

8 STATE PROTECTION

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INTRODUCTION

The definition of refugee in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* (the Refugees Convention) and the codified definition of refugee in s.5H of the *Migration Act 1958* (the Act)¹ refer to a person who is outside their country of nationality and unable or unwilling to avail themselves of the protection of that country. These definitions also refer to such a person having a well-founded fear of persecution.

The concept of state protection in refugee law operates in a number of ways. High Court authority confirms that the expression ‘the protection of that country’, at least in the context of Article 1A(2), is concerned with external or diplomatic protection extended to citizens abroad. However, for both definitions, internal protection is nevertheless relevant to whether the applicant has a well-founded fear of persecution. To the extent that questions of state protection arise further to the consideration of whether there is a well-founded fear of harm, it

¹ 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).

is unnecessary to consider such questions in cases where it is determined that there is no well-founded fear.²

It will be seen that questions relating to ‘protection’ in the context of either Article 1A(2) or s.5H do not usually arise where the harm feared is inflicted by the state or its agents, or when the state is complicit: in such a case, provided other threshold requirements are met, the fear will be well-founded, it may readily be characterised as persecution, and will justify the unwillingness to seek (external) protection.³ For this reason, the main focus of this chapter is protection against privately inflicted harm.

Note that this chapter deals solely with the concept of state protection as it applies to the definitions of ‘refugee’.⁴ The first part of the chapter considers state protection in the context of the Refugees Convention, relevant to protection visa applications made prior to 16 December 2014, and the second part considers that concept under the codified definition in s.5H of the Act, which is applicable to applications made on or after that date. For consideration of the concept ‘protection from an authority of a country’ under s.36(2B) as it applies to the ‘complementary protection’ criterion, see Chapter 10 of this Guide.

STATE PROTECTION UNDER THE REFUGEES CONVENTION

To satisfy the refugee criterion in s.36(2)(a) of the Act, as it applies to protection visa applications made prior to 16 December 2014, an applicant must be a person in respect of whom Australia has protection obligations under the Refugees Convention.⁵ Article 1A(2) of the Convention states that the term ‘refugee’ shall apply to any person who...

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

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

² See e.g. *SZSHH v MIBP* [2014] FCCA 1500 (Judge Lloyd-Jones, 14 July 2014) at [173]-[186] and the authorities cited there; *SZQKC v MIAC* (2012) 206 FCR 253 at [21]-[24] (application for special leave to appeal dismissed: *SZQKC v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); *Razai v MIAC* [2012] FCA 394 (North J, 24 February 2012) at [36] (application for special leave to appeal dismissed: *Razai v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); *SZQGU v MIAC* [2012] FCA 340 (Rares J, 5 April 2012) at [7]-[8] (application for special leave to appeal dismissed: *SZQGU v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); *MZYPA v MIAC* [2012] FCA 581 (Bromberg J, 5 June 2012) at [37]. However, note that in the absence of a clear finding that there is no real chance of serious harm, consideration of state protection may lead to an inference that the decision maker has accepted that the claimed harm will occur, or is not confident in finding that it will not (see, for example, *DZADB v MIAC* [2012] FMCA 679 (Raphael FM, 7 August 2012) at [13]).

³ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [23] per Gleeson CJ, Hayne and Heydon JJ.

⁴ The issue of protection also arises in the following contexts:

- Protection in second country of nationality (as set out in the second paragraph of Article 1A(2) (Chapter 2)),
- Relocation (Chapter 6),
- Protection in a third country under Article 1E (Chapter 7), and
- Protection in a third country under s.36(3) of the *Migration Act 1958* (Chapter 9).

⁵ This part of the chapter is concerned primarily with the concept of protection in the Convention definition. However the concept also has a role to play in theories as to the purpose of the Convention. The competing theories - ‘protection’ and ‘accountability’ – are discussed briefly below in relation to circumstances where there is no functioning state apparatus.

not availed himself of the protection of one of the countries of which he is a national.⁶

As discussed below, while the expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad, internal protection is nevertheless relevant to the first limb, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

‘The Protection of that Country’ = External Protection

Some Federal Court case law has proceeded on the basis that the reference to ‘protection’ in the second limb of Article 1A(2) is to internal protection.⁷ However the High Court decisions of *MIMA v Khawar*⁸ and *MIMA v Respondents S152/2003*⁹ demonstrate that this approach was incorrect.

In *Khawar*, Gleeson CJ and McHugh and Gummow JJ each held that the reference in the second limb of Article 1A(2) to ‘the protection of that country’ was to ‘external protection’, such as diplomatic or consular protection extended abroad by a country to its nationals, and not to ‘internal’ protection provided inside the country from which the refugee has departed.¹⁰ In *S152/2003* the High Court unanimously confirmed that the term ‘protection’ in the second limb in Article 1A(2) is concerned with diplomatic or consular protection extended abroad by a country to its nationals.¹¹ As such, it is not regarded as one of the ‘key’ elements of the Convention definition¹² and will not normally arise for separate consideration.

Nevertheless, it should not be overlooked. As Gummow J stated in *Applicant A v MIEA*, to satisfy the definition of ‘refugee’, two cumulative conditions must be met: a person must be not only outside their country of nationality owing to well-founded fear of persecution; the person must also be *unable* to avail himself or herself of the protection of the country of nationality or alternatively the person must be *unwilling* for a Convention reason to avail

⁶ The second paragraph of Article 1A(2), dealing with people with more than one nationality, is discussed in Chapter 2 of this Guide.

⁷ See e.g. *MIMA v Prathapan* (1998) 86 FCR 95; *A v MIMA* [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999); *MIMA v Kandasamy* [2000] FCA 67 (Hill, Whitlam & Carr JJ, 10 February 2000) per Hill J at [30], per Whitlam and Carr JJ at [51]-[52]; *Okwoli v MIMA* [2001] FCA 846 (Hely J, 21 June 2001).

⁸ (2002) 210 CLR 1.

⁹ (2004) 222 CLR 1.

¹⁰ *MIMA v Khawar* (2002) 210 CLR 1 per Gleeson CJ at [21]; McHugh and Gummow JJ at [62].

¹¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [19] per Gleeson, CJ, Hayne and Heydon JJ, [63] per McHugh J and [109] per Kirby J. Chief Justice Gleeson, Hayne and Heydon JJ at [19] held that the Ukrainian respondent would be required to show that ‘[h]e is unable or, owing to his fear of persecution in Ukraine, unwilling to avail himself of the diplomatic or consular protection extended abroad by the state of Ukraine to its nationals. Availing himself of that protection might result in his being returned to Ukraine. Where diplomatic or consular protection is available, a person such as the first respondent must show, not merely that he is unwilling to avail himself of such protection, but that his unwillingness is owing to his fear of persecution. He must justify, not merely assert, his unwillingness’. Note however that in *SZATV v MIAC* (2007) 233 CLR 18 at [60] Kirby J opined that the Court should reconsider its holding that ‘protection’ in Article 1A(2) refers to external protection, expressing a preference for the view that ‘protection’ refers to internal protection.

¹² See the discussion in UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, 2001) (*‘Interpreting Article 1’*) at [35]-[36], as quoted in *MIMA v Khawar* (2002) 210 CLR 1 per McHugh and Gummow JJ at [72]; see also Antonio Fortin, ‘The Meaning of “Protection” in the Refugee Definition’ (2000) 12 (4) *International Journal of Refugee Law* 548 at 575. The ‘protection’ element contained in the second limb of Article 1A(2) does not appear among the four ‘key’ elements of the Article 1A(2) definition of ‘refugee’ identified by the High Court in *MIEA v Guo* (1997) 191 CLR 559 at 570.

himself or herself of the protection of their country (that is, diplomatic and consular protection abroad).¹³

Unable or unwilling

Examples of circumstances in which a person is **unable** to avail him or herself of diplomatic and/or consular protection may include circumstances where the country of nationality has no representation in the country in which the person finds him or herself,¹⁴ denial of a national passport or extension of its validity or denial of admittance to the home territory, loss of nationality or refusal of a certificate of nationality, or consular authorities' refusal to intervene in his or her favour with the authorities of another state.¹⁵

Obtaining administrative assistance from the consular authorities of the country of nationality, such as renewing a passport, may provide an indication that the person enjoys diplomatic protection in the strict sense, but is not necessarily incompatible with refugee status. For instance, the fact that a person has been issued or renewed a national passport should not automatically lead to denial of refugee status.¹⁶

Whether a particular refusal constitutes a refusal of protection must be determined according to the circumstances of the case.¹⁷ Some commentators have expressed the view that refusals by diplomatic or consular authorities to intervene on behalf of nationals, or to provide administrative services to them, may be considered equivalent to a refusal of protection for the purposes of Article 1A(2) if it can be shown that the refusal was in reality for one of the Convention reasons.¹⁸

'**Unwilling**' refers to refugees who refuse to accept the protection of their country. That unwillingness must be for reasons of a well-founded fear of persecution.

An inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection (that is, protection in the wider sense), or may be related to a possibility that seeking such protection could result in return to the place of persecution.¹⁹

¹³ *Applicant A v MIEA* (1997) 190 CLR 225 at 283; reiterated in *MIMA v Khawar* (2002) 210 CLR 1 at [61], per Gummow and McHugh JJ. Note that the Convention definition does not speak of the protection of stateless persons by their country of former habitual residence; rather, it speaks of such persons being unable, or unwilling owing to a well-founded fear of persecution, to return to that country. The relevance of state protection in relation to stateless persons is discussed later in this chapter; statelessness is discussed more fully in Chapter 2 of this Guide.

¹⁴ *MIMA v Khawar* (2002) 210 CLR 1 at [61] per McHugh and Gummow JJ. In their joint judgment in *MIMA v Respondents S152/2003* (2004) 222 CLR 1, Gleeson CJ, Hayne and Heydon JJ found it unnecessary to examine what was involved in the concept of inability to seek external protection, noting that in that case there was a Ukrainian Embassy in Australia and before that a consulate: at [23].

¹⁵ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, reissued 2011) ('*Handbook*') at [99]; *MIMA v Khawar* (2002) 210 CLR 1 at [65]; Fortin, above n 12 at 564-5; Walter Kalin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415 at 426; Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (A.W. Sijthoff, 1966) at 255, 261.

¹⁶ See Fortin, above n 12 at 565; UNHCR, *Handbook*, above n 15, at [47]-[50].

¹⁷ UNHCR, *Handbook*, above n 15, at [99].

¹⁸ See Fortin, above n 12 at 565. Note, however, that in contrast to 'unwilling', the relevant inability in the second limb of Article 1A(2) is not linked to a well-founded fear of persecution for a Convention reason.

¹⁹ *MIMA v Khawar* (2002) 210 CLR 1 at [22] per Gleeson CJ; *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [19] per Gleeson CJ, Hayne and Heydon JJ and at [63] per McHugh J; UNHCR, *Interpreting Article 1*, above n 12 at [35].

As noted above, the availability of external protection is not one of the 'key' elements of the Convention definition, and will not normally arise for separate consideration.

Internal Protection

While the term 'protection' in Article 1A(2) refers to external protection, the availability of internal protection is nevertheless relevant.

In *MIMA v Khawar* an issue arose as to whether the failure of a country to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution for the purposes of the Convention. While Gleeson CJ concurred with the view that the term 'protection' in Article 1A(2) refers to external protection, his Honour held that the concept of 'protection' is also used in a broader sense in the Convention context.²⁰ His Honour cited the following statement of Brennan CJ in *Applicant A v MIEA* as an example:

The feared "persecution" of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to "the country of his nationality" for protection of his fundamental rights and freedoms but, if "a well-founded fear of being persecuted" makes a person "unwilling to avail himself of the protection of [the country of his nationality]", that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent.²¹

The Chief Justice also cited with approval the following statement of Lord Hope of Craighead in *Horvath*, as reflecting the relationship between persecution as the inflicting of serious harm and the responsibility of a country as a protector of human rights:

... in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme.²²

His Honour held that persecution may result from the combined effect of the conduct of private individuals and the state or its agents; and that a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm.²³ Justice Kirby took a similar approach, adopting the formula 'Persecution = Serious Harm + The Failure of State Protection'.²⁴

²⁰ *MIMA v Khawar* (2002) 210 CLR 1.

²¹ (1997) 190 CLR 225 at 233. See also at 258 per McHugh J.

²² *MIMA v Khawar* (2002) 210 CLR 1 at [19] per Gleeson CJ, citing *Horvath v Secretary of State for the Home Department (SSHD)* [2001] 1 AC 489 at 497-8 per Lord Hope of Craighead.

²³ *MIMA v Khawar* (2002) 210 CLR 1 at [30] per Gleeson CJ.

²⁴ *MIMA v Khawar* (2002) 210 CLR 1 at [118], referring to *R v IAT; Ex parte Shah* [1999] 2 AC 629 at 653, per Lord Hoffmann and *Horvath v SSHD* [2001] 1 AC 489 at 515-6, per Lord Clyde. In *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [100], Kirby J stated that his formula 'represents the alternate theory of 'persecution' accepted by most contemporary

In *MIMA v Respondents S152/2003*, Gleeson CJ, Hayne and Heydon JJ followed the reasoning in *Horvath*,²⁵ stating that where the persecutor is a non-state agent, the willingness and ability of the state to protect its citizens may be relevant to:

- Whether the fear is well-founded;
- Whether the conduct giving rise to the fear is persecution; and
- Whether the applicant is unable or, owing to their fear, unwilling to avail themselves of the (external) protection of their country of nationality.²⁶

Thus, in *Horvath*, where it was found that Slovakia provided citizens with a sufficient level of state protection against violence, four members of the House of Lords held that there was no persecution, no well-founded fear, and no inability, or unwillingness owing to such fear, on the part of the appellant to avail himself of the protection of Slovakia.²⁷ Similarly, on the facts as found by the Tribunal in *MIMA v Respondents S152/2003*, Gleeson CJ, Hayne and Heydon JJ in their joint judgment reasoned that the existence of the appropriate level of state protection led to the conclusion that the applicant was not a victim of persecution, and could not justify his unwillingness to seek the protection of his country.²⁸

Well-founded fear

It is uncontroversial that the availability of protection in the country of nationality is relevant to the existence of an objective basis upon which the well-founded fear of persecution that is necessary for Convention protection rests.²⁹

However, the existence of an appropriate level of state protection need not lead to the finding that the fear of *harm* is not well-founded, or that there is no real chance of the feared harm occurring. The joint judgment in *S152/2003* shows that the existence of the appropriate level of state protection leads to the conclusion that there is not a justifiable unwillingness to seek the protection of the country of nationality, even if the fear of harm remains well-founded.³⁰ Their Honours explained:

elaborations of the Convention (the protection theory)'. He also confirmed at [109] that 'protection of that country' in Article 1A(2) refers to external protection, although internal state protection is relevant to whether the applicant holds a well-founded fear of persecution. However, as noted above, in *SZATV v MIAC* (2007) 233 CLR 18 at [60] his Honour opined that the Court should reconsider its holding that 'protection' in Article 1A(2) refers to external protection.

²⁵ *Horvath v SSHD* [2001] 1 AC 489.

²⁶ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [20]-[23].

²⁷ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [22] per Gleeson CJ, Hayne and Heydon JJ.

²⁸ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [19], [21]-[23] per Gleeson CJ, Hayne and Heydon JJ.

²⁹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 per Gleeson CJ, Hayne and Heydon JJ at [21]-[22], per McHugh J at [65], [76]. See also, eg, *MIMA v Khawar* (2002) 210 CLR 1 at [29] and UNHCR, *Interpreting Article 1*, above n 12 at [15], [37].

³⁰ *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004) at [38] referring to *MIMA v Respondents S152/2003* (2004) 222 CLR 1. See *SBZD v MIAC* [2008] FCA 1236 (Gray J, 14 August 2008) in which the Court upheld a Tribunal decision applying *S152/2003* in circumstances where the Tribunal found there was a real chance of harm for a Convention reason from non-state agents, but found the level of protection available from the authorities met international standards and so the fear of persecution was not well-founded. Contrast *MZXY v MIAC* [2007] FMCA 418 (Burchardt FM, 19 April 2007) in which the Court appeared to take an approach consistent with the reasoning of McHugh J in *MIMA v*

If the Full Court contemplated that the Tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed.³¹

Justice McHugh disagreed. His Honour stated that once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the state and its agencies have taken all reasonable steps to eliminate the risk.³² His Honour's opinion does not represent the prevailing view in Australia.³³ However, in many cases involving private harm, the availability of the requisite level of protection will mean that the fear of serious harm will not be well-founded. Thus, the differences of opinion in the High Court are likely to result in different outcomes only where there remains a well-founded fear of serious harm notwithstanding that appropriate protection is available.³⁴

Persecution

The relationship between 'protection' and 'persecution' is a matter of divided opinion in the High Court.

In *MIMA v Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ held that where the persecutor is a non-state agent, the willingness and ability of the state to protect its citizens may be relevant to whether the conduct giving rise to the fear is persecution. In particular, the joint judgment suggests that if the country of nationality provides its citizens with the requisite level of protection, fear of harm will not amount to a fear of persecution.³⁵ Justice Kirby's analysis similarly relates failure of protection to the concept of persecution.

Respondents S152/2003 in finding error by the Tribunal because the evidence indicated the applicant faced a real chance of harm notwithstanding the appropriate involvement of the authorities.

³¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28]. Because this approach links the concept of 'persecution' with failure of protection, it follows that where there is no relevant failure, there will be no 'persecution': *S152/2003* at [29]. In *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004), the Court confirmed at [38] that on the majority view in *S152/2003* the appropriate level of state protection need not lead to the finding that the fear of harm is not well-founded, or that there is no real chance of the feared harm occurring. Referring to the joint judgment at [19], Mansfield J explained: 'the existence of the appropriate level of state protection leads to the conclusion ... that there is not a justifiable unwillingness to seek the protection of the country of nationality. If the unwillingness is not justifiable, it is not owing to the fear of persecution'. In their joint judgment in *S152/2003* Gleeson CJ and Hayne and Heydon JJ refer (at [20]) to Article 33 of the Convention as part of the context in which the word 'persecuted' is used in Article 1A(2), but it is not easy to reconcile their view of the second limb of Article 1A(2) with that provision, which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of one of the factors referred to in Article 1A(2).

³² *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [83].

³³ *SBZD v MIAC* [2008] FCA 1236 (Gray J, 14 August 2008) at [24] agreed with *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004) that the view in the joint judgment of *MIMA v Respondents S152/2003* (2004) 222 CLR 1 was authoritative and rejected the contention that the view of McHugh J could be treated as authoritative.

³⁴ What amounts to an appropriate level of protection is discussed below.

³⁵ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [21]-[22], [29]. It should be noted that the decision of the Tribunal under consideration by the High Court in *S152/2003* predated the introduction of s.91R of the *Migration Act 1958*. In *VBAO v MIMIA* (2006) 233 CLR 1 per Callinan and Heydon JJ at [27] it was stated that s.91R of the Act 'defines "persecution" for the purposes of Australian law.' However, this did not appear to reflect consideration of the limits of what would constitute persecution and did not consider the position of state protection in relation to s.91R. The language of s.91R, and the

By contrast, in *MIMA v Khawar*, McHugh and Gummow JJ held that it would be an error to inject the notion of internal protection into the first limb of Article 1A(2), that is, the ‘well-founded fear of persecution’ test.³⁶ In their view, the persecution in question was not constituted, even in part, by ‘failure of protection’ but rather by the selective denial of a fundamental right otherwise enjoyed by nationals of the country concerned, of the kind contemplated by Mason CJ in *Chan*.³⁷ Reiterating that view, McHugh J stated in *MIMA v Respondents S152/2003*:

If conduct constitutes persecution for a Convention reason when carried out by the State or its agents, it is persecution for a Convention reason when carried out by non-State agents. In neither its ordinary nor its Convention meaning does the term “persecution” require proof that the State has breached a duty that it owed to the applicant for refugee status. Where the State is involved in persecution, it will certainly be in breach of its duty to protect its citizens from persecution. But that is beside the point. State culpability is not an element of persecution.³⁸

However, the prevailing view in Australia is that where the required level of internal protection is available, the claim to refugee status cannot succeed because, among other things, the conduct in question will not be ‘persecution’. As mentioned above, in many cases involving private harm, the availability of the requisite level of protection will mean that the fear of serious harm will not be well-founded. Thus, the differences of opinion in the High Court are likely to result in different outcomes only where there remains a well-founded fear of serious harm notwithstanding that appropriate protection is available.³⁹

Unable or unwilling

While the expression ‘the protection of that country’ in Article 1A(2) is concerned with external or diplomatic protection,⁴⁰ internal protection from persecution is nevertheless relevant to whether a person is unable, or, owing to fear of persecution, is unwilling to avail himself or herself of the protection of his or her home state. As was stated in *Horvath*, if state protection against the acts of non-state agents is insufficient, it may be the reason why the applicant is unable, or, owing to a fear of persecution, unwilling, to avail himself of the protection of his home state.⁴¹

However, the joint judgment in *S152/2003* makes it clear that the fact that the authorities in an applicant’s country may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not necessarily justify unwillingness to seek their protection. By way of example, their Honours observed that an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness.

discussion in *VBAS v MIMA* (2005) 141 FCR 435 at [16]-[19], would suggest that its provisions do not replace the Convention test but place an additional hurdle in the way of claimants. On that view, the discussion of protection in *S152/2003* in relation to persecution remains relevant.

³⁶ (2002) 210 CLR 1 at [66].

³⁷ *MIMA v Khawar* (2002) 210 CLR, at [84]-[87] referring to *Chan Yee Kin v MIEA* (1989) 169 CLR 379 at 388 per Mason CJ.

³⁸ (2004) 222 CLR 1 at [65].

³⁹ What amounts to an appropriate level of protection is discussed below.

⁴⁰ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [19] per Gleeson CJ, Hayne and Heydon JJ, [63] per McHugh J and [109] per Kirby J, confirming the opinion in *MIMA v Khawar* (2002) 210 CLR 1 at [21] per Gleeson CJ, and at [62] per McHugh and Gummow JJ. See also *SZMCI v MIAC* [2009] FCA 98 (Graham J, 9 February 2009) at [19]-[20].

⁴¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [21] referring to *Horvath v SSHD* [2001] 1 AC 489 at 497.

A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed.⁴²

This reasoning was applied by the Federal Court in *Applicant VFAH v MIMIA* where the Court held that:

having concluded that the state protection available to the appellant is efficient and adequate, the Tribunal was also entitled, according to the passages from *S152/2003* cited above, to conclude that the appellant was not able to justify her unwillingness to return to Sri Lanka. Thus, even if the appellant was able to demonstrate that despite the protection of the authorities she nonetheless faced a “real chance” of persecution she could not, in the light of the Tribunal’s finding as to the adequacy of state protection and the majority view in *S152/2003*, meet the further criterion of a justified (that is, by reason of having a well-founded fear of persecution for a Convention reason) unwillingness to return to Sri Lanka.⁴³

The question that arises is what kind of inability to protect a person from private harm would justify an unwillingness, owing to a well-founded fear of persecution, to seek the country’s protection for the purposes of Article 1A(2).

Adequacy of protection

It is clear that the state concerned is not required to guarantee the safety of its citizens from harm caused by non-state persons.⁴⁴ In *MIMA v Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ observed that ‘no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence’.⁴⁵ Justice Kirby similarly stated that the Convention does not require or imply the elimination by the state of all risks of harm; rather it ‘posits a reasonable level of protection, not a perfect one’.⁴⁶

What is required for the purposes of Article 1A(2) has been described in several ways. The joint judgment in *S152/2003* refers to the obligation of the state to take ‘reasonable measures’ to protect the lives and safety of its citizens, including ‘an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system’,⁴⁷ or a ‘reasonably effective police force and a reasonably impartial system of justice’,⁴⁸ indicating that the appropriate level of protection is to be determined by ‘international standards’, such as those considered by the European Court of Human Rights in *Osman v United Kingdom*.⁴⁹ Thus, an unwillingness to seek protection will be justified for

⁴² *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28].

⁴³ [2004] FCA 1018 (Merkel J, 6 August 2004) at [16]. The reference to a real chance of ‘persecution’ may not be accurate. As discussed above, the reasoning in *S152/2003* indicates that where protection from private harm is adequate, the harm cannot be characterised as persecution. See also the discussion of *S152/2003* in *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004) at [38].

⁴⁴ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26]. See also *MIMA v Thiyagarajah* (1998) 80 FCR 543 at 566-7, *MIMA v Prathapan* (1998) 86 FCR 95 at 104-5 per Lindgren J, Burchett & Whitlam JJ agreeing. This aspect of *Thiyagarajah* was not disturbed by the High Court decision in *NAGV & NAGW v MIMIA* (2005) 222 CLR 161.

⁴⁵ (2004) 222 CLR 1 at [26].

⁴⁶ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [117].

⁴⁷ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26].

⁴⁸ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28].

⁴⁹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [27], citing *Osman v United Kingdom* (1998) 29 EHRR 245.

the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to ‘international standards’.⁵⁰

While the joint judgment in *S152/2003* gives support to the use of ‘international standards’ as a benchmark of adequate protection levels, it does not necessarily require an administrative decision maker to identify and specify the ‘international standards’ against which to assess a particular country’s responses to a claimed fear of persecution by non-state agents. In *MZRAJ v MIMIA*, Heerey J stated that:

[t]he ratio decidendi of *S152/2003* does not include the proposition that, in considering a claimed fear of persecution by non-state agents where the issue of effective protection arises, there will be jurisdictional error unless the Tribunal identifies, and specifies the content of, “international standards” of protection and matches the law enforcement machinery of the state in question against those standards.⁵¹

The High Court in *S152/2003* found it unnecessary to consider what the relevant standards might require or how they would be ascertained, and courts have commented on the difficulties in identifying and defining their practical content.⁵² However *Osman’s case*, referred to in *S152/2003*, may provide some limited guidance.

That case was concerned with the right to life protected by Article 2.1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁵³ The Court described the state’s primary duty in this respect as a duty ‘to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions’.⁵⁴ It accepted that Article 2 may also imply ‘in certain well-defined circumstances’ a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Bearing in mind ‘the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources’, the Court held that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.⁵⁵ It was held that, where there is an allegation that the authorities have violated their obligation to protect the right to life in the context of their duty to prevent and suppress offences against the person, it must be established:

... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they

⁵⁰ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29].

⁵¹ [2004] FCA 1261 (Heerey J, 29 September 2004) at [26]. See also *SZBBE v MIMIA* [2004] FMCA 753 (Raphael FM, 8 November 2004) and on appeal *SZBBE v MIMIA* [2005] FCA 264 (Jacobson J, 24 March 2005) at [46]; *S1573 of 2003 v MIMIA* [2005] FMCA 47 (Smith FM, 4 February 2005); *NASJ v MIMIA* [2005] FMCA 124 (Barnes FM, 25 February 2005) at [9]; *SZGHC v MIAC* [2007] FMCA 570 (Driver FM, 7 May 2007) at [27]; *SZCAL v MIAC* [2008] FMCA 330 (Orchiston FM, 20 March 2008) at [51]-[56]; and *SZOET v MIAC* [2010] FMCA 483 (Smith FM, 5 July 2010) at [23]-[24]. Contrast *A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004).

⁵² See *MZ RAJ v MIMIA* [2004] FCA 1261 (Heerey J, 29 September 2004) at [26]-[33]; *S1573 of 2003 v MIMIA* [2005] FMCA 47 (Smith FM, 4 February 2005) at [30]-[34].

⁵³ Article 2.1 enjoins the state to refrain from the intentional and unlawful taking of life, and also to take appropriate steps to safeguard the lives of those within its jurisdiction.

⁵⁴ *Osman v United Kingdom* (1998) 29 EHRR 245 at [115].

⁵⁵ *Osman v United Kingdom* (1998) 29 EHRR 245 at [116].

failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. ... [H]aving regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.⁵⁶

Some guidance can also be found in Australian case law predating *S152/2003*. In *Prathapan* at first instance, Madgwick J referred to ‘a reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy’ as ordinarily amounting to effective and ‘available’ protection.⁵⁷ His Honour stated:

No doubt the protection in question must be effective and “available”, and an actual inquiry into this must be made: *Jong Kim Koe*.⁵⁸ However, in 1951 and since, having regard to the realities of nations and the practicalities of applying the Convention, the framers and keepers of the Convention would hardly have envisaged that a reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy, would not ordinarily amount to effective and “available” protection.⁵⁹

Similarly, the Full Court in *A v MIMA* explained that where the decision maker has a view based on available material that a particular country is one which has effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort feared, in the absence of evidence advanced by the claimant, the decision maker will be entitled to reject the contention that the applicant is unable or unwilling for a Convention reason to avail him or herself of the protection of that country.⁶⁰ The Court emphasised that there must be information or material available to the decision maker from some source or sources on the issue of effective protection, adding that:

In some cases the claimant may have to do little more than show that he or she falls within a particular class of persons or possesses particular attributes to make out want of effective protection as a basis for a well-founded fear of persecution and inability or unwillingness to avail [himself or herself] of the relevant protection. In other cases the claimant may face a very difficult task indeed.⁶¹

In *MIMA v Khawar*,⁶² Kirby J drew a distinction between those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem of domestic violence from those countries that, for supposed religious, cultural, political or other reasons, consciously withdraw the protection of the law from a particularly vulnerable group within their society. Persons in Australia who are unwilling to avail themselves of the protection of their country where that country falls in the former category do not fall within the Refugees Convention. However, depending upon the evidence and the

⁵⁶ *Osman v United Kingdom* (1998) 29 EHRR 245 at [115]-[117].

⁵⁷ *Prathapan v MIMA* (1998) 47 ALD 41.

⁵⁸ *Koe v MIMA* (1997) 74 FCR 508.

⁵⁹ *Prathapan v MIMA* (1998) 47 ALD 41 at 48. This decision was overturned on appeal (*MIMA v Prathapan* (1998) 86 FCR 95) but this point was not disturbed.

⁶⁰ [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999) at [42]. Note that some aspects of the discussion of protection in that case may not be consistent with what was said about the second limb of Article 1A(2) in the joint judgment in *MIMA v Respondents S152/2003* at [28].

⁶¹ *A v MIMA* [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999) at [43].

facts found, the Convention may well be available to persons from the latter category of country.⁶³

However, as the Federal Court stated in *A v MIMA*,

there is no golden rule which says a person may never be given refugee protection if they come to Australia from a democratic country governed by the rule of law with generally effective judicial and law enforcement institutions.⁶⁴

Each case turns on its own facts; and the Tribunal should ensure it addresses the particular circumstances of the applicant and the particular harm feared when considering the question of state protection.⁶⁵ Even if the general evidence points to a reasonably effective police force and a reasonably impartial system of justice, particular attention may need to be given to whether it meets the required standards in circumstances where protection sought was not provided or was not effective,⁶⁶ or where the claimed persecution is by ‘rogue’ state officials,⁶⁷ or where an applicant is in a particularly vulnerable position.⁶⁸ That said, it is clear that the required system of protection is one of reasonable, but not perfect, efficiency,⁶⁹ and may not necessarily provide a guarantee of safety or remove any reasonable basis for fear.⁷⁰

It may be noted that, regardless of the content of the relevant ‘international standards’, where the issue of state protection is considered in relation to whether a fear of persecution is *well-founded*, what is relevant is whether the protection that is available is sufficient to remove a real chance of persecution. However, on the majority view in *S152/2003*, even where state protection is not sufficient to remove a real chance of serious harm from non-state actors, Convention protection might not be engaged if the level of protection provided meets international standards.⁷¹

⁶² (2002) 210 CLR 1.

⁶³ *MIMA v Khawar* (2002) 210 CLR 1at [130]-[131], per Kirby J. Discriminatory failure of state protection is discussed further in Chapter 4 of this Guide.

⁶⁴ [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999) at [39].

⁶⁵ See *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [116] per Kirby J; *Marshood v MIMA* [1999] FCA 1415 (Kiefel J, 15 October 1999); *M251 of 2003 v MIMIA* [2005] FMCA 582 (McInnis FM, 5 May 2005); *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); *SZAIX v MIMIA* (2006) 150 FCR 448. See also *SZQUB v MIAC* [2012] FMCA 74 (Driver FM, 8 February 2012) at [11] where the Court stated that the Tribunal was entitled to have regard to the particular facts of the case, which may run counter to circumstances appearing from country information (upheld on appeal: *SZQUB v MIAC* [2012] FCA 471 (Katzmann J, 10 May 2012)).

⁶⁶ See, for example, *M251 of 2003 v MIMIA* [2005] FMCA 582 (McInnis FM, 5 May 2005); *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); *SZAIX v MIMIA* (2006) 150 FCR 448. Note, for example, *obiter* comments of the Court in *SZOID v MIAC* [2010] FMCA 517 (Driver FM, 19 July 2010) at [29] that it would be difficult to say that protection is effective if it is dependent upon payment of a bribe.

⁶⁷ See, for example, *SZDWR v MIMIA* [2005] FMCA 860 (Smith FM, 1 July 2005) and on appeal, *SZDWR v MIMIA* (2006) 149 FCR 550. Note that the Full Court in *SZDWR* rejected the proposition in *VRAW v MIMIA* [2004] FCA 1133 (Finkelstein J, 3 September 2004) that in the case of persecution by rogue state agents a different standard of protection is required, specifically, that there will only be adequate protection if the state is taking action to curb their illegal and unauthorised actions. Nevertheless, as Smith FM indicated in *SZDWR* at first instance at [36], even when a single standard is applied, the Tribunal of fact must appreciate the different risks attaching to persecution by state agents, even where unauthorised and criminal, and of the need to find available and effective protective measures to deal with this type of persecution before finding that the applicant’s claim is not made out.

⁶⁸ See, for example, *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); *SZAIX v MIMIA* (2006) 150 FCR 448.

⁶⁹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [117] per Kirby J; *SZDWR v MIMIA* (2006) 149 FCR 550 at [22].

⁷⁰ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [23], [26] per Gleeson CJ, Hayne and Heydon JJ.

⁷¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28]. As noted above, McHugh J at [83] disagreed; however the difference between his Honour’s approach and the majority view will be significant to the outcome only where there remains a well-founded fear of serious harm notwithstanding that the country in question provides the level of protection required by international standards.

Needless to say, there is no need to test whether a state complies with the international norms of the provision of adequate protection unless the applicant is in need of that protection, that is, unless he or she has a real chance of suffering serious harm.⁷²

Whether circumstances establish lack of protection

The authorities make it clear that the Convention posits a reasonable level of protection that does not impose an impossible or disproportionate burden on the authorities. Thus, the Convention is not directed against the failure of a country to protect its citizens against random criminal behaviour, or a failure to act on insufficient evidence. Nor would the Convention normally be engaged where state protection has not been sought, in circumstances where such protection might reasonably have been forthcoming.

In *Mehmood v MIMA*, von Doussa J recognised that '[h]owever good the level of protection offered by a state might be, *random acts of thuggery or other criminal behaviour* cannot always be prevented, and hence absolute guarantees against harm are impossible in fact, and are not required in law to negate a real chance of persecution'.⁷³ Similarly, in *Primatchek v MIMA*, Madgwick J acknowledged that no country can guarantee protection of its nationals, adding that 'if there is insufficient evidence as to the identity of persecutors for law enforcement authorities to act on, then no matter how willing and capable such authorities may generally be of protecting a person against persecution, protection will fail. It is not against such irreducible failure to protect its nationals that the Convention is directed'.⁷⁴

In *Efimcova v MIMA*⁷⁵ the Tribunal had found that the protection offered to the applicant against attacks made upon her by reason of her ethnicity was 'effective'. Although it was true that the state did not prevent a nasty assault upon the applicant, Burchett J recognised that such incidents can occur anywhere, and that when they occur police are frequently unable to detect the miscreant or miscreants, particularly when, as in that case, there is some delay before the police are brought into the matter. Given the quantity of evidence of the goodwill of authorities and the paucity of evidence of anything more than verbal abuse and threats by individuals against the applicant, his Honour found that the conclusion reached by the Tribunal was open to it on the evidence.⁷⁶

Where a government has not been given an opportunity to provide protection in circumstances where it might reasonably have done so, an applicant's unwillingness to seek protection would not be justified and would not satisfy the second limb of Article 1A(2). However, where information before a decision maker indicates that protection might not reasonably have been forthcoming, it would be an error to require the applicant to have

⁷² *SZDBB v MIMA* [2006] FMCA 298 (Raphael FM, 7 March 2006) at [7]. See also the authorities referred to at n 2.

⁷³ [2000] FCA 1799 (von Doussa J, 12 December 2000) at [15].

⁷⁴ [2000] FCA 517 (Madgwick J, 24 March 2000) at [14].

⁷⁵ unreported, Federal Court of Australia, Burchett J, 4 September 1998.

⁷⁶ *Efimcova v MIMA*, unreported, Federal Court of Australia, Burchett J, 4 September 1998.

approached the authorities for protection before making a finding of absence of adequate state protection.⁷⁷ If cultural norms, practices or widely held assumptions in a particular society engender a reasonable apprehension that such an approach would only exaggerate a victim's predicament, the law does not require a victim to expose himself or herself to likely future harm to substantiate that he or she was being persecuted for Convention purposes.⁷⁸

No legal presumption of State protection

It appears clear that a decision maker cannot be satisfied that there is a failure of state protection in the relevant sense in the absence of evidence to that effect.⁷⁹ Although in the context of administrative decision making in Australia under the Convention there is no *legal* presumption of state protection,⁸⁰ there is some authority for the proposition that an asylum seeker will bear a practical burden of establishing that protection is lacking.⁸¹ The Supreme Court of Canada stated in *Canada (Attorney-General) v Ward (Ward)* that in the absence of a state admission as to its inability to protect its nationals, clear and convincing evidence of a state's inability to protect must be provided.⁸² The Court continued:

Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of State apparatus ... it should be assumed that the State is capable of protecting a claimant.⁸³

In *MIMA v Khawar*, Kirby J referred to *Ward* in support of the broad proposition that as a practical matter in most cases, save those involving a complete breakdown of the agencies of the state, decision makers are entitled to assume (unless the contrary is proved) that the state is capable within its jurisdiction of protecting an applicant.⁸⁴

The joint judgment reasoning in *MIMA v Respondents S152/2003* appears to be consistent with that approach. In that case there was no evidence before the Tribunal to support a

⁷⁷ *AZAAR v MIAC* [2009] FCA 912 (Finn J, 19 August 2009) at [25]. Although aspects of his Honour's reasoning in *AZAAR* were overturned by the Full Federal Court in *MIAC v SZONJ* (2011) 194 FCR 1, this point was undisturbed. See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd edition, 2014), at 323-4.

⁷⁸ *AZAAR v MIAC* [2009] FCA 912 (Finn J, 19 August 2009) at [25]. As noted above, although aspects of his Honour's reasoning in *AZAAR* were overturned by the Full Federal Court in *MIAC v SZONJ* (2011) 194 FCR 1, this point was undisturbed.

⁷⁹ See *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28], *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004) at [41]; *SHKB v MIMIA* [2004] FCA 545 (Selway J, 5 May 2004) at [32] and on appeal, [2005] FCAFC 11 (Cooper, Marshall and Mansfield JJ, 18 February 2005) at [13]; *NASJ v MIMIA* [2005] FMCA 124 (Barnes FM, 25 February 2005) at [8]; and *SZBBE v MIMIA* [2005] FCA 264 (Jacobson J, 24 March 2005) at [45]. In *SZBBE*, Jacobson J at [46] suggested further that it is for the applicant to put forward international standards of protection with which the state failed to comply.

⁸⁰ *A v MIMA* [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999). This issue had been the subject of continuing debate, but now appears settled after *A*. For prior discussion see e.g. *Koe v MIMA* (1997) 74 FCR 508, *Thiyagarajah v MIMA* (1997) 80 FCR 543 at 567, *MIMA v Prathapan* (1998) 86 FCR 95, *MIMA v A* (1998) 156 ALR 489 (Nicholson J, 9 April 1998) and *MIMA v Kobayashi* (unreported, Federal Court of Australia, Foster J, 29 May 1998).

⁸¹ See for example *SZBJH v MIAC* [2007] FMCA 1395 (Scarlett FM, 3 August 2007) at [43] and *SZIRA v MIAC* [2007] FMCA 1082 (Nicholls FM, 7 June 2007) at [32].

⁸² [1993] 103 DLR (4th) 1 at 23.

⁸³ *Canada (Attorney-General) v Ward* [1993] 103 DLR (4th) 1 at 23.

⁸⁴ (2002) 210 CLR 1 at [115]. In *A v MIMA* [1999] FCA 116 (French, Merkel and Finkelstein JJ, 23 February 1999) the Full Federal Court characterised the presumption that 'nations should be presumed capable of protecting their citizens' as 'a presumption without a basic fact' and therefore as 'a rule of law relating to the existence of a burden of proof [which] has no part to play in administrative proceedings which are inquisitorial in their nature'. Accordingly, the Court agreed with the trial judge that there was no foundation in authority or principle which should lead it to accept the existence of a presumption in terms of *Ward*. The apparent conflict between these cases may be explained by the different ways in which Kirby J and the Full Federal Court in *A* characterised the reference in *Ward* to the presumption of protection.

conclusion that Ukraine did not provide its citizens with the level of state protection required by international standards, because that was not the case that the applicant was seeking to make. Their Honours observed that the country information available to the Tribunal extended beyond the case that was put by the applicant but gave no cause to conclude that there was any failure of state protection in the relevant sense.

Protection from non-government agencies

The Convention definition refers to the protection of the country. However, when the issue of (internal) protection is under consideration solely in relation to ‘well-founded fear’, then the availability of protection will be a relevant factor in determining whether the fear is, in fact, well-founded, regardless of the source of that protection. In this respect, Sundberg J in *Siaw v MIMA* observed that the political composition of those who are keeping the peace (in Freetown, Sierra Leone, in that case) and making an area secure is not relevant to the assessment of whether an applicant has a well-founded fear.⁸⁵ Thus, his Honour saw no difference between cases where adequate protection is provided:

- entirely by government forces;
- by a combination of government forces and friendly forces;
- by forces from a neighbouring country or ally;
- by mercenaries (alone or paid to assist government forces); or
- by UN forces invited to assist government forces.⁸⁶

His Honour referred to *Cole v MIMA*⁸⁷ as supporting the view that so long as an area is safe for an applicant to return to, the consequence of which is that any fear of return he may have is not well-founded, it does not matter that that safety is brought about by UN as well as government forces.

Similarly, and depending upon the circumstances, effective protection that is available from purely private sources may be enough to negative a well-founded fear of persecution.⁸⁸

⁸⁵ [2001] FCA 953 (Sundberg J, 23 July 2001).

⁸⁶ *Siaw v MIMA* [2001] FCA 953 (Sundberg J, 23 July 2001) at [7]-[8].

⁸⁷ [2000] FCA 1375 (Heerey J, 27 September 2000) and on appeal: [2001] FCA 76 (Spender, Marshall, and Goldberg JJ, 16 February 2001). Similarly, in *SZQGU v MIAC* [2012] FCA 340 (Rares J, 5 April 2012) at [8] the Court confirmed that once there is no well-founded fear, the reason why the person might not suffer harm if he were to return to his country of nationality is not relevant (special leave application dismissed: *SZQGU v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)).

⁸⁸ See, for example: *SZQGT v MIAC* [2011] FMCA 744 (Cameron FM, 7 October 2011) at [30]-[31]; *Razai v MIAC* [2011] FMCA 777 (Nicholls FM, 27 October 2011) at [69] (upheld on appeal: *Razai v MIAC* [2012] FCA 394 (North J, 20 April 2012), application for special leave to appeal dismissed: *Razai v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); *SZQKC v MIAC* [2011] FMCA 848 (Cameron FM, 4 November 2011) at [47] (upheld on appeal: *SZQKC v MIAC* (2012) 206 FCR 253 at [21] and application for special leave to appeal dismissed: *SZQKC v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); *SZQGU v MIAC* [2012] FCA 340 (Rares J, 5 April 2012) at [7] (application for special leave to appeal dismissed: *SZQGU v MIAC* [2013] HCATrans 145 (French CJ and Kiefel J, 7 June 2013)); all of which found no error in Reviewers’ findings that the applicants did not have a well-founded fear of being persecuted by the Taliban in Afghanistan because operations of the (non-state) dominant Hazara faction excluded Taliban influence from the area.

Protection and Statelessness

In the case of people who are stateless, the question of availing of protection of the relevant country simply does not arise under the second limb of Article 1A(2).⁸⁹

However, it has been seen that in its broader meaning ‘protection’ also operates on the concepts of ‘persecution’ and ‘well-founded fear’ in the first limb of Article 1A(2). High Court consideration of the relevance of internal state protection to those concepts has been in the context of citizens of a country and provides little direct guidance in the context of stateless people. Nor is it clear whether the same ‘international standards’ would apply in that context. Nevertheless, it is reasonably clear that the question of internal protection will be relevant to whether an applicant’s fear is *well-founded*, regardless of the applicant’s status in the relevant country. Further, on the basis that a state’s duty of protection within its territory extends to stateless residents,⁹⁰ it appears that the relationship between ‘protection’ and ‘persecution’ as discussed by the High Court in relation to citizens of a country would apply similarly to stateless residents of a country.

No Functioning State Apparatus - ‘Protection’ vs ‘Accountability’

The different views as to the extent of a signatory state’s obligation where persecution is perpetrated by non-state agents are underpinned by different theories of the Convention. The differing views, sometimes described as the ‘accountability’ and ‘protection’ theories, have particular significance where claims to refugee status arise in a context where there is no functioning state, such as in circumstances of widespread civil unrest. On one view, the Convention is premised upon state responsibility so that it does not apply in a situation in which state protection is unavailable simply because there is no functioning state apparatus at all, as appeared to be the case in Somalia on the material before the Tribunal in *MIMA v Haji Ibrahim*.⁹¹

Under the ‘accountability’ theory, signatory states are only required to extend Convention protection where the government of the country of nationality is responsible for the persecution of a person for a Convention reason either by inflicting, condoning or tolerating the persecution. Under this theory, no Convention obligation is owed where the government of the country has reacted effectively to prevent the persecution or the persecution is beyond its resources or capacity to prevent,⁹² or on the German view, where there is no effective state authority, as in a situation of civil war. In short, the “accountability” theory:

⁸⁹ While refugees with a nationality must be unable or owing to such fear unwilling *to avail themselves of the protection of their country*, a stateless person who is outside their country of former habitual residence owing to well-founded fear of persecution must be unable or owing to such fear unwilling *to return* to that country. See *MIMA v Khawar* (2002) 210 CLR 1 per McHugh & Gummow JJ at [63], *MIMA v Savvin* (2000) 98 FCR 168 at [34], and UNHCR, *Handbook* above n 15, at [101].

⁹⁰ See the discussion in Fortin, above n 12, e.g., at 552, 564.

⁹¹ (2000) 204 CLR 1.

⁹² See *MIMA v Respondents S152/2003* (2004) 222 CLR 1 per McHugh J at [54]. His Honour observed that the accountability theory of the Convention continues to prevail in Germany and has traditionally prevailed in France, Italy and Switzerland,

limits the class of case in which a claimant may obtain refugee status to situations where the persecution alleged can be attributed to the state so that the status of refugee is not available, on the German view, where there is no effective state authority or, on the French view, the state authority is unable to provide protection.⁹³

This is often contrasted with the more widely accepted ‘protection’ theory which proceeds from the premise that the object of the Convention is to provide surrogate or substitute protection where such protection is lacking in the country of nationality. State complicity is not a requirement.⁹⁴ The Court of Appeal has held that under the ‘protection’ theory:

the Convention definition of “refugee” extends to persons who fear persecution by non-State agents where the State is not complicit in the persecution but is unwilling or unable to afford protection, *including situations where effective State authorities do not exist*.⁹⁵ (emphasis added)

While state complicity is not a requirement of the protection theory, its proponents contend that the purpose of refugee law is to offer surrogate protection when the country of nationality ‘fails in its duty’ to protect its citizens. Thus, persecution by non-state actors occurs only when there is a violation of a right and the state has a duty to prevent that violation.⁹⁶

In *Haji Ibrahim*, Gummow J expressed the opinion that it was not immediately apparent that the ‘accountability’ and ‘protection’ theories are necessarily in opposition, or that the latter necessarily leads to acceptance of the proposition that the Convention extends to situations where effective state authorities do not exist.⁹⁷ His Honour considered that the concept of ‘protection’ in the Convention definition involves the notion of protection by a functioning government. He observed that ‘the protection spoken of in the Convention definition is not that of a “country” in an abstracted sense, divorced from the notion of a government with administrative organs’ and therefore disagreed with a proposition that the ‘protection of [the] country of a refugee excludes the notion of protection by its government’.⁹⁸

On the other hand, in their dissenting judgments Gaudron, McHugh and Kirby JJ clearly accepted that the Convention definition extends to persons who fear persecution by non-

although these countries ‘appear to have broken away, if not in doctrine, in practice, though in a discretionary and informal way’, citing European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000, at 7 and 14. See also *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [117] and [152] per Gummow J for further discussion of this theory.

⁹³ *R v SSHD; Ex parte Adan* [1999] 3 WLR 1274 as explained in *Horvath v SSHD* [2001] 1 AC 489 per Lord Hope of Craighead; see also *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [117], [152] per Gummow J. The Court of Appeal rejected what it identified as the ‘accountability’ theory in favour of what it called the ‘protection’ theory, adherence to which it attributed to a majority of contracting states, including Australia: *R v SSHD; Ex parte Adan* [1999] 3 WLR 1274.

⁹⁴ See *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [55]-[58] per McHugh J. For further discussion of this theory, see also *Applicant A v MIEA* (1997) 190 CLR 225 per Dawson J at 248 and *MIMA v Haji Ibrahim* (2000) 204 CLR 1 per Gummow J at [117] and [154].

⁹⁵ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [117]-[118] per Gummow J, referring to *R v SSHD; Ex parte Adan* [2001] 2 AC 477 at 492-493; see also [154].

⁹⁶ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 per McHugh J at [57] referring to Helene Lambert, ‘The Conceptualisation of “Persecution” by the House of Lords: *Horvath v Secretary of State for the Home Department*’ (2001) 13 *International Journal of Refugee Law* 16 at 20.

⁹⁷ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [154].

⁹⁸ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [153]. His Honour commented that given the failure in the submissions to grapple with the task of construing the terms ‘persecution’ and ‘protection’, these questions of law could not be resolved on that occasion.

state agents in situations such as those that existed in Somalia, where effective state authorities do not exist.⁹⁹ Justice McHugh stated:

Because Somalia has had no government in any relevant sense, persons such as the applicant have had no protection from their country of nationality. Where the State has disintegrated ... so that there is no State to prevent the persecution of a person by private individuals or groups, that persecution will fall within the definition of refugee just as it would if an existing government had failed to protect that person from the persecution. Given the objects of the Convention, I can see no reason for reading down the definition of refugee so that it applies only when the country of nationality has a government. A person who otherwise satisfies the definition is a refugee when that person cannot avail him or herself "of the protection of [his or her] country", not its government.¹⁰⁰

Justice Callinan also appeared to be sympathetic to this view.¹⁰¹

Whether the 'accountability' or the 'protection' theory should be accepted in Australia remains unsettled.¹⁰² The reasoning in the joint judgment in *S152/2003* appears to be broadly consistent with the views earlier expressed by Gummow J in *Haji Ibrahim*; however the question of the operation of the Convention in circumstances where there is no functioning government did not arise for consideration in the later case *S152/2003* and the approach reflected in the joint judgment may not necessarily be conclusive of the issue.¹⁰³

Notwithstanding Gummow J's tentative views in *Haji Ibrahim* to the contrary, the preponderance of Australian authority supports the view that the Convention is not limited to situations where the asylum seeker's country has a functioning government.

Accordingly, in the absence of further judicial guidance on these issues, it should be accepted that the Convention definition extends to persons who fear persecution by non-state agents where the state is not complicit in the persecution but an appropriate level of state protection is lacking, including situations where effective state authorities do not exist.

⁹⁹ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [18] per Gaudron J, at [69] per McHugh J, and at [196]-[199] per Kirby J.

¹⁰⁰ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [69] per McHugh J.

¹⁰¹ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [226]-[227] per Callinan J.

¹⁰² The issue was left open in *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [154] per Gummow J, and at [228] per Callinan J; *MIMA v Khawar* (2002) 210 CLR 1 at [75], [87] per McHugh and Gummow JJ; the reasoning of Kirby J in *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [111] suggested the protection theory had been generally followed in Australia. The joint judgment of Gleeson CJ, Hayne and Heydon JJ in *MIMA v S152/2003* does not address the issue directly, however their reasoning appears to be consistent with the 'protection' theory as explained by McHugh J; in the same case McHugh J expressly rejected both theories.

¹⁰³ Whilst Kirby J reserved the issue 'for another day', his Honour considered it appropriate to continue to approach the alleged conduct of non-state actors in accordance with the protection theory that he had previously accepted as applicable to claims of 'persecution' under the Convention, at least where there is a functioning state apparatus as in Ukraine: *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [112]. His Honour's qualification points to the possibility that different considerations might arise where there is no such state apparatus. Gummow, Hayne and Heydon JJ's reference to 'surrogate protection' in *S152/2003* at [20] received endorsement in the joint judgment their Honours delivered together with Gleeson CJ, McHugh and Callinan JJ in *NAGV and NAGW v MIMA* (2005) 222 CLR 161 at [32]. However that case was concerned only with the interpretation of the phrase 'protection obligations under [the Convention]' in s.36(2) of the Act and in particular, whether the phrase draws in anything more than Article 1 of the Convention. It provides no guidance on the question of refugee status in situations where there is no functioning government.

PROTECTION UNDER SECTION 5H OF THE ACT

Section 36(2)(a), as it applies to protection visa applications made on or after 16 December 2014, refers to a person in respect of whom Australia has protection obligations because they are a 'refugee'. 'Refugee' is defined in s.5H(1) of the Act as follows:

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:
 - (a) in a case where the person has a nationality — is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
 - (b) in a case where the person does not have a nationality — is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

As with Article 1A(2), the concept of protection arises under this definition in a number of ways. Firstly, the definition requires that, in the case of an applicant with a nationality, the applicant is unable or unwilling to avail themselves of the protection of that country, a requirement which, at least in the Refugees Convention context, has been interpreted to refer to external or diplomatic protection.

Secondly, the definition requires that the applicant have a 'well-founded fear of persecution'. This phrase is defined in s.5J of the Act which, insofar as is relevant to protection, provides in sub-section (2) that a person will not have a well-founded fear of persecution if 'effective protection measures are available to the person in a receiving country'. Section 5LA provides circumstances in which 'effective protection measures' are available to a person, requiring consideration of the protection available to an applicant within their country of nationality or former habitual residence.

Under the Convention, an applicant who seeks asylum in circumstances where adequate state protection is available within their country of origin is not justified in their claimed inability or unwillingness to avail themselves of the (external) protection of that country, even if their fear of harm is well-founded. While s.5J(2) does not expressly link the existence of internal protection to an applicant's inability or unwillingness to return, the practical effect will be the same. Where effective protection measures are available to an applicant in their country of nationality or former habitual residence, they will be taken not to have a well-founded fear of persecution and will not meet the definition of 'refugee', notwithstanding that there may be a real chance that they will be harmed.

A key distinction between the concept of 'state protection' under the Convention and 'protection' under s.5J(2) of the Act is the role of non-State actors. Under the Convention as interpreted in Australia, protection provided by non-State actors may be relevant to the assessment of whether there is a real chance of harm, but plays no part in consideration of 'adequate' protection provided by a State. In contrast, the concept of 'effective protection' under the Act expressly includes protection by certain non-State actors.

The standard of ‘effective’ internal protection for the purpose of the definition of refugee in s.5H is otherwise largely similar to that of ‘adequate’ protection under the Convention. While these standards involve some similar considerations, ss.5J(2) and 5LA of the Act are intended to incorporate the standard for protection used by the European Union in determining asylum cases, rather than the test under the Convention as interpreted in Australia.¹⁰⁴

Unable or unwilling to avail themselves of protection of the country

To meet the definition of refugee in s.5H(1), an applicant with a nationality must, owing to a well-founded fear of persecution, be *unable* or *unwilling* to avail him or herself of the *protection of his or her country of nationality*.¹⁰⁵ This requirement clearly draws on the terms of the Article 1A(2) definition of refugee and is intended to codify that definition, as interpreted in Australian case law.¹⁰⁶

As set out earlier in this chapter, the ‘protection of that country’ in the context of Article 1A(2) has been interpreted by the High Court to mean external protection.¹⁰⁷ This interpretation appears equally applicable to s.5H(1), which is in near identical terms to Article 1A(2). Further, s.5H(1) is complemented by s.5J(2), which is specifically directed at internal protection, suggesting that s.5H(1) refers to protection of a different nature.

There may, however, be some overlap between internal protection in s.5J(2) and external protection for the purpose of s.5H(1). In the context of the Refugees Convention, the High Court has said that an inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection (that is, protection in the wider sense), or may be related to a possibility that seeking such protection could result in return to the place of persecution.¹⁰⁸ While in the majority of cases, state protection is more likely to arise as part of consideration of whether an applicant has a well-founded fear of persecution *within* the receiving country, the external protection limb remains a requirement of s.5H(1) and should not be overlooked.

Given the similarity in the terms of s.5H(1) and Article 1A(2), the discussion above regarding external protection in the Convention context, under the heading ‘The Protection of that Country’ = External Protection’, including the consideration of the terms ‘Unable or unwilling’, is likely to be equally applicable to those concepts under s.5H(1).

¹⁰⁴ The definition in s.5LA is intended to be consistent with a European Union Qualification Directive of 13 December 2011: Second Supplementary Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, at [39].

¹⁰⁵ No such requirement applies in the case of stateless applicants.

¹⁰⁶ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, at [1167].

¹⁰⁷ *MIMA v Khawar* (2002) 210 CLR 1; *MIMA v Respondents S152/2003* (2004) 222 CLR 1.

¹⁰⁸ *MIMA v Khawar* (2002) 210 CLR 1 at [22] per Gleeson CJ; *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [19] per Gleeson CJ, Hayne and Heydon JJ and at [63] per McHugh J; UNHCR, *Interpreting Article 1*, above n 12 at [35].

Effective protection measures

In the context of s.5H(1), the protection available to an applicant *within* their receiving country is directly relevant to a determination of whether the applicant has a well-founded fear of persecution. Section 5J(2) provides that an applicant to whom effective protection measures are available does not have a well-founded fear of persecution. Unlike the external protection requirement in s.5H(1) which applies only to applicants with a nationality, the internal protection inquiry in s.5J(2) also applies to stateless applicants.

Section 5LA sets out circumstances where ‘effective protection measures’ are available for the purpose of s.5J(2), in effect providing a presumption of protection in certain circumstances. Section 5LA(1) provides that effective protection measures are available to a person in a receiving country if:

- (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
- (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.

This is complemented by s.5LA(2) which provides that a relevant state, party or organisation is *taken to be able* to offer protection against persecution where:

- (a) the person can access the protection; and
- (b) the protection is durable; and
- (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

This definition contains a number of different limbs relating to who may offer protection, the ability or willingness of the protector, access to the protection and the nature of the protection. Some of these draw on concepts familiar from the Refugees Convention context, whereas others are distinct. The various elements of ‘effective protection measures’ are considered in turn below.

Section 5J(2) will only arise for consideration in circumstances where there is a real chance of serious harm. In some cases, the existence of protection from another person, body or entity, may lead to the conclusion that there is no real chance of harm, such that it is not necessary to independently consider s.5J(2) or 5LA. Conversely, the ‘deeming’ operation of ss.5J(2) and 5LA may have the effect that, in some cases, an applicant may be taken not to have a well-founded fear of persecution despite there being a real chance that he or she will, in fact, be subject to harm. This is similar to the Convention standard whereby the State is not required to guarantee the safety of its citizens,¹⁰⁹ and the existence of the appropriate level of state protection may lead to the conclusion that there is not a justifiable

¹⁰⁹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26]. See also *MIMA v Thiyagarajah* (1998) 80 FCR 543 at 566-7, *MIMA v Prathapan* (1998) 86 FCR 95 at 104-5 per Lindgren J, Burchett & Whitlam JJ agreeing. This aspect of *Thiyagarajah* was not disturbed by the High Court decision in *NAGV & NAGW v MIMA* (2005) 222 CLR 161.

unwillingness to seek the (external) protection of the country of nationality, even if the fear of harm remains well-founded.¹¹⁰

Protection by a State, party or organisation

Section 5LA(1) expressly provides that protection may be provided by the relevant State, but also by certain non-State actors.¹¹¹ These are a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State.¹¹² This is consistent with the approach to determining ‘well-founded fear’ under the Refugees Convention as interpreted in Australia. In the Convention context, relevant non-State actors may include forces from a neighbouring country or ally, mercenaries, or UN forces invited to assist government forces.¹¹³ However, for the purpose of s.5LA, the decision maker must be satisfied that the relevant party or organisation controls the relevant State or a substantial part of its territory.¹¹⁴

The Department of Home Affairs’ ‘Policy: Refugee and humanitarian – Refugee Law Guidelines’ (the Refugee Law Guidelines) state that whether protection *could* be provided involves consideration of whether the relevant protector has the ability and motivation to do so, which suggests that there is some overlap between the enquiry in s.5LA(1)(a) and whether the relevant State, party or organisation is willing and able to offer such protection for the purposes of s.5LA(1)(b).¹¹⁵

The Refugee Law Guidelines state that, in the absence of evidence to the contrary, it would be reasonable to take the view that a party or organisation which has control of the State or a substantial part of the territory of a State is in a position to protect persons whom they are willing to protect and resist influence by an alleged persecutor within its area of control.¹¹⁶

¹¹⁰ *Applicant A99 of 2003 v MIMIA* [2004] FCA 773 (Mansfield J, 9 July 2004) at [38] referring to *MIMA v Respondents S152/2003* (2004) 222 CLR 1.

¹¹¹ Department of Home Affairs, ‘Policy: Refugee and humanitarian - Refugee Law Guidelines’, section 9.3, re-issued 1 July 2017 (Refugee Law Guidelines) state that the relevant protection could be provided by the party or organisation working alone or in conjunction with the State. The textual basis in s.5LA for this interpretation is unclear, but this approach is consistent with *Siaw v MIMA* [2001] FCA 953 (Sundberg J, 23 July 2001) at [7]-[8] and the intention to codify existing case law indicated in the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at [2]. Note that Ministerial Direction No. 56, made under s.499 of the Act, requires the Tribunal to have regard to those Guidelines, where relevant (for further discussion, see Chapter 12 of this Guide).

¹¹² The terms ‘party’ and ‘organisation’ are not defined in the Act. Department of Home Affairs, Refugee Law Guidelines, section 9.3, re-issued 1 July 2017 state that for an organisation to be considered an ‘international organisation’ its operations or parts must be in or cross borders of States, or be considered to be part of multi-State co-operation, or have influence across more than one State.

¹¹³ *Siaw v MIMA* [2001] FCA 953 (Sundberg J, 23 July 2001) at [7]-[8].

¹¹⁴ Department of Home Affairs, Refugee Law Guidelines, section 9.3, re-issued 1 July 2017 note that ‘controls the relevant State’ differs from ‘controls...a substantial part of the territory’, in that the former does not necessarily involve holding territory and could be an ability to exercise direction to the governing authority of the State about how it will fulfil its functions, which may only mean having exercise over the organs and agencies of the State or occupying a part of the territory allowing direction and command to be exerted.

¹¹⁵ Department of Home Affairs, Refugee Law Guidelines, section 9.3, re-issued 1 July 2017.

¹¹⁶ Department of Home Affairs, Refugee Law Guidelines, section 9.3, re-issued 1 July 2017.

Willing and able to provide protection

Section 5LA(1)(b) requires that the relevant State, party or organisation must be both willing and able to offer the relevant protection.

Whether a State, party or organisation is willing to offer protection will be a question of fact. If the State, party or organisation is *unwilling* to offer protection for the purpose of s.5LA(1)(b), effective protection measures will not be available in accordance with s.5LA. This may arise, for example, where there is a discriminatory withholding of protection.

The Refugee Law Guidelines state that the assessment of whether the relevant party or organisation is *willing* to offer protection may require consideration of the operations and profile of the party or organisation as well as the circumstances of the applicant. By way of example, the Guidelines refer to a party that purports to protect persons of a particular religion or race, but may not in fact protect members of those groups with certain profiles. The Guidelines refer to considering the nature of the party or organisation and any information on the principles or ideals underpinning the group along with the factual circumstances of the applicant.¹¹⁷

The other limb of s.5LA(1)(b) is that the protecting party is *able* to provide the protection. While s.5LA(2) provides for circumstances where a State or non-State party is *taken to be able* to offer protection, it does not exclude the decision maker from finding that a State, party or organisation is able to provide protection in other circumstances. This will largely be a question to be determined on the facts of the case and available country information.

Circumstances where the State, party or organisation is taken to be able to offer protection

Section 5LA(2) provides certain circumstances in which a State, party or organisation is deemed to be able to offer protection against persecution to an applicant.

The State, party or organisation will be taken to be able to provide protection against persecution if the person can access the protection, the protection is durable and, in the case of protection provided by a State, it consists of certain threshold requirements.

Access to protection

For the presumption of effective protection to apply, the person must be able to access the protection: s.5LA(2)(a). Inability to access protection may arise where the actor in question is unwilling to provide it to the person, or where protection is only intermittently available or exists only in certain areas. Further, the requirement that 'the person' can access the protection may include consideration of any particular circumstances of the applicant which may prevent him or her from being able to access the protection in question.

¹¹⁷ Department of Home Affairs, Refugee Law Guidelines, section 9.4, re-issued 1 July 2017.

The Refugee Law Guidelines note that in some situations a protector may not provide protection to an applicant with certain behavioural characteristics and that it may be relevant to consider whether the applicant could take reasonable steps to modify his or her behaviour such that they would not have a well-founded fear of persecution in accordance with s.5J(3).¹¹⁸

The Refugee Law Guidelines also contain guidance on factors to consider when determining if a person can access protection, depending upon whether the protection is provided by the State or another party or organisation.¹¹⁹

Protection is durable

For a State, party or organisation to be taken to be able to offer protection, the protection must also be durable: s.5LA(2)(b). This suggests that temporary or intermittent protection will not be sufficient. According to the Refugee Law Guidelines protection will be 'durable' where it lasts for the period required to avoid the well-founded fear of persecution, i.e. the reasonably foreseeable future.¹²⁰ Consideration of this aspect may be particularly relevant in cases where the protection is provided by a State, party or organisation that has only recently taken control or whose authority is under threat.

Nature of protection provided by the State

Section 5LA(2)(c) imposes a specific requirement as to the standard of protection that must be provided by a State in order for that State to be taken to be able to offer protection. It requires that the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system. These will be findings of fact, to be assessed based on the evidence before the decision maker.

The terms of s.5LA(2)(c) appear similar in part to case law on internal state protection for the purpose of Article 1A(2) of the Convention. The joint judgment in *MIMA v S152/2003* refers to the obligation of the state to take 'reasonable measures' to protect the lives and safety of its citizens, including 'an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system', or a 'reasonably effective police force and a reasonably impartial system of justice'.¹²¹ Thus, consistent with the interpretation of the Convention, s.5LA(2)(c) sets a minimum threshold for the protection that a State must provide. However, even where the protection meets the s.5LA(2)(c) requirements, the State will not be taken to be able to provide protection unless the applicant can actually access the protection.

¹¹⁸ Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.

¹¹⁹ Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.

¹²⁰ Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.

¹²¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26] and [28].

In relation to the appropriateness of a criminal law, the Refugee Law Guidelines refer to considering whether the laws are laws of general application, or, if discriminatory, are appropriately adapted to meeting a legitimate State objective.¹²²

The Refugee Law Guidelines contain guidance in relation to determining whether the police force is 'reasonably effective' and there is an impartial judicial system.¹²³ According to the Refugee Law Guidelines, a reasonably effective police force is one that is able to respond in a reasonable time but need not cover every situation and an impartial judicial system is one that applies the law in a consistent manner and does not apply differing standards for a reason under s.5J(1)(a).¹²⁴

There is an ambiguity as to the effect of s.5LA(2)(c) in cases where the persecution is of a non-criminal nature. The measures in s.5LA(2)(c) would not appear to provide protection against harm such as discrimination or economic harm. It may be that in such cases the State is not *taken* to be able to offer protection (as the protection in question does not consist of the measures required by s.5LA(2)(c)), or that the person cannot access protection for the purpose of s.5LA(2)(a), as it is not protection against the persecution they fear. Although the deeming provision in s.5LA(2) may have no effect in such cases, the decision maker may nonetheless find that effective protection measures are available, if the matters in s.5LA(1) are made out on the evidence.

Further, even where a State, party or organisation is taken to be *able to offer* protection, the decision maker will still need to be satisfied that the other requirements of s.5LA(1) are met, including that the actor is willing to provide protection, before reaching a finding that effective protection measures are available to an applicant.

¹²² Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.

¹²³ Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.

¹²⁴ Department of Home Affairs, Refugee Law Guidelines, section 9.5, re-issued 1 July 2017.