

## INTRODUCTION

This Guide provides an analysis of refugee law and complementary protection in Australia, as it relates to the grant of a protection visa under the *Migration Act 1958*. The applicable criteria for the grant of a protection visa depend upon the date on which the application for the visa is made. The Guide is structured around key concepts and issues that arise in considering the definition of ‘refugee’ in the Migration Act, which applies to visa applications made on or after 16 December 2014. These concepts are drawn from consideration of Article 1A of the Refugees Convention, which applied to earlier protection visa applications in Australia and were the subject of several decades of judicial interpretation by the Australian courts. The Guide also examines the complementary protection criterion for a protection visa.

Separate chapters of this Guide examine the four ‘key’ elements of the definition of refugee identified by the High Court in *MIEA v Guo* in the Refugees Convention context, namely:

1. the applicant must be outside his or her country of nationality [or former habitual residence];
2. the applicant must fear “persecution”;
3. the applicant must fear such persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”; and
4. the applicant must have a “well-founded” fear of persecution for a Convention reason.<sup>1</sup>

Other chapters deal with related matters such as relocation, state protection, third country protection, exclusion and cessation of refugee status, and some of the factual circumstances in which issues about who is a refugee have commonly arisen. There are additional chapters on the complementary protection criterion and on merits review of protection visa decisions.

Whether looking at the Convention definition or the definition in the Migration Act, the concept of ‘refugee’ must be construed as a whole and each element must be satisfied before a favourable determination can be made on an applicant’s case.<sup>2</sup> This allows the Tribunal to take a focused approach. If an applicant’s case clearly fails to meet one of the elements of the definition there is no need for the decision maker to go on to consider the other elements.

Australian migration legislation is subject to frequent amendment and the law that is relevant to any particular case will depend on a number of factors such as the date of the visa application and the terms of relevant amending legislation. Unless otherwise stated, the provisions referred to in this Guide are those in force at the time of writing.

While some of the cases presented in this Guide establish general legal principles, others are simply illustrative. Protection visa decisions generally turn on their own facts and the

<sup>1</sup> *MIEA v Guo* (1997) 191 CLR 559 at 570, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

<sup>2</sup> In the context of the Convention definition it has been observed that: ‘It is ... a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole’, per McHugh J in *Applicant A v MIEA* (1997) 190 CLR 225 at 256.

application of the law to the particular circumstances of the individual case, and the courts have observed that rulings on factual issues in individual cases shouldn't be treated as setting down universal propositions of law.<sup>3</sup>

---

<sup>3</sup> See for example the comments of Windeyer J in *Teubner v Humble* (1963) 108 CLR 491 at 503-4 (referring to the judgment of du Parcq LJ in *Easson v London & North Eastern Railway Co.* [1944] 1 KB 421 at 426): '[o]bservations made by judges in the course of deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application ... There is a danger ... of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense'. See also *GIO of NSW v King* (1960) 104 CLR 93 at 105.