authoritative definition for the purposes of Article 1F(a).

¹⁵⁷ *SRYYY v MIMIA* (2005) 147 FCR 1 at [68].

¹⁵⁸ *SRYYY v MIMIA* (2005) 147 FCR 1 at [73]. The Court gave as obvious examples the London Charter as an appropriate instrument for international crimes committed in Europe during the Second World War and the Statutes for the ICTY and ICTR for crimes committed in the course of the conflicts the subject of those Statutes: at [74]. However, their Honours' reasoning would suggest that even in relation to crimes covered by specific instruments it might also be permissible to rely on more recent definitions such as those contained in the Rome Statute.

¹⁵⁹ See *SRYYY v MIMIA* (2005) 147 FCR 1 at [73].

Crimes against peace

There is currently no international consensus on what constitutes a crime against peace; and little or no jurisprudence on this element of Article 1F(a).¹⁶⁰ Most commentators suggest that responsibility for crimes against peace is limited to those in a position of high authority in a state.¹⁶¹

‘Crimes against Peace’ are defined in Article 6 of the Nuremberg Charter as:

planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Drawing on this definition, Control Council Law No. 10 defines crimes against peace as the ‘[i]nitiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to’ the crimes specified in Article 6 of the Nuremberg Charter.¹⁶²

Relevant to these definitions, ‘aggression’ has been defined by the UN General Assembly as:

... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations¹⁶³

The ‘crime of aggression’ is listed in the Rome Statute as a crime within the jurisdiction of the ICC.¹⁶⁴ A definition of the crime has been agreed upon, but has not yet entered into force.¹⁶⁵

¹⁶⁰ There is no Australian jurisprudence on this aspect of Article 1F(a). As at September 2003 UNHCR was not aware of any jurisprudence dealing with crimes against peace in this context: UNHCR, *Background Note Article 1F 2003*, above n 156.

¹⁶¹ See UNHCR *Article 1F Guidelines, 2003*, above n 125; UNHCR, *Background Note Article 1F 2003*, above n 156; Gilbert suggests that if individual responsibility for the crime against peace is to be consistent with the 1974 Resolution on the Definition of Aggression, then, as well as the leaders of a state, it might include the leaders of rebel groups in non-international armed conflicts which seek secession, but few if any others: G Gilbert, ‘Current issues in the application of the exclusion clauses’ and ‘Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001’ in Feller, Turk and Nicholson, above n 21 at 434-5.

¹⁶² Article II(1)(a).

¹⁶³ UNGA res. 3314 (XXIX), 1974.

¹⁶⁴ Article 5(1)(d), Rome Statute of the International Criminal Court.

¹⁶⁵ Paragraph 2 of Article 5 states that ‘The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. ...’. On 11 June 2010, the Review Conference of The Rome Statute adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression (Resolution RC/Res.6). Whilst the Conference decided to adopt the amendments, they are subject to ratification or acceptance and the Court’s jurisdiction is subject to a decision to be taken after 1 January 2017 (Resolution RC/Res.6, Annex I, Art 15 *ter*; Rome Statute, Arts. 12, 121, 122). Article 8 *bis* Resolution RC/Res.6, Annex I states that, for the purpose of the Statute, ‘crime of aggression’ means ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’ An ‘act of aggression’ is defined to mean ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.’ It includes invasion or attack by the armed forces of a State of the territory of another State; bombardment or use of weapons against the territory of another State; blockade of ports or coasts of a State; the use of armed forces in the territory of a receiving State, in contravention of the conditions of the relevant agreement; a State allowing its territory to be used by another State for perpetrating an act of aggression against a third State; and the sending by or on behalf of a State of armed bands or irregulars which carry out acts of armed force against another state of such gravity as to amount to the other acts listed in the article.

Although there is no current universally accepted treaty definition of crimes against peace, in most situations where charges of aggression may be brought there will be an overlap with the other categories of crimes within Article 1F(a) and also, possibly, Article 1F(c).¹⁶⁶

War crimes

Numerous international instruments contain definitions of the term 'war crime', including the Nuremberg Charter, the Geneva Conventions and Additional Protocols, the Statutes of the ICTY and ICTR and the Rome Statute. Article 6(b) of the Nuremberg Charter defines 'war crimes' as:

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

This definition is not static, but takes into account new developments respecting the laws and customs of war.¹⁶⁷

War crimes are set out in the four Geneva Conventions of 1949 and Additional Protocol 1 of 1977 as 'grave breaches'. They are:

- wilful killing; torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or other protected person of the right of fair and regular trial; unlawful deportation or transfer or unlawful confinement of other protected person; and
- taking civilians as hostages.¹⁶⁸

Under the Geneva Conventions and Protocol I 'grave breaches' apply only to international armed conflicts.¹⁶⁹ In the case of armed conflict *not* of an international character, common

¹⁶⁶ Pejic, above n 147, at 16.

¹⁶⁷ Weisman, above n 147, at 116.

¹⁶⁸ *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* Article 50; see also *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* Arts. 50, 51; *Convention relative to the Treatment of Prisoners of War* Arts. 129, 130; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* Arts. 146, 147; *Additional Protocol 1* Arts. 11, 85. The term 'war crimes' is not used in the Conventions, but Article 85 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol 1) (1977) provides that grave breaches shall be considered as such: Article 85(5). Cited in Goodwin-Gill and McAdam, above n 21 at 166-167.

¹⁶⁹ See common Article 2 of the Geneva Conventions.

Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II prohibit the following acts committed with respect to persons taking no active part in the hostilities:¹⁷⁰

violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable by civilized peoples.

These prohibited acts are not technically 'war crimes' or 'grave breaches' under the Geneva Conventions and Additional Protocol II¹⁷¹; however they are covered by the definition of 'war crime' in the Rome Statute. Under Article 8 of the Rome Statute, 'war crimes' means:

- grave breaches of the 1949 Geneva Conventions;¹⁷²
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;¹⁷³
- in the case of an armed conflict *not* of an international character, serious violations of Article 3 common to the four Geneva Conventions, committed against persons taking no active part in the hostilities;¹⁷⁴ and
- other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.¹⁷⁵

Although the Rome Statute definition of 'war crimes' is not limited to armed conflicts of an international character, it expressly excludes acts that occur in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.¹⁷⁶

It is established under international law that an individual may be responsible for war crimes, regardless of whether that person belongs to the armed forces.¹⁷⁷ Thus, the laws relating to war crimes apply equally to civilians as to combatants in the conventional sense.

Crimes against humanity

This category of crime, potentially the broadest of those covered by Article 1F(a) of the Refugees Convention, ss.5H(2)(a) and 36(2C)(a)(i) of the Act, was first defined in the Nuremberg Charter.¹⁷⁸ It has subsequently been provided for in a number of international instruments including, most recently, the Statutes of the ICTY and ICTR and the Rome

¹⁷⁰ Including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.

¹⁷¹ Weisman, above n 147 at 117.

¹⁷² Rome Statute Article 8(2)(a). Article 2 of the *Amended Statute of the International Criminal Tribunal for the Former Yugoslavia* contains a virtually identical provision. Note that both these provisions are restricted to acts against persons or property protected under the provisions of the relevant Geneva Convention.

¹⁷³ Rome Statute Article 8(2)(b). The provision contains an exhaustive list of the relevant acts.

¹⁷⁴ Rome Statute Article 8(2)(c).

¹⁷⁵ Rome Statute Article 8(2)(e). The provision contains an exhaustive list of the relevant acts.

¹⁷⁶ Rome Statute Article 8(2)(d) and (f).

¹⁷⁷ Pejic, above n 147 at 18.

¹⁷⁸ On crimes against humanity generally, see Bassiouni, above n 147.

Statute.¹⁷⁹ The Rome Statute incorporates most of the provisions of the earlier international instruments and in general, may be taken to reflect customary international law, including developments in the case law of the ICTY and ICTR.¹⁸⁰

The essential feature of crimes against humanity is the desire to prohibit only crimes “which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind”.¹⁸¹

Article 6(c) of the Nuremberg Charter exhaustively defines ‘crimes against humanity’ as:

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁸²

The list of specified crimes against humanity was subsequently expanded to include imprisonment, torture and rape¹⁸³ and has now been further expanded to include other sexual crimes, enforced disappearance and apartheid.¹⁸⁴

Article 7(1) of the Rome Statute defines a crime against humanity as any of the following acts ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’:

(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...¹⁸⁵ or other grounds that are universally recognized as impermissible under international law...¹⁸⁶ (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁸⁷

Each of the recent statutes specifies threshold requirements that serve to distinguish ordinary crimes such as murder from crimes against humanity. For the purposes of the ICTY, the specified crimes qualify as crimes against humanity ‘when committed in armed

¹⁷⁹ Other important instruments providing for crimes against humanity include Control Council Law No. 10, the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946, T.I.A.S. No. 1589 (the Tokyo Charter), the International Convention on the Suppression and Punishment of the Crime of Apartheid, and the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).

¹⁸⁰ Pejic, above n 147 at 31, H von Hebel, ‘Crimes Against Humanity under the Rome Statute’, in van Krieken, above n 147 at 105, 118; R Dixon, in O Triffterer, above n 147, Article 7, margin No. 4. There are exceptions, however they are not to be construed as an amendment of customary law: see Article 10. Note, too, that ICTY and ICTR case law has developed in some respects since the Rome Statute came into force.

¹⁸¹ *History of the United Nations War Crimes Commission and the Development of the Laws of War 179* (UN War Crimes Commission, 1948), cited by R Dixon, in O Triffterer, above n 147 Article 7, margin No. 4.

¹⁸² Similar definitions in the Tokyo Charter and Control Council Law No. 10 were derived from this definition: see von Hebel, above n 180, at 117.

¹⁸³ For example, Control Council Law No. 10 Article II(1)(c), and ICTY and ICTR Statutes Articles 5 and 3 respectively.

¹⁸⁴ Rome Statute Article 7(1).

¹⁸⁵ For the purposes of the Statute, ‘gender’ is defined in paragraph 3 of Article 7.

¹⁸⁶ The persecution must be in connection with any act referred to in paragraph 2 of Article 7 or any crime within the jurisdiction of the Court.

¹⁸⁷ Rome Statute Article 7(1). The expressions ‘attack directed against any civilian population’, ‘extermination’, ‘enslavement’, ‘deportation or forcible transfer of population’, ‘torture’, ‘forced pregnancy’, ‘persecution’, ‘the crime of apartheid’ and ‘enforced disappearance of persons’ are defined in Article 7(2).

conflict, whether international or internal in character, and directed against any civilian population'.¹⁸⁸ For the purposes of the ICTR, the specified crimes are crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. The chapeau to the Rome Statute definition of 'crimes against humanity' refers to specified acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Importantly, the chapeau does not require a nexus with an armed conflict (whether internal or international), or refer to a discriminatory intent. Thus, it is now generally accepted that crimes against humanity can be committed in times of absolute or relative peace.¹⁸⁹

Decisions of the ICTY¹⁹⁰ and the ICTR¹⁹¹ have clarified some of the customary international law principles now reflected in the statutory definitions. Judicial consideration of the application of Article 7(1) of the Rome Statute in Australia has been limited.¹⁹²

Defences

In general, the defences that are normally available under the relevant international instrument should be available in the context of examining the applicability of Article 1F(a).¹⁹³

Neither the Nuremberg Charter, nor the 1948 Geneva Conventions nor the Statutes of the ICTY and ICTR expressly recognise any defences to the crimes they deal with.¹⁹⁴ Nevertheless, in certain circumstances, defences are available under the relevant international instruments. The grounds for defence derive their origins from criminal law and have the effect that a person cannot be held responsible for a crime where the mental

¹⁸⁸ Defined to mean 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack': Article 7(2)(a).

¹⁸⁹ The General Division of the AAT has accepted this proposition. See *Re W97/164 and MIMA* [1998] AATA 618 at [61]-[62] and *N96/1441 and MIMA* [1998] AATA 619 at [71]-[73]. In those cases, President Mathews observed however that '[t]he mere fact that atrocities are committed on a systematic basis against an identifiable group of people would normally, in itself, create a discernible conflict within the community'.

¹⁹⁰ See eg *Prosecutor v Tadic*, No. IT-94-1-T, Opinion and Judgement, Trial Chamber II, 7 May 1997; IT-94-1-A, Appeals Chamber Judgement 15 July 1999; *Prosecutor v Jelusic*, No. IT-95-10-T, Judgement, Trial Chamber I, 14 December 1999; IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, *Prosecutor v Kupreskic et al*, No. IT-95-16-T, Judgement, Trial Chamber II, 14 January 2000; *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-T, Judgement, Trial Chamber III, 26 February 2001; *Prosecutor v Kunarac & Ors*, No. IT-96-23 & IT-96-23/1, Judgement, Trial Chamber II, 22 February 2001, Appeals Chamber, 12 June 2002; *Prosecutor v Vasiljevic*, No. IT-98-32-T, Judgement, Trial Chamber II, 29 November 2002; *Prosecutor v Radoslav Brdjanin*, No IT- 99-36, Judgment, Trial Chamber II, 1 September 2004; and *Prosecutor v Popovic et al*, No. IT-05-88, Judgment, Trial Chamber II, 10 June 2010. Note that the Appeals Chamber in *Tadic's case* found that the Trial Chamber had erred in law in some respects. See below. The Appeals Chamber in *Kupreskic's case* overturned the decision of the Trial Chamber in respect of three of the defendants, but not on questions of law: *Prosecutor v Kupreskic*, No. IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001.

¹⁹¹ See eg *Prosecutor v Akayesu*, No. ICTR-96-4-T, Judgement, Trial Chamber I, 2 September 1998; ICTR-96-4-A, Appeals Chamber Judgement, 1 June 2001; *Prosecutor v Kayishema & Ruzindana*, ICTR-95-1-T, Trial Chamber 21 May 1999; ICTR-95-1-A, Appeals Chamber Judgement, 1 June 2001; and *Prosecutor v Semanza*, No. ICTR- 97-20-T, Appeals Chamber Judgment, 15 May 2003.

¹⁹² See, for example, *MZYVM v MIAC* [2013] FCA 79 (Dodds-Streeton J, 13 February 2013) dismissing an appeal from *MZYVM v MIAC* [2012] FMCA 762 (Burchardt FM, 5 September 2012), upholding a recommendation by an Independent Merits Reviewer that there were serious reasons for considering the appellant had committed the crime against humanity of murder while a member of the Liberation Tamil Tigers of Eelam. The focus was on procedural fairness obligations and no issue was taken with the application of Article 7(1)(a) of the Rome Statute.

¹⁹³ UNHCR, *Summary Conclusions – Exclusion from Refugee Status*, Lisbon Expert Roundtable (EC/GC/01/2Track/1, 30 May 2001), at [20]; *SRYYY v MIMIA* (2005) 147 FCR 1 at [127].

¹⁹⁴ See ILC Commentary to Article 14 of the Draft Code. Under that draft Article, 'the competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime'.

element, or *mens rea*, of the crime, is absent.¹⁹⁵ However, as one commentator has observed, where the necessary *mens rea* is not present, then the crime has not been committed so it is inappropriate to talk of defences.¹⁹⁶ Article 31 of the Rome Statute recognises a number of ‘grounds for excluding criminal responsibility’. They include circumstances relating to mental incapacity, self-defence, duress, and other grounds derived from applicable treaties and the principles and rules of international law, or general principles of law derived by the Court from national laws and legal systems. In addition, mistake of fact and mistake of law are recognised as grounds for excluding criminal responsibility where the mistake negates the mental element required by the crime.¹⁹⁷ Further, a defence of ‘superior orders’ is available under the Statute only in certain limited circumstances.¹⁹⁸

Serious non-political crimes

Article 1F(b) of the Convention excludes persons from the operation of the Convention if there are serious reasons for considering that they have committed a serious non-political crime. Article 1F(b) states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

...

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

Sections 5H(2)(b) and 36(2C)(a)(ii) provide for similarly worded exclusions for consideration in matters where a person is seeking a protection visa under the post 16 December 2014 refugee definition or on the basis of ‘complementary protection’ grounds. For that reason, the discussion below, is equally relevant to consideration of those sections.

It is generally accepted that the purpose of Article 1F(b) is to protect the interests of the receiving state.¹⁹⁹

The issues that most often arise in relation to Article 1F(b) are the meaning of ‘serious non-political crime’, whether the seriousness of the crime needs to be balanced against the possible harm faced, and the relevance of prior punishment for the crime. A further issue that has arisen is the meaning of ‘committed ... outside the country of refuge’.

¹⁹⁵ Weisman, above n 147 at 128.

¹⁹⁶ Gilbert, above n 161 at 472.

¹⁹⁷ Rome Statute Article 32.

¹⁹⁸ Rome Statute Article 33. For discussion of this defence, see *SRYYY v MIMIA* (2005) 147 FCR 1; and *SZITR v MIMIA* (2006) 221 FCR 583; and *VWYJ v MIMIA* [2006] FCAFC 1 (Gray, Kiefel and Lander JJ, 16 March 2006).

¹⁹⁹ See, for example, *Dhayakpa v MIEA* (1995) 62 FCR 556 at 565, *Ovcharuk v MIMA* (1998) 88 FCR 173, per Whitlam J at 179, Branson J at 185, Sackville J agreeing, and *MD Shahidul and MIMA* [1998] AATA 331 (Chappell DP, 8 May 1998), *YYMT and MIAC and FRFJ and MIAC* (2010) 115 ALD 590.

The 'non-political' element of Article 1F(b) is qualified by s.91T of the Act for visa applications made prior to 16 December 2014. Under s.91T, the meaning of 'non-political crime' in Article 1F is that in s.5(1) of the Act.

Section 5(1) of the Act defines 'non-political crime', both for the purpose of s.91T (and Article 1F), ss.5H(2)(b) and 36(2C)(a)(ii) as:

- (a) subject to paragraph (b), ...a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and
- (b) includes an offence that, under paragraph (a), (b), (c) or (d) of the definition of **political offence** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.

It should be noted that some judicial consideration of Article 1F(b) in Australia predates the introduction of the statutory definition.²⁰⁰

The elements of Article 1F(b)

'Crime'

Given the different connotations of the term 'crime' in different legal systems, it is not easy to define what constitutes a 'crime' under Article 1F(b)²⁰¹ (and ss.5H(2)(b) and 36(2C)(a)(ii)), and the categories of conduct capable of amounting to a 'crime' in this context have not been exhaustively determined in Australian law.²⁰²

On one view, 'crime' in Article 1F(b) means an offence for which the maximum penalty in the majority of countries of Western Europe and North America is imprisonment for more than 5 years, or death.²⁰³ On another view, the qualification 'serious' denotes that the word 'crime' was used in the broader sense (i.e. every punishable act) and then qualified by the addition of the word 'serious'.²⁰⁴

In *Ovcharuk v MIMA* a question arose as to whether the conduct in question (conspiracy to import a large quantity of heroin into Australia) must be criminal in the place where it occurred or whether it may include conduct that constitutes an offence under a law of the country of refuge with extraterritorial application. Rejecting the contention that Article 1F(b) is confined to fugitives from foreign justice, the Court held that it can include a crime for which the person is open to be convicted in the country in which refuge is sought, and does not

²⁰⁰ See, for example, *Dhayakpa v MIEA* (1995) 62 FCR 556 at 565, and *Ovcharuk v MIMA* (1998) 88 FCR 173. On Article 1F(b) more generally, see also *MIMA v Singh* (2002) 209 CLR 533 and *SZLDG v MIAC* (2008) 166 FCR 230. There are also several AAT decisions which are of interest for their discussion of Article 1F(b) – see, for instance, *Hapugoda and MIMA* [1997] AATA 108, *MD Shahidul, SRLLLL and MIMA* [2002] AATA 795 (Handley DP, 12 September 2002), *SRBBBB and MIMIA* [2003] AATA 1066 (Handley DP, 24 October 2003), *WBA and MIMIA* [2003] AATA 1250 (Hotop DP, 11 December 2003), *SRCCCC & MIMIA* [2004] AATA 315 (Handley DP, 26 March 2004) and *YYMT and FRFJ* (2010) 115 ALD 590. Section 91T was considered by the Tribunal in *SRLLL*, *WBA* and *YYMT*. Although *SRBBBB* post-dated s.91T, the Tribunal did not mention the provision in its discussion of 'non-political'.

²⁰¹ UNHCR, *Handbook*, above n 5 at [155], Goodwin-Gill and McAdam, above n 21 at 178. See also the discussion in Grahl-Madsen, above n 39 vol. 1 at 292-4.

²⁰² *Ovcharuk v MIMA* (1998) 88 FCR 173 at 186.

²⁰³ Grahl-Madsen, above n 39 vol. 1, at 294.

²⁰⁴ Robinson, above n 18 at 68.

require identification of a crime which is justiciable according to the law of the foreign jurisdiction in which it was committed.²⁰⁵ However, Justice Sackville expressed the opinion that where the conduct committed outside the country of refuge does *not* constitute a crime under the law of that country, it would not be enough that the conduct would have been criminal had it taken place within that country. Rather, Article 1F(b) would not be satisfied in those circumstances unless the conduct was criminal under the laws of the country where it occurred. His Honour reasoned:

It is not difficult to imagine conduct that would have been regarded as a crime (and perhaps a serious crime) had it occurred in the country of refuge, yet was not criminal in the place where it occurred.²⁰⁶ ...

It is hardly a beneficial construction of the Refugees Convention to exclude a person who has never engaged in conduct for which he or she is liable to prosecution on the ground that he or she has committed a serious crime.²⁰⁷

Related to the question of what constitutes a 'crime' for the purposes of Article 1F(b) is the question of what constitutes a 'serious' crime in that context.

'Serious'

The UNHCR Handbook states that in the context of Article 1F(b) a 'serious' crime must be a capital crime or a very grave punishable act.²⁰⁸ However, whether serious criminality for the purposes of Article 1F(b) is to be assessed according to international or local standards is not entirely clear. According to UNHCR, in determining whether a particular crime is serious, international rather than local standards are relevant.²⁰⁹ Professor Goodwin-Gill and Dr McAdam similarly state that the standard finally to be applied is an international standard, in that a provision of a multilateral treaty is involved, although standards relating to criminal prosecution and treatment of offenders current in the potential country of asylum are also relevant.²¹⁰ Elsewhere the learned authors state that each state must determine what constitutes a serious crime, according to its own standards, considered against the objectives of the Convention.²¹¹

In *Ovcharuk v MIMA*²¹² the Full Federal Court held that the question of whether there are serious reasons for considering that a person 'has committed a serious non-political crime outside the country of refuge' may be answered by reference to notions of serious criminality accepted within the receiving state.²¹³ Justice Branson made it clear that the question of

²⁰⁵ For example, a conspiracy to import drugs into Australia, which is committed outside of Australia but punishable under Australian law: *Ovcharuk v MIMA* (1998) 88 FCR 173 per Whitlam J at 179, Branson J at 186, Sackville J generally agreeing; see also Sackville J at 190-1. The crime must have constituted a crime at the time it was committed: *SRYYY v MIMIA* (2005) 147 FCR 1.

²⁰⁶ His Honour gave the examples of sexual relations with persons under a specified age, the use or supply of particular drugs and certain forms of economic activity illegal in some places and not others.

²⁰⁷ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Sackville J at 190-1. As to whether 'crime' in Article 1F(b) might refer to conduct regarded as criminal by international norms (or the common consent of nations), Sackville J commented on some difficulties with that notion, but found it neither necessary nor appropriate to resolve the question: at 191.

²⁰⁸ UNHCR, *Handbook*, above n 5 at [155].

²⁰⁹ UNHCR *Article 1F Guidelines 2003*, above n 125 at [14].

²¹⁰ Goodwin-Gill and McAdam, above n 21 at 178.

²¹¹ Goodwin-Gill and McAdam, above n 21 at 176.

²¹² (1998) 88 FCR 173.

²¹³ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Branson J at 185, Sackville J agreeing. See also per Sackville J at 191. However, Sackville J did suggest at 199-1 that if the conduct outside the country of refuge did not constitute a crime under

whether conduct undertaken in a country from which refuge is sought amounts to ‘a serious non-political crime’ should certainly not be answered solely by reference to the notions of serious criminality accepted within that country.²¹⁴

UNHCR has identified a number of indicators that might point to the seriousness of a common crime, including the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime (i.e. whether the crime is an indictable offence or dealt with summarily), the prescribed punishment, the nature of the penalty, and whether most jurisdictions would consider it a crime.²¹⁵ Commentators and jurisprudence indicate that serious crimes are those against physical integrity, life and liberty.²¹⁶ Thus, for example, murder, rape, armed robbery, wounding, arson, and drug trafficking would qualify, whereas petty theft would not.²¹⁷ Other offences such as burglary, stealing, embezzlement and assault may also be considered as raising a presumption of serious crime if other factors such as the use of weapons, injury to persons and property damage were present.²¹⁸ Elements suggested as tending to rebut a presumption of serious crime include the age of the offender, parole, a lapse of five years since the conviction or completion of sentence, generally good character, the offender being merely an accomplice, and other circumstances such as provocation and self-defence.²¹⁹

Article 1F(b) was considered by the General Division of the AAT in *SRCCCC and MIMIA*.²²⁰ In that case, the applicant had been found guilty of ‘people smuggling’, undoubtedly a serious crime in the eyes of the Australian government as reflected in the heavy maximum penalty of twenty years imprisonment. The Tribunal was of the view that the applicant’s crime was a more modest one when one considered the circumstances and nature of his involvement, including the circumstance that the applicant did not initially know the principal purpose of the trip (he learnt of this when the boat was already at sea). The Tribunal found

the laws of that country, or under the laws of the country where it took place, it would not be enough that it would have been a crime, even a serious one, had it taken place in the country of refuge. In *Jayasekara v Canada* (2008) 305 DLR (4th) 630 the Canadian Federal Court of Appeal stated that ‘[w]hile regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime’ (at [43]).

²¹⁴ *Ovcharuk v MIMA* (1998) 88 FCR 173 at 185. To illustrate the point, Branson J noted that Australia would not classify conduct such as peaceful political dissent, the possession of alcohol or the ‘immodest’ dress of women as seriously criminal, even though it might be regarded as such by regimes elsewhere: at 186.

²¹⁵ UNHCR, *Interpreting Article 1*, 2001, at [45], *Article 1F Guidelines 2003* above n 125 at [14].

²¹⁶ Goodwin-Gill and McAdam, above n 21 at 177.

²¹⁷ See, eg, UNHCR *Article 1F Guidelines 2003*, above n 125 at [14], Goodwin-Gill and McAdam, above n 21 at 179 referring to UNHCR’s proposed approach to Article 1F(b) in a joint UNHCR/US State Department exercise in 1980, Grahl-Madsen, above n 39 vol 1, at 294. For discussion of the application of Article 1F(b) to drug trafficking, see M Gottwald, ‘Asylum claims and drug offences: the seriousness threshold of Article 1F(b) of the 1951 Convention relating to the status of refugees and the UN Drug Conventions’, *New Issues in Refugee Research*, Working Paper No. 112, UNHCR, Evaluation & Policy Analysis Unit, March 2005.

²¹⁸ Note that conspiracy to import heroin has been held to be a serious crime of a non-political nature in a line of Australian cases from *Dhayakpa v MIEA* (1995) 62 FCR 556, to the Full Federal Court’s decision in *Ovcharuk v MIMA* (1998) 88 FCR 173.

²¹⁹ Goodwin-Gill and McAdam, above n 21 at 179-180. See *Hapugoda and MIMA* [1997] AATA 108 at [30]. In *Jayasekara v Canada* (2008) 305 DLR (4th) 630 the Canadian Federal Court of Appeal stated that it ‘believe[d] there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S. v. Refugee Status Appeals Authority*; *S. & Ors v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157; *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), August 29, 2007, at pages 945 and 946-947. In other words, whatever presumption of seriousness may attach to a crime internationally or under legislation of the receiving state, that presumption may be rebutted by reference to the above factors’: (at [44]).

²²⁰ [2004] AATA 315 (Handley DP, 26 March 2004).

that neither by Australian standards nor by the standards espoused by the UNHCR could his criminal conduct be described as of such a serious nature as to negate any protection obligations Australia may have pursuant to the Refugees Convention.²²¹

Seriousness of crimes versus possible harm feared

It is established in Australian law that there is no obligation to weigh up the degree of seriousness of the crime against possible harm to the applicant if returned to the country of reference.²²² In *Dhayakpa v MIEA*, French J stated:

It has been said that the operation of Article 1F confers upon the potential State of refuge a discretion to determine whether the criminal character of the applicant for refugee status in fact outweighs his character as a *bona fide* refugee and so constitutes a threat to its internal order... The adjective “serious” in Article 1F (b) involves an evaluative judgment about the nature of the allegedly disqualifying crime. A broad concept of discretion may encompass such evaluative judgment. But once the non political crime committed outside the country of refuge is properly characterised as “serious” the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the Applicant if returned to the state of origin.²²³

His Honour did not decide whether the evaluative characterization of an offence as ‘serious’ attracts elements of a balancing exercise;²²⁴ however it has been stated that in determining whether the disqualifying crime is ‘serious’ it is appropriate to have regard to the fact that it must be of such a nature as to result in Australia not having protection obligations to persons who commit such crimes.²²⁵

Meaning of ‘non-political crime’

Section 91T, as in force prior to 16 December 2014, provides that for the purpose of the Act, Article 1F of the Convention has effect as if the reference in that Article to a non-political crime were a reference to a non-political crime within the meaning of the Act. Section 5(1) of the Act defines the meaning of ‘non-political crime’ for the purpose of s.91T (and therefore Article 1F(b) of the Convention), and for ss.5H(2)(b) and 36(2C)(a)(ii). It states:

non political crime:

²²¹ *SRCCCC and MIMIA* [2004] AATA 315 (Handley DP, 26 March 2004) at [59]. See also the similar cases of *SRBBBB and MIMIA* [2003] AATA 1066 (Handley DP, 24 October 2003). In contrast, in *JSDW and MIBP* [2017] AATA 2420 (Kendall DP, 1 November 2017) the Tribunal found that the applicant’s active, albeit low-level involvement in people smuggling did amount to a serious non-political crime, distinguishing *SRBBBB* on the facts. See also *ZYVZ and MIBP* [2018] AATA 3967 (Boyle DP, 23 October 2018).

²²² *Applicant NADB of 2001 v MIMA* (2002) 126 FCR 453 at [41], [42]. Contrast the position of UNHCR, *Interpreting Article 1, 2001*, at [48]: ‘If the well-founded fear is of very severe persecution endangering the applicant’s life or freedom, the crime committed must be very grave indeed to exclude the person from status’. See also Goodwin-Gill and McAdam, above n 21 at 176. Hathaway and Foster, above n 36 at 565 revised the endorsement of a balancing test in an earlier edition (see Hathaway (1991), above n 61 at 224-225).

²²³ (1995) 62 FCR 556 at 563. Note that *Dhayakpa* was approved by Marshall J in *Ovcharuk v MIMA* (1998) 153 ALR 385, and by the Full Federal Court in *Ovcharuk v MIMA* (1998) 88 FCR 173. In *NADB v MIMA* [2002] FCA (2000) (Hely J, 8 March 2002), the Federal Court considered that academic commentators, Canadian, New Zealand and English cases supported the view that Article 1F(b) does not require any balancing between the seriousness of the crime committed, and the seriousness of the harm feared. *NADB v MIMA* was affirmed on appeal to the Full Court: *Applicant NADB of 2001 v MIMA* (2002) 126 FCR 453.

²²⁴ *Dhayakpa v MIEA* (1995) 62 FCR 556 at 564. His Honour referred to *T v SSHD* [1995] 1 WLR 545 at 554-555 where the Court of Appeal held that there is nothing in the Convention to support the view that, in deciding whether a non-political crime is ‘serious’ and therefore within Article 1F, the decision maker is obliged to weigh the threat of persecution if asylum be refused against the gravity of the crime.

²²⁵ *Applicant NADB of 2001 v MIMA* (2002) 126 FCR 453 per Merkel J at [41], Madgwick and Conti JJ agreeing.

- (a) subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and
- (b) includes an offence that, under paragraph (a), (b), or (c) of the definition of **political offence** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.²²⁶

The *Extradition Act 1988* identifies a broad range of offences which are considered not to be political, including offences referred to in a number of specified international instruments and domestic regulations. Section 5 of the Extradition Act states:

"political offence", in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

- (a) an offence that involves an act of violence against a person's life or liberty; or
- (b) an offence prescribed by regulations for the purposes of this paragraph to be an extraditable offence in relation to the country or all countries; or
- (c) an offence prescribed by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries.²²⁷

Various offences are prescribed in r.2B of the Extradition Regulations 1988 as extraditable offences for the definition of 'political offence' in s.5 of the Extradition Act.²²⁸ Some offences are specified by reference to Australian legislation and/or international Conventions, for example, Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, the English text of which is set out in Schedule 1 to the *Crimes (Aviation) Act 1991*.²²⁹ Other offences are specified by reference to particular conduct in specified countries, such as taking or endangering, attempting to take or endanger, or participating in the taking or endangering of, the life of a person in circumstances in which the conduct creates a collective danger, whether direct or indirect, to the lives of other persons.²³⁰

Thus, for the purposes of the Act, a crime is 'non-political' if it is excluded from the definition of 'political offence' in the Extradition Act, or if the perpetrator's motive is wholly or mainly non-political. It will be insufficient to avoid exclusion to establish some minor motivation that is political.

The Explanatory Memorandum to the Bill that introduced s.91T indicates that the purpose of the amendment was that 'Court judgments had set too low a threshold when determining the

²²⁶ Inserted by *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011). The definition effectively substituted that in s.91T which had been inserted by *Migration Legislation Amendment Act (No. 6) 2001* (No. 131 of 2001), with effect from 1 October 2001. Amended by the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (No.7 of 2012), with effect from 20 September 2012.

²²⁷ Amended by the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (No.7 of 2012), with effect from 20 September 2012.

²²⁸ Inserted by Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Regulation 2012 (No. 1), with effect from the commencement of the amendment to the definition of 'political offence' in s.5 of the *Extradition Act 1988* (12 September 2012).

²²⁹ r.2B(1)(a) of the Extradition Regulations 1988.

²³⁰ r.2B(3) of the Extradition Regulations 1988 specifies the conduct is not a political offence in relation to countries specified in r.2B(4).

degree of political motivation needed in order for a criminal act to fall outside the Article 1F exclusion clause'.²³¹

In the leading Australian case predating s.91T, *Singh v MIMA*,²³² the High Court considered the meaning of 'non-political crime' in Article 1F(b). The case concerned a 'Commander of Information' in the Khalistan Liberation Front who was involved as an accessory in the revenge killing of a police officer. The majority upheld the decision of the Full Federal Court, finding that the Tribunal erred in characterising the crime as 'non-political' on the basis that it was a revenge killing.²³³ The High Court essentially confirmed the position of the Full Federal Court that simply classifying an act as revenge would not necessarily preclude it from being a political one.²³⁴

The High Court confirmed that **political crimes** are not limited to offences such as treason, sedition and espionage, but can extend to what would otherwise be 'common' crimes, including unlawful homicide.

While there is no 'bright line' differentiating political and non-political crimes,²³⁵ a political crime must in some appropriately close way be linked with a **political purpose**, such as changing the political environment, commonly the government, or altering the practices or policies of those who exercise power or political influence in the country in which the crime is committed.²³⁶ In deciding whether a crime is 'political' or 'non-political' for the purposes of Article 1F(b), relevant factors may include the weapons and means used; whether the 'target' of the crime is a public official or a government agent as distinct from unarmed civilians chosen indiscriminately; and whether the crime is proportionate to the political end propounded. It will usually be necessary to also examine the alleged objectives of any organisation involved and the applicant's connection if any with that organisation.²³⁷

According to Gleeson CJ achievement of the political objective must be the **substantial** purpose of the act.²³⁸ Even if a killing occurs in the course of a political struggle, it will not be regarded as an incident of the struggle if the **sole or dominant** motive is the satisfaction of a personal grudge against the victim.²³⁹ According to Gaudron J, a crime is political if a **significant** purpose of the act or acts involved is political; but there is no reason why the

²³¹ Migration Legislation Amendment Bill (No.6) 2001, Explanatory Memorandum, at [33].

²³² (2002) 209 CLR 533.

²³³ *Singh v MIMA* (2002) 209 CLR 533.

²³⁴ *Singh v MIMA* (2002) 209 CLR 533. In dissent at [52] and [55], McHugh J agreed that the Tribunal would have been in error had it classified the act in this way, however he was of the view that the Tribunal had simply found that the KLF members who committed the murder did so only because they privately wished to avenge the torture and subsequent death of their fellow members. Callinan J at [170], also dissenting considered that although a retributive element may have been involved, this did not necessarily mean that the respondent had committed a serious non-political crime.

²³⁵ *Singh v MIMA* (2002) 209 CLR 533 per Gleeson CJ at [21], and Kirby J at [141].

²³⁶ *Singh v MIMA* (2002) 209 CLR 533 per Gleeson CJ at [21]-[22], Gaudron J at [45], Kirby J at [141]. Egregious acts of violence, such as acts those commonly considered to be of a 'terrorist' nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective according to UNHCR *Article 1F Guidelines 2003*, above n 125 at [15].

²³⁷ *Singh v MIMA* (2002) 209 CLR 533 per Kirby J at [141]. See also per Gaudron J at [46]

²³⁸ *Singh v MIMA* (2002) 209 CLR 533 per Gleeson CJ, at [21]-[22].

²³⁹ *Singh v MIMA* (2002) 209 CLR 533 per Gleeson CJ, at [18], referring to *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556 at 583.

political purpose should be the sole or even the dominant purpose.²⁴⁰ Justice McHugh suggested that murdering a policeman because he has tortured or killed a member of the group cannot be regarded as so remote from furthering the political objectives of the group that the murder is necessarily non-political.²⁴¹ However, it will be non-political if the only motivation for the murder is personal revenge, divorced from the political struggle.²⁴²

Singh's case confirms that for the purposes of Article 1F(b), a crime will be political if a substantial, or significant, purpose of the act or acts involved is political; the fact that there may also be a non-political motive will not necessarily make it non-political.

However, in determining whether a crime is non-political for the purposes of Article 1F(b) it is necessary to have regard to ss.5(1) and 91T of the Act. As set out above, a crime is non-political if the motive for committing it is **wholly or mainly** non-political or if it is an offence excluded from the definition of 'political offence' in the Extradition Act.

While the pre-s.91T case law and commentaries on Article 1F(b) continue to provide guidance on aspects of the meaning of 'non-political crime', the starting point will be ss.5(1) and 91T of the Act, depending upon the criteria in issue and when the application was made.

'Committed ... outside the country of refuge'

Article 1F(b) requires that the serious non-political crime be committed 'outside the country of refuge'. This would normally be the country of origin but may be any country apart from the country of refuge (that is, Australia).²⁴³

The place where a crime was 'committed' may become difficult to determine where an element of the crime is international - for instance, when drugs are taken from one country and imported into another. This was the issue in *Dhayakpa v MIEA* where the Court held that the fact that the crime (conspiracy to import heroin) was committed both inside and outside Australia, the country of refuge, did not preclude the operation of Article 1F(b).²⁴⁴ Justice French stated:

The elements of that offence [conspiracy to import heroin] were complete when the criminal agreement had been concluded ... the criminal agreement to import heroin into Australia was concluded outside Australia. It continued in effect and the offence thereby continued after the applicant entered Australia.

...

A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Article 1F(b) if it were shown that such a person had a record of serious non-political criminal offences whether in the country of origin or elsewhere. In my opinion it makes no difference that the offence, in this

²⁴⁰ *Singh v MIMA* (2002) 209 CLR 533 at [42], [44], [45].

²⁴¹ *Singh v MIMA* (2002) 209 CLR 533 Callinan J (dissenting) held at [164] that murder, or its planning and furtherance will 'practically never' be a political crime, but this will of course always depend on the circumstances of the case.

²⁴² *Singh v MIMA* (2002) 209 CLR 533 per McHugh J at [54].

²⁴³ UNHCR, *Handbook*, above n 5 at [153]. In the context of ss.5H(2)(b) and 36(2C)(a)(ii), the legislation specifies that the crime must be committed 'before entering Australia'.

²⁴⁴ (1995) 62 FCR 556. This position was upheld by Marshall J in *Ovcharuk* at first instance: (1998) 153 ALR 385 at 389. The issue was not specifically dealt with on appeal.

case a continuing offence, was committed both outside and within Australia.²⁴⁵

Individuals who commit 'serious non-political crimes' within the country of refuge are subject to that country's criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the Convention.²⁴⁶ Similarly, for the complementary protection criterion and the post 16 December 2014 protection visa criteria generally, there are specific exclusions for applicants who commit certain crimes in Australia: ss.36(1C) and 36(2C)(b).

The significance of prior punishment for the crime

Some commentators consider that Article 1F(b) is intended to bring refugee law into line with extradition law by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment. On that view, the provision should not be applied to an individual who has already been convicted and punished, pardoned or amnestied, or has benefited from a statute of limitations.²⁴⁷ However, this has not been accepted in Australia. In Australian law, it makes no difference that the applicant has already been punished for the offence, or the offence is no longer justiciable.²⁴⁸ In *Dhayakpa v MIEA*, French J explained that the difficulty with the suggestion that the exemption in Article 1F(b) does not extend to crimes for which punishment had been suffered or which were no longer justiciable was that it imports into the provision limitations not able to be found in its language.²⁴⁹

Acts contrary to the purposes and principles of the UN

Article 1F(c) of the Refugees Convention excludes a person from the definition of a refugee if there are serious reasons for considering that they are guilty of acts contrary to the purposes and principles of the United Nations (UN). Parallel exclusions are provided for in ss.5H(2)(c) and 36(2C)(a)(iii) for the post 16 December 2014 refugee definition or persons claiming protection on complementary protection grounds.

The purposes and principles of the UN are proclaimed in Articles 1 and 2 of the *United Nations Charter* respectively.²⁵⁰

²⁴⁵ (1995) 62 FCR 556 at 565.

²⁴⁶ UNHCR Article 1F Guidelines, 2003, at [16].

²⁴⁷ See Hathaway and Foster, above n 36, at 543; Grahl-Madsen, above n 39, vol. 1, 290-2, UNHCR, *Background Note Article 1F 2003*, above n 156 at [73]. Grahl-Madsen states that 'it stands to reason to submit that crimes for which punishment has been suffered ... should not be held against persons seeking recognition as refugees'. See also European Council on Refugees and Exiles, above n 147 at 257-285. See also the discussion in Goodwin-Gill and McAdam, above n 21 at 173-176, and *Ovcharuk v MIMA* (1998) 88 FCR 173 at 184-186.

²⁴⁸ *Dhayakpa v MIEA* (1995) 62 FCR 556 at 564-565, *Ovcharuk v MIMA* (1998) 88 FCR 173.

²⁴⁹ *Dhayakpa v MIEA* (1995) 62 FCR 556 at 564. The Full Court in *Ovcharuk v MIMA* (1998) 88 FCR 173 also emphasised the ordinary meaning of the words of the article. Justice Branson found there was nothing in the text of Article 1F(b) or in the policy underlying the provision to support a construction that it was confined to persons who were fleeing from foreign justice: at 186.

²⁵⁰ Some commentators (eg Goodwin-Gill and McAdam, above n 21 at 185-186, cf Grahl-Madsen, above n 39 at 283-284) also refer to the Preamble of the UN Charter in the context of Article 1F(c). Commentators have observed that Article 1F(c) appears in embryonic form in Annex I to the IRO Constitution, which refers to 'the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations'. The Preamble refers to a determination to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, in the dignity and worth of the human

The **purposes** of the UN are (1) to maintain international peace and security; (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; (3) to achieve international co-operation in solving economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion; and (4) to be a centre for harmonizing the actions of nations directed to those ends.²⁵¹

Its **principles** are essentially the sovereign equality of its members; good faith fulfilment of Charter obligations; peaceful settlement of international disputes; refraining from the threat or use of force against the territorial integrity or political independence of any state; assisting the UN in its actions under the Charter and withholding assistance to states against which it is taking preventive or enforcement action; and ensuring that non Members act in accordance with these principles so far as may be necessary to maintain international peace and security.²⁵²

These purposes and principles offer little clarification of the types of act which would deprive a person of refugee status and there has been some debate as to the scope of Article 1F(c), both in relation to the kinds of act it covers and who can perpetrate them. The *travaux préparatoires* reflect a lack of clarity in its formulation and a concern that the phrase was so vague as to be open to abuse.²⁵³

On one view, as most of the purposes and principles enumerated in the UN Charter are addressed to governments and not to individuals, the Article 1F(c) exclusion would normally be limited to persons in positions of power.²⁵⁴ Other commentators favour the view that the UN Charter has a dynamic aspect and that in certain areas the practical content of the

person, to establish conditions under which justice and respect for the obligations arising from international law can be maintained and to promote social progress, and for those ends to practice tolerance and live together in peace, to unite strength to maintain international peace and security, to ensure that armed force shall not be used safe in the common interest and to employ international machinery to promote economic and social advancement of all peoples, and a resolve to combine efforts to accomplish these aims (see Grahl-Madsen, above n 39 at 282).

²⁵¹ Article 1 of the UN Charter.

²⁵² Article 2 of the UN Charter.

²⁵³ In debate, it was variously suggested that the provision was 'not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of States, ministers and high officials', that it was intended to bar enemy collaborators in the Second World War, that it meant 'such acts as war crimes, genocide and the subversion or overthrow of democratic regimes', and that it involved a violation of human rights that fell short of a crime against humanity. See Goodwin-Gill and McAdam, above n 21 at 184; Grahl-Madsen, above n 39 at 283, UNHCR, *Background Note Article 1F, 2003*, above n 156 at [46]; Hathaway and Foster, above n 36 at 587.

²⁵⁴ See eg UNHCR, *Handbook*, above n 5 at [162]-[163] and UNHCR, *Background Note Article 1F, 2003*, above n 156 at [50] (although note that UNHCR subsequently revised its position: UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to cases Bundesrepublik Deutschland v. B and D pending before the Court of Justice of the European Union*, July 2009, at [29]); Grahl-Madsen, above n 39 at 286. See also E Kwakwa, 'Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations', (2000) 12 *International Journal of Refugee Law* 79, at 84-5, Weisman, above n 147 at 110-1, *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193 at 230-1. In *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745 in considering the general approach to Art 1F(c), the UK Supreme Court considered that '[t]he article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security"' (quoting from UNHCR, *Background Note Article 1F, 2003*, above n 156 at [47]) (at [16]). It also stated 'there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character' (at [16]).

declared purposes and principles must be determined in the light of more general developments.²⁵⁵

In France, Article 1F(c) was initially applied only to serious violations of human rights by heads of state and other senior state officials but was gradually extended to include lower ranking officials, as well as persons who did not hold positions of power but personally committed acts contrary to the purposes and principles of the United Nations by carrying out orders from superiors.²⁵⁶ Article 1F(c) has also been applied in cases where there was no link with the authorities. For example, it was applied in the 1950s against individuals who, during the Second World War, had denounced individuals to the occupying forces with extreme consequences including death, in 1969 against a person who had carried out a bombing campaign to reunite South Tyrol with Austria,²⁵⁷ and in 1997 it was applied against a person who had attempted to overthrow the democratically elected Shevardnadze regime in Georgia.²⁵⁸

Article 1F(c) was applied in a line of Canadian cases in relation to drug trafficking offences on the basis that the UN initiatives to counter traffic in illegal drugs²⁵⁹ could form part of the UN's purposes and principles.²⁶⁰ However, a majority of the Supreme Court of Canada has held that conspiring to traffic in narcotics is not within the provision.²⁶¹ The majority reasoned that the purpose of Article 1F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting, and that it will apply where there is consensus in international law that particular acts constitute violations of that kind, or are explicitly recognised as contrary to the purposes and principles of the United Nations. The majority held that there was no indication

²⁵⁵ See eg, Goodwin-Gill and McAdam, above n 21 at 185, Hathaway and Foster, above n 36 at 589. This view has been accepted by the majority of the Supreme Court of Canada in *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193. Bastarache J, speaking for the majority, stated at [62] that the statement found in the Preamble and Articles 1 and 2 of the UN Charter is 'principally organizational; its general wording also allows for a dynamic interpretation of state obligations, which must be adapted to the changing international context'.

²⁵⁶ See for example, *Muntumosi Mpemba*, CRR No.238.444 (29 October 1993) (case of member of the Garde civile zairoise), cited in Kwakwa, above n 254 at 89.

²⁵⁷ See Gilbert, above n 161 at 22.

²⁵⁸ *Avetisan*, 303164 CRR (France, 4 April 1997), referred to in Gilbert, above n 161 at 23. Kwakwa, above n 254 at 90, argues that this is an erroneous interpretation of Article 1F(c).

²⁵⁹ See, eg, UN Security Council Resolution 1373 clause 4 which '[n]otes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security'. See also the discussion of Cory J in *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193.

²⁶⁰ For example *Re Mannikan* (1993) 17 Imm LR (2d) 236; *Velupillai v Minister for Employment and Immigration* [FCTD no. IMM-240-93], 1 Sept 1993, referred to in *Reflex* Issue 23 at 1.

²⁶¹ *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193.

that drug trafficking formed part of the corpus of fundamental human rights.²⁶² However the Court did not rule out the possibility that non-state actors could fall within Article 1F(c).²⁶³

Some actions have been characterised by the UN as contrary to the UN Charter. The UN General Assembly has expressly condemned torture or other cruel, inhuman or degrading treatment or punishment and enforced disappearance as forms of denial of the purposes of the UN Charter.²⁶⁴ Similarly, terrorism has also been declared contrary to the purposes and principles of the UN on a number of occasions.²⁶⁵ In the aftermath of the 11 September 2001 attacks in the USA, the UN Security Council reaffirmed that such acts, 'like any act of international terrorism' constituted a threat to international peace and security, and declared acts of terrorism and related acts to be contrary to the purposes and principles of the United Nations.²⁶⁶ Under paragraph 5 of Resolution 1373 (2001), the Security Council declared:

that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.²⁶⁷

In *SRLLL & MIMIA* the General Division of the AAT held that the applicant, an Indian citizen who had been involved in a Sikh terrorist organisation for a number of years, was excluded under all three paragraphs of Article 1F by reason of his involvement in the murder of three police officers. The Tribunal held that his involvement in these murders was terrorist activity

²⁶² *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193 at [63]-[67], [72], [74]. Whether Australian courts would follow this approach is open to doubt. Note that the UN Security Council has expressed concern at the close connection between international terrorism and transnational crime, including drug trafficking, and has emphasized the need to enhance coordination of efforts on national, regional and international levels in order to strengthen a global response to this threat to international security: UNSC Resolution 1373 (2001), 28 September 2001, Article 4. See also UNGA Resolution 49/60 Measures to eliminate international terrorism, 9 December 1994. Drug trafficking that is related to terrorism might arguably fall within Article 1F(c).

²⁶³ *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193, at [68].

²⁶⁴ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), 9 December 1975 Article 2 and Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, Article 1(1) respectively.

²⁶⁵ The application of Article 1F(c) to acts of terrorism has been considered by the UK Supreme Court in *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745. In considering whether labelling an act as 'terrorism' or a person as a 'terrorist' was sufficient to bring the act or person within the scope of art 1F(c), or whether there needs to be an 'international dimension', the Court stated (at [38]) the 'appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines' (UNHCR, *Guidelines on International Protection: Application of Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003) which states: 'Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.'

²⁶⁶ The Security Council determined in Resolutions 1373(2001) and 1377(2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations: UNHCR, *Background Note Article 1F, 2003*, above n 156, at [49].

²⁶⁷ UN Security Council Resolution 1373 (2001), enacted under Chapter VII of the UN Charter and adopted on 28 September 2001. See also UN General Assembly Resolution 49/60 Declaration on Measures to Eliminate International Terrorism (A/RES/49/60, 9 December 1994), reaffirmed in Resolution 51/210 (A/RES/51/210, 16 January 1997), to similar effect. Although some recent UN documents have attempted to define terrorism, there is no internationally agreed definition: see Gilbert, above n 161, at 11-13. In *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745 in considering acts of terrorism and Art 1F(c), the Court said at[39] '[t]he essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way...It is, it seems to us, very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR' (referring to the UNHCR Guidelines at para 17, set out above, n 265).

and regarded paragraph 5 of Security Resolution 1373 as a statement that terrorist acts are contrary to the purposes and principles of the UN, so that Article 1F(c) applied.²⁶⁸

Article 1F(c) has only rarely been applied in Australia, or elsewhere, as the tendency has been to rely on the more specific provisions of Articles 1F(a) and (b).

ARTICLES 32 AND 33(2)

The contracting states to the Refugees Convention accept significant obligations under Articles 32 ('Expulsion') and 33 ('Prohibition of expulsion or return (*'refoulement'*')). These provisions, and others dealing with the content of a refugee's rights under the Convention, do not purport to define a refugee, or touch upon how a refugee is to be defined or accorded recognition as such, as these matters are expressly and exhaustively the subject of Article 1 of the Convention.²⁶⁹ Accordingly, they are not provisions that arise for consideration in the context of the pre 16 December 2014 refugee criterion under s.36(2)(a) of the Act. Nevertheless, the Act as it applies to such applications does refer to the same concepts in the related complementary protection context.²⁷⁰

For protection visa applications made on or after 16 December 2014, similar considerations are contained in the s.36(1C) criterion for the grant of a protection visa but do not form part of the refugee definition itself in s.5H of the Act, or the refugee criterion in s.36(2)(a). Rather, they serve to provide a basis on which a protection visa cannot be granted, regardless of whether an applicant may meet the refugee or complementary protection criteria. Concepts clearly drawn from Article 33 also form the basis for s.36(2C)(b) which operates to prevent certain persons who would otherwise meet the 'complementary protection' criterion in s.36(2)(aa) from being granted a protection visa.²⁷¹ To that extent, the matters relevant to Article 33(2) will be applicable to the consideration of ss.36(1C) and 36(2C).²⁷²

²⁶⁸ *SRLLL & MIMIA* [2002] AATA 795 (Handley DP, 12 September 2002). However, when dealing with most so-called terrorist offences, any unduly expansive interpretation of the 'purposes and principles of the United Nations' should be avoided to prevent abuse of the exclusion clauses according to the European Council on Refugees and Exiles, above n 147, at 259. The general approach to Article 1F(c) has been considered by the United Kingdom Supreme Court in *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745. The Court stated, (at [16]): '[t]he article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security"' (quoting from the UNHCR Background Note on the Application of Exclusion Clauses: Article 1F" (September 2003) at para 47). It also stated 'there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.'

²⁶⁹ *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161; *MIMIA v QAAH of 2004* (2006) 231 CLR 1 per Gummow ACJ, Callinan, Heydon and Crennan JJ, at [47]-[49]; *SZOQQ v MIAC* (2013) 251 CLR 577. The expression 'a person to whom Australia has protection obligations' in s.36(2)(a) means no more than a person who is a refugee under Article 1 of the Convention and does not call for consideration of Article 33 or s.91U: *SZOQQ v MIAC* (2013) 251 CLR 577 per Keane J at [30]-[31], French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ agreeing. The Court unanimously rejected the Minister's argument that s.91U somehow changes the operation of s.36(2)(a).

²⁷⁰ Section 91U elaborates on the concept of 'particularly serious crime' in Article 33(2); and s.500 deals with review of decisions to refuse to grant a protection visa or to cancel a protection visa, relying on Article 1F, 32 or 33(2) of the Convention and, following amendments, s.36(1C) and s.36(2C). In particular, s.500(4)(c) makes it clear that the General Division of the AAT, rather than the Migration and Refugee Division, has jurisdiction with respect to such decisions.

²⁷¹ See Chapter 10 of this Guide for discussion of s.36(2C).

²⁷² It should be noted that a decision not to grant a person a protection visa (whether by reason of s.36(2C) or the character considerations in s.501 of the Act) is not a decision to remove a person from Australia in breach of Article 32 or 33: *MZYOO v MIAC* (2013) 214 FCR 68 per Murphy J at [68]-[69] and *WASB v MIAC* (2013) 217 FCR 292 per Barker J at [53].

As discussed in Chapter 12 of this Guide, the General Division of the AAT, rather than the Migration and Refugee Division, has jurisdiction in relation to decisions to refuse to grant or to cancel a protection visa made by relying upon s.36(1C) or s.36(2C).²⁷³

Article 32

Article 32 prohibits expulsion of refugees lawfully in Australia except on grounds of national security or public order. It requires that the refugee be afforded due legal process and be allowed to seek legal admission to another country. Article 32 states:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Unlike Article 33, discussed below, there is no parallel provision to Article 32 in the complementary protection regime.

Article 33

Article 33(1) prohibits the expulsion or return (*'refoulement'*) of a refugee to any country where his or her life or freedom would be threatened for a Convention reason. However, Article 33(2) operates to negate the prohibition against *refoulement* in cases where a refugee poses a risk to the safety or security of the country of refuge. Article 33(2) states:

The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

On one view, the *non-refoulement* principle in Article 33(2) only applies where a person has already been granted refugee status under the Convention,²⁷⁴ however, this is not universally accepted.²⁷⁵

It is established in Australian law that in determining whether the terms of Article 33(2) apply, there is no scope to undertake any balancing of the consequences for the individual upon

²⁷³ Sections 411(c) and (d), 500(1)(c) and 500(4)(c).

²⁷⁴ *Ovcharuk v MIMA* (1998) 88 FCR 173 per Whitlam J at 179; see also *Vabaza v MIMA* (unreported, Federal Court of Australia, Goldberg J, 27 February 1997); *SZOQQ v MIAC* [2011] FCA 1237 (Stone J, 4 November 2011) at [35], upheld on appeal: *SZOQQ v MIAC* (2012) 200 FCR 174 per Jagot and Barker JJ at [49], Flick J agreeing (although the High Court subsequently held that those proceedings had miscarried, the Court's reasoning on Article 33 was left undisturbed: *SZOQQ v MIAC* (2013) 251 CLR 577).

²⁷⁵ See E Lauterpacht QC and D Bethlehem, 'The scope and content of the principle of non-refoulement' in Feller, Turk and Nicholson, above n 21 at 116.

being removed from Australia. If the circumstances specified in Article 33(2) are present, then the benefit of the duty against *refoulement* in Article 33(1) cannot be claimed.²⁷⁶

Reasonable grounds

Article 33(2), s.36(1C) and s.36(2C)(b) each impose a standard of ‘reasonable grounds’ for believing that the circumstances outlined in those provisions exist. While not settled, the Federal Court has suggested in *obiter* that the reference to ‘reasonable grounds’ in Article 33(2) may refer only to the first circumstance it sets out (a refugee who is a danger to the security of the country in which he is) and not to the second circumstance (having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country).²⁷⁷ In contrast, the structure of ss.36(1C) and 36(2C)(b) appear to require that there be ‘reasonable grounds’ for considering that either of these circumstances exist. Thus, a different threshold may apply to the test in the Convention and those in the Act.

Meaning of ‘danger to the security of the country’

Article 33(2), and ss.36(1C)(a) and 36(2C)(b)(i) require that there be ‘reasonable grounds’ that the person is a ‘danger to the security’ of Australia / ‘danger to Australia’s security’. There is limited judicial guidance in relation to the type of conduct and evidence which may form ‘reasonable grounds’ for regarding the person as a ‘danger to the security of the country’.

The Federal Court has suggested that it may not be sufficient to rely solely on an assessment by ASIO or another Australian intelligence agency. The requirement that there be ‘reasonable grounds’ to believe the person poses a ‘danger to the security of the country’ suggests that an objective assessment of any information or report may be required.²⁷⁸

²⁷⁶ *SZOQQ v MIAC* (2012) 200 FCR 174 per Jagot and Barker JJ at [49], Flick J agreeing. The appellant conceded he had been convicted of a particularly serious crime but argued that in refusing to grant him a protection visa pursuant to s.65 of the Act the decision maker should have weighed up and balanced the likely consequences of returning him to Indonesia against the danger to the Australian community, and applied the principle of proportionality. The Court rejected these arguments, finding that the ordinary meaning of Article 33(2) is clear, and that its structure and text do not permit any balancing exercise. The Court cited the decision of the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 as persuasive (per Flick J at [21]) and compelling (per Jagot and Barker JJ at [54]). Although the High Court subsequently held that the earlier proceedings in *SZOQQ* had miscarried, the Full Federal Court’s reasoning was left undisturbed: *SZOQQ v MIAC* (2013) 251 CLR 577. Contrast the United Kingdom Court of Appeal decision cited by the appellant in support of his arguments *R v Secretary of State for the Home Department; Ex parte Chahal* [1995] 1 WLR 526.

²⁷⁷ *SZOQQ v MIAC* (2012) 200 FCR 174 per Jagot and Barker JJ at [49], Flick J at [11]. Although the High Court subsequently held that the earlier proceedings in *SZOQQ* had miscarried, the Full Federal Court’s reasoning on Article 33 was left undisturbed: *SZOQQ v MIAC* (2013) 251 CLR 577.

²⁷⁸ *Kaddari v MIMA* (2000) 98 FCR 597 at [23]-[24]. Compare *Director General Security v Sultan* (1998) 90 FCR 334. This element of Article 33(2) was considered at length by the Supreme Court of New Zealand in *Attorney-General v Zaoui (No 2)* [2006] 1 NZLR 289. The Court held that the assessment to be made under Article 33(2) is to be made in its own terms, by reference to danger to the security of the country (in that case, New Zealand), and without any balancing or weighing or proportional reference to the matter dealt with in Article 33(1). As to the relevant test, the Court held that to come within Article 33(2), the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

Meaning of ‘particularly serious crime’

For protection visa applications made prior to 16 December 2014, for the purposes of the Act and the Migration Regulations 1994, s.91U²⁷⁹ specifies that a reference to a ‘particularly serious crime’ in Article 33(2) includes a reference to a crime that consists of the commission of a ‘serious Australian offence’ or a ‘serious foreign offence’. A similar specification is contained in s.5M of the Act in respect of the reference to ‘particular serious crime’ in s.36(1C)(b), applicable to protection visa applications made on or after 16 December 2014. This definition is also effectively reflected in the terms of s.36(2C)(b)(ii) which identifies a ‘particularly serious crime’ as including a ‘serious Australian offence’ or a ‘serious foreign offence’.

Both ‘serious Australian offence’ and ‘serious foreign offence’ are further defined in s.5(1) of the Act.²⁸⁰

‘Serious Australian offence’ means:

an offence against a law in force in Australia, where:

- (a) the offence:
 - (i) involves violence against a person; or
 - (ii) is a serious drug offence; or
 - (iii) involves serious damage to property; or
 - (iv) is an offence against section 197A or 197B (offences relating to immigration detention); and
- (b) the offence is punishable by:
 - (i) imprisonment for life; or
 - (ii) imprisonment for a fixed term of not less than 3 years; or
 - (iii) imprisonment for a maximum term of not less than 3 years.

‘Serious foreign offence’ means

an offence against a law in force in a foreign country, where:

- (a) the offence:
 - (i) involves violence against a person; or
 - (ii) is a serious drug offence; or
 - (iii) involves serious damage to property; and
- (b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital territory, the act or omission would have constituted an offence (the **Territory offence**) against a law in force in that Territory, and the Territory offence would have been punishable by:
 - (i) imprisonment for life; or
 - (ii) imprisonment for a fixed term of not less than 3 years; or
 - (iii) imprisonment for a maximum term of not less than 3 years.

In both cases, the offence is characterised not only by its type, but also the severity of the associated penalty. In the case of the serious foreign offence, the penalty is measured by comparison with domestic offences.

²⁷⁹ Inserted by *Migration Legislation Amendment Act (No 6) 2001* (No. 131 of 2001), and amended by *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011).

²⁸⁰ Both definitions inserted by the *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011), Schedule 1, items 6 and 7, from 24 March 2012. The definitions are in the same terms as that which previously appeared in s.91U.

Sections 5M, 36(2C)(b)(ii) and 91U do not purport to provide an exhaustive definition of what constitutes a ‘particularly serious crime’. It is possible that other types of crimes may fall within the meaning of ‘particularly serious crime’, depending on the circumstances of the particular case. The introduction of the definition in s.91U was originally aimed at ensuring that certain types of criminal offences which are regarded by the community as being particularly serious are treated as ‘particularly serious crimes’ for the purpose of Article 33(2).²⁸¹ It was not intended to affect the requirement that a person must be convicted by final judgment of a particularly serious crime and must be assessed as representing a risk to the community in order to be excluded from protection.²⁸²

Judicial consideration of the meaning of the phrase ‘particularly serious crime’ is limited.²⁸³ The Federal Court has suggested that the decision maker needs to consider not only the crime itself, but the circumstances surrounding its commission.²⁸⁴

Danger to the community

The second element of the second limb of Article 33(2), which is also reflected in ss.36(1C)(b) and 36(2C)(b)(ii), is that the person constitutes a danger to the community of the host country. The decision of the AAT’s General Division in *WKCG and MIAC* provides an illustration of its application.²⁸⁵ The Tribunal held that in assessing whether a danger to the community exists it will be sufficient if there is ‘a real or significant risk or possibility of harm to one or members of the Australian community’.²⁸⁶ Having regard to the expression ‘danger’ used in Article 33(2), probability of harm was considered by the Tribunal to be too high a threshold.²⁸⁷ It considered the question whether a person constitutes a danger to the community to be one of fact and degree, having regard to all the circumstances of the case.²⁸⁸ The Tribunal indicated that the risk of recidivism was a primary consideration and that other relevant considerations may include the seriousness and nature of the crimes committed, the length of the sentence imposed, any mitigating or aggravating circumstances, their criminal record as a whole and the prospects for their rehabilitation.²⁸⁹ These principles were considered in *EWG17 v MIBP* with apparent approval, with the Federal Court finding that the Tribunal in that case had correctly applied the legal principles from *WKCG and MIAC* in assessing whether s.36(1C)(b) was met.²⁹⁰ In *LQKD v MICMSMA*, the Federal Court also rejected an argument that the Tribunal erred in following the test in

²⁸¹ Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No. 6) 2001.

²⁸² Revised Explanatory Memorandum to the Migration Legislation Amendment Bill (No. 6) 2001.

²⁸³ See *MIMIA v Betkhoshabeh* [1999] FCA 980 (O’Connor, Sundberg and North JJ, 20 July 1999), *A v MIMIA* [1999] FCA 227 (Burchett, Lee and Katz JJ, 16 March 1999) and *Vabaza v MIMIA* (unreported, Federal Court of Australia, Goldberg J, 27 February 1997).

²⁸⁴ *Betkhoshabeh v MIMA* (1998) 84 FCR 463 at 467, followed in *Betkhoshabeh v MIMA* [1999] FCA 16 (Marshall J, 15 January 1999). Compare *Vabaza v MIMIA* (unreported, Federal Court of Australia, Goldberg J, 27 February 1997). The Full Court in *MIMA v Betkhoshabeh* [1999] FCA 980 (O’Connor, Sundberg and North JJ, 20 July 1999) found it unnecessary to consider the issue.

²⁸⁵ *WKCG and MIAC* (2009) 110 ALD 434 at [25]-[31].

²⁸⁶ *WKCG and MIAC* (2009) 110 ALD 434 at [31].

²⁸⁷ *WKCG and MIAC* (2009) 110 ALD 434 at [31].

²⁸⁸ *WKCG and MIAC* (2009) 110 ALD 434 at [25]. See also *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019) per Logan J at [76]-[78].

²⁸⁹ *WKCG and MIAC* (2009) 110 ALD 434 at [26].

WKCG and MIAC, although it held that the Tribunal erred for failing to consider a claim relevant to that test.²⁹¹

These considerations were also accepted by Logan J in *DOB18 v MHA* as pertinent to the consideration of s.36(1C)(b).²⁹² However, his Honour considered that the expression 'danger' in s.36(1C) was unlikely to refer 'to a risk that is discernible but which is trivial, nothing more than a bare possibility', but means 'present and serious risk' and carries a narrower and more restrictive meaning than just 'risk'. His Honour disagreed with the observations made in *WKCG* about 'danger' to the extent that it might be thought to suggest otherwise.²⁹³ His Honour clarified that a finding that there is a 'danger' is necessarily a conclusion based on an assessment of the present 'level of risk', however the word 'danger' does not carry a meaning that differs from case to case, but is fixed. Whether it is present in respect of a person applying for a protection visa will depend on the circumstances of a given case.²⁹⁴ It has been held by the Federal Court in *LKQD v MICMSMA* that the standard does not rise to the level of 'very serious danger'.²⁹⁵

While it may be suggested by the language of Article 33(2) (and ss.36(1C)(b) and 36(2C)(b)(ii)), it is not clear whether there must be a relationship between the danger posed by the person and the particularly serious crime of which they have been convicted.²⁹⁶

²⁹⁰ *EWG17 v MIBP* [2018] FCA 1536 (Collier J, 11 October 2018) at [52].

²⁹¹ *LKQD v MICMSMA* [2019] FCA 1591 (Jackson J, 1 October 2019) at [47] and [50]-[62]. See also *JRJZ and MHA* (Migration) [2018] AATA 3687 (Rayment DP, 3 October 2018) for another illustration of the application of s.36(1C)(b).

²⁹² *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019) per Logan J at [78].

²⁹³ *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019) per Logan J at [72], [83]-[84].

²⁹⁴ *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019) per Logan J at [87].

²⁹⁵ *LKQD v MICMSMA* [2019] FCA 1591 (Jackson J, 1 October 2019) at [62]. The Court noted the interpretation of 'danger' of Logan J in *DOB18 v MHA* [2019] FCAFC 63 and the suggestion that this may be inconsistent with *WCKG and MIAC* but did not address this further, as even that standard did not rise to the level of 'very serious danger' submitted on behalf of the applicant in *LKQD*.

²⁹⁶ In *Betkhoshabeh v MIMA* (1998) 84 FCR 463 at 467 the Federal Court (Finkelstein J) commented in *obiter*: '[t]he expression 'particularly serious crime' in Art 33(2) is not defined in the Convention. The expression shows that it is not enough for the crime committed to be a serious crime. It must be a particularly serious crime as well as a crime that shows that the refugee is a danger to the community.' Compare the decision of the AAT in *WKCG and MIAC* (2009) 110 ALD 434 where the Tribunal rejected submissions that the particular offences for which the person has been convicted must always somehow be causally linked to the type of danger to the community (at [29]).