Administrative Review Tribunal

A Guide to Refugee Law in Australia

Chapter 7 – Exclusion and cessation

October 2024

Table of contents

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Chapter 7 – Exclusion and cessation[1]

Introduction

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

The exclusion and/or cessation provisions applicable to an applicant seeking to satisfy the refugee criterion in s 36(2)(a) vary depending upon when the applicant applied for the protection visa. For applications made prior to 16 December 2014, the relevant exclusion and cessation criteria are those in the 1951 *Convention relating to the Status of Refugees* (the Convention)[3] as amended by the 1967 *Protocol relating to the Status of Refugees* (the Protocol)[4] (although some statutory exclusions are also applicable). For applications made on or after that date, the definition of a refugee and applicable exclusion provisions are codified in the Act.[5] There are additional statutory exclusions applicable to the complementary protection criterion in s 36(2)(aa), which apply regardless of the application date.

Some of the statutory exclusions are also relevant to a decision by the Minister (or his or her delegate), made under s 197D(2), that an unlawful non-citizen is no longer a person in respect of whom any 'protection finding' within the meaning of s 197C(4), (5), (6) or (7) of the Act would be made, including the review of such a decision by the Tribunal.

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

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

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1 Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to other chapters of this Guide are materials prepared by Legal Services.

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

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

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

5 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth) (No 135 of 2014) 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 (F2015L00543).

Exclusion and cessation in relation to refugee status

The Convention excludes from refugee status persons who, despite falling within the terms of art 1A(2), are not in need of protection (because they have ceased to require that protection, are presently receiving protection from certain United Nations organs, have acquired certain rights in a third country), or who are not considered to be deserving of protection because they have committed certain very serious crimes.[6] While not all of these provisions have been carried over into the codified definition of refugee, those that have largely replicate the terms of the Convention.

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

Protection visa applications made prior to 16 December 2014

The phrase 'in respect of whom … Australia has protection obligations under the Refugees Convention' in s 36(2)(a) of the Act describes a person who is a refugee within the meaning of art 1 of the Convention. Whether Australia has protection obligations under s 36(2)(a) depends upon whether a person satisfies the definition in art 1A(2), in the context of other provisions of art 1.[7] The relevant clauses are:

- **Article 1C** - which sets out circumstances in which refugee status will cease to apply to a refugee.
- **Article 1D** - which excludes from the Convention persons presently receiving assistance or protection from a United Nations organ other than the United Nations High Commissioner for Refugees (UNHCR).
- **Article 1E** - which excludes from Convention protection persons who have the rights and obligations of a national of a third country.
- **Article 1F** - which excludes persons who have committed certain types of crime.

As the clauses in art 1 of the Convention together comprise the definition of refugee, it is permissible to determine whether an applicant is a person in respect of whom Australia has protection obligations by considering art 1D, 1E or 1F, and in some cases 1C, without first undertaking a separate inquiry as to whether the applicant meets the requirements of art 1A(2). If any of these provisions are found to apply, then that will be the end of the inquiry.[8]

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

7 *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [33], [43]; *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [37], [48], [68], [82].

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

Protection visa applications made on or after 16 December 2014

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

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

These grounds are substantively the same as those in art 1F of the Convention and parliament's intention was for s 5H(2) to be interpreted consistently with existing Australian case law on art 1F.[9] Therefore the discussion of art 1F below will be of direct relevance.

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

Exclusion from complementary protection

As with the assessment of refugee status under the Convention, and the obligations surrounding the expulsion of refugees under art 33 of Convention, the Act imposes restrictions on the grant of a protection visa in respect of persons who have committed certain serious crimes or are considered to be a danger to the community. These restrictions are intended to provide the same exclusion to the complementary protection regime as applies to those claiming protection under the Convention.[10] Relevantly, s 36(2C) provides that a person will be taken not to satisfy the complementary protection criterion if:

- the Minister has serious reasons for considering that the applicant:
    - has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations (s 36(2C)(a)(i));
    - has committed a serious non-political crime before entering Australia (s 36(2C)(a)(ii)); or
    - has been guilty of acts contrary to the purposes and principles of the United Nations (s 36(2C)(a)(iii)); or
- the Minister considers, on reasonable grounds, that the non-citizen:

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

[10] Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth) at [87]–[88].

- is a danger to Australia's security (s 36(2C)(b)(i)); or
- is a danger to the Australian community, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence) (s 36(2C)(b)(ii)).

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

For further information on s 36(2C) see Chapter 10 – Complementary protection. This chapter focuses on exclusion and cessation in the context of the Convention; however, given the stated intention of parliament to create a 'mirror' regime for the complementary protection criterion, the discussion below of concepts relating to arts 1F and 33, will be of direct relevance.[11]

Security risk criteria for the grant of a protection visa

Separate to the exclusion and cessation provisions that qualify the refugee and complementary protection criteria, there are a number of additional bases on which a person may be excluded from being granted a protection visa. These additional criteria – ss 36(1B) and (1C) – relate to security specific matters. Whether or not these criteria are applicable depends upon the date of the protection visa application.

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

Adverse ASIO assessment – s 36(1B)

Section 36(1B) provides that a criterion for the grant of a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).[12]

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

For protection visa applications made on or after 16 December 2014, the further criterion in s 36(1C) also applies.[13] Section 36(1C) is in terms similar to arts 32 and 33 of the Convention and s 36(2C) of the Act. It provides that a criterion for the grant of a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

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[11] For art 1F, see in particular the sections dealing with 'Serious reasons for considering', 'War crimes', 'Crimes against peace, 'Crimes against humanity' and 'Acts contrary to the purposes and principles of the UN'.

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

[13] Section 36(1C) was inserted by item 9, Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth) (No 135 of 2014). It commenced on 18 April 2015 and applies to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s 2 and item 28 of Schedule 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543).

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

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

As s 36(1C) is intended to codify art 33(2) of the Convention,[14] the discussion below on that Article will be relevant to its interpretation.

Jurisdictional issues

Decisions to refuse or cancel a protection visa, relying on s 5H(2) or 36(1C); or s 36(2C)(a) or (b) of the Migration Act, are generally reviewable by the Tribunal under s 500.[15]

These include matters referred to in arts 1F, 32 and 33 of the Refugees Convention. Such decisions are, however, specifically excluded from the definition of 'reviewable protection decisions' in Part 5 of the Act[16], and are therefore not reviewable under s 348, which confers jurisdiction to review protection decisions not relying on s 5H(2) or 36(1C), or s 36(2C).[17]

A decision made under s 197D(2) of the Migration Act that an unlawful non-citizen is no longer a person in respect of whom any 'protection finding' within the meaning of s 197C(4), (5), (6) or (7) is also a 'reviewable protection decision'.[18] Review of these type of decisions may include consideration of ss 5H(2) and/or 36(1C) and/or 36(2C) because they are not decisions to refuse or cancel a protection visa, meaning they do not fall within the types of decisions based on ss 5H(2), 36(1C) and (2C) which are specifically excluded from the definition of 'reviewable protection decisions' in s 338A(1)(c) and (d) of the Act.

A decision relying on s 36(1B) is not reviewable by the Tribunal.[19] The jurisdiction of the Tribunal is discussed in greater detail in Chapter 12 – Merits review of Protection visa decisions.

Article 1C

The principal concern of the Convention is with the protection of a person against threats of certain kinds in another country. The Convention does not require that when the threat passes, protection

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[14] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth), p.180 at [1236].
[15] *Administrative Review Tribunal Act 2024*, s 12; *Migration Act 1958*, s 500(1)(c)
[16] Migration Act, s 338A.
[17] Migration Act, s 348.
[18] Migration Act, ss 338A(1)(e), 348.
[19] Migration Act, s 500(4A)(a).

should be regarded as necessary and continuing.[20] Article 1C is broadly directed at persons who, having once required Convention protection, no longer do so. Based on the underlying principle that refugee status was not intended to be permanent, it was intended to allow a state to divest itself of the protection 'burden' when international protection is no longer needed.[21] It states:

> This Convention shall cease to apply to any person falling under the terms of section A if:
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
> (2) Having lost his nationality he has voluntarily re-acquired it, or
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
> (6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Cessation of refugee status under one of these provisions may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of art 1A(2).[22]

The first four clauses of art 1C relate to changes in circumstances which are brought about by refugees themselves. Clauses (5) and (6) 'are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist'.[23]

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[20] *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [36].

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

[22] UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', *Refugee Survey Quarterly*, (2001) 20 (3) 77 ('*UNHCR Interpreting Article 1, 2001*') at [54]. See also Robinson, above n 21 at 58: 'Section C is the result of the conditions described in par. A for a person to become a "refugee" within the meaning of the Convention. Once any of the cumulative conditions disappear, the basis for his special status ceases to exist'; and *NBGM v MIMIA* (2006) 150 FCR 522 at [166], [202] in relation to arts 1C(5) and 1A(2). The reasons of the High Court majority in *QAAH* and *NBGM* indicate agreement with this view: *MIMIA v QAAH of 2004* (2006) 231 CLR 1; *NBGM v MIMIA* (2006) 231 CLR 52. While the issue before the Court in both cases related to art 1C(5), it is clear from the majority reasoning in *QAAH*, and the discussion during the hearing in that case ([2006] HCATrans 339 at lines 692–704, 726–7 and 742–758), that the proposition applies equally to arts 1C(1)–(4).

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

Article 1C has rarely been applied in practice and there is very little guidance to be obtained from the higher courts of the contracting states.[24] In Australia, art 1C has been considered and applied on a number of occasions in the context of further protection visa applications by previously recognised refugees.[25] Judicial scrutiny of some of these decisions disclosed divided opinion as to its interpretation and operation.[26] The High Court has made it clear that in that context, in considering whether an applicant is a person in respect of whom Australia has protection obligations, it will not usually be necessary to give separate consideration to the cessation provisions, but rather whether a person satisfies the refugee definition in art 1A of the Convention, albeit in the context of other relevant articles.[27]

Circumstances in which Article 1C issues may arise for consideration

Article 1C will only arise for consideration by Australian authorities in relation to a person who has already been recognised by Australia as a refugee.[28] Historically, this occurred in the context of temporary protection visa holders who applied for a further temporary protection visa.[29] The opening words of art 1C indicate that the cessation provisions operate automatically according to their terms, and need not be triggered by a request for a visa, although in practice such a request ordinarily was the occasion for consideration of a person's right or otherwise to continuing protection.[30]

In relation to review of decisions to refuse to grant further protection visas under the previous legislation, where the decision-maker was considering whether the applicant in such a case was a

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

[25] See discussion of temporary protection visas at n 29 below.

[26] Largely encapsulated in *QAAH of 2004 v MIMIA* [2004] FCA 1448 and on appeal *QAAH v MIMIA* (2005) 145 FCR 363 and *MIMIA v QAAH of 2004* (2006) 231 CLR 1; and *NBGM v MIMIA* [2004] FCA 1373 and on appeal *NBGM v MIMIA* (2006) 150 FCR 522 and *NBGM v MIMIA* (2006) 231 CLR 52.

[27] *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [37].

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

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

[30] *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [44]. Their Honours were referring specifically to art 1C(5) but their reasoning makes it clear that these observations would apply equally to the other provisions of art 1C.

person to whom Australia had protection obligations, it was legitimate to inquire whether he or she has ceased to be a refugee by operation of one of the art 1C cessation provisions.[31] However, the High Court made it clear that while this approach would not necessarily be wrong, the proper approach in these cases, as in other protection visa applications, is to apply the definition of 'refugee' in art 1A(2).[32]

Article 1C may still arise for consideration, indirectly, in relation to applications for review of certain visa cancellation decisions.[33] Under s 116(1) of the Act, a protection visa may be cancelled on various grounds, including because any circumstances which permitted the grant of the visa no longer exist, or because the visa holder has not complied with a visa condition.[34] One of the circumstances which permit the granting of a protection visa is that the applicant is a person in respect of whom Australia has protection obligations.[35] In addition, protection visa holders are subject to a condition imposing a restriction on the visa holder's return to the country by reference to which they were found to be owed protection obligations.[36] Thus, there is obvious overlap between these grounds for cancellation and some of the provisions of art 1C. For example, where a protection visa is cancelled on the basis that the circumstances which permitted the grant of the visa no longer exist, it may be that the evidentiary basis of the decision would also support cessation of refugee status under arts 1C(5) or (6). Similarly, return to the country from which the person was granted protection may support cessation under arts 1C(1) or (4). However, the statutory provisions should always remain the focus of the review. The relevant question for the Tribunal in the review of such a decision is whether the statutory ground for cancellation is made out and if so whether, as a discretionary matter and having regard to relevant statutory and policy considerations, the visa should be cancelled.

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

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

Article 1C(1) applies to refugees possessing a nationality who remain outside their country of nationality and who voluntarily re-avail themselves of the protection of that country. 'Protection' in this context comprises the establishment of normal relations with the authorities of the country as a result of actions by the refugee, such as registration at consulates or application for, and renewal

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31 See *NBGM v MIMIA* [2004] FCA 1373 at [65].

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

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

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

35 Sections 36(2)(a)–(aa).

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

of, passports or certificates of nationality.[37] Article 1C(1) does not primarily refer to refugees who have returned to their country of nationality.[38]

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

- the refugee must act voluntarily in requesting formal protection;
- there must be an intention to avail him or herself of the protection; and
- the refugee must actually obtain the protection.[39]

An act that is not voluntary will not enliven art 1C(1).[40] The emphasis on intention means that some purely practical forms of contact with the diplomatic mission of the refugee's country will not usually come within the scope of art 1C(1).[41] For there to be a re-availment under this provision there needs to be shown the voluntary and conscious choice of subjection to the government of the relevant country. In other words, there has to be shown the normalisation of the relationship between State and individual.[42]

When considering art 1C(1), all the circumstances of the contact between the individual and the country of origin should be taken into account. These might include the object to be attained by the contact, whether the contact was successful, whether it was repeated and what advantages were actually obtained.[43]

While art 1C(1) does not primarily apply to refugees who have returned to their country of nationality, visits to the country may be relevant. For example, renewing and making use of a national passport for travel to the country of nationality is likely to be persuasive evidence of cessation of refugee status.[44] In *Rezaei v MIMA* the applicant husband and wife had sought review of a decision refusing to revoke cancellation of their protection visas on the basis of voluntary re-availment of protection of and voluntary re-establishment in their country of nationality, Iran.[45]

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37 Goodwin-Gill and McAdam, above n 24 at 136. See also UNHCR, *Note on the Cessation Clauses 1997*, above n 21 at [12]. This is consistent with the opinion of the High Court as to the meaning of 'protection' in art 1A(1): *MIMA v Khawar* (2002) 210 CLR 1 at [62], *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [19], [63], [109].

38 Refugees who have returned to their country are governed by art 1C(4), discussed below. See UNHCR *Handbook*, above n 6, at [118]. In this respect, Allsop J's comment in *Rezaei v MIMA* [2001] FCA 1294 at [52], that the protection to which art 1C(1) refers '*is not limited to* the protection brought about by physical presence within the relevant country … *but includes* the re-availment of consular and diplomatic protections' (emphasis added) may be somewhat misleading.

39 See for example UNHCR, *Handbook*, above n 6 at [119], JC Hathaway and M Foster, *The Law of Refugee Status,* (Cambridge University Press, 2nd edition, 2014), at 465–466, Goodwin-Gill and McAdam, above n 24 at 136, P Weis, 'The Concept of the Refugee in International Law' (1960) 87 *Journal du droit international* 928 at 976.

40 Such as applying to a Consulate for a national passport on the instruction of the country of refuge. See UNHCR *Handbook,* above 6 at [120]; Goodwin-Gill and McAdam, above n 24 at 136; Hathaway and Foster, above n 39, at 466. Commentators suggest that obtaining a national passport or renewal creates a presumption, in the absence of evidence to the contrary, that re-availment of protection is intended (see e.g. UNHCR, *Handbook,* above 6 at [121], Goodwin-Gill and McAdam, above n 24, at 136). However this may not be consistent with Australian law: see *Rezaei v MIMA* [2001] FCA 1294 (Allsop J, 14 September 2001) at [50], [51].

41 Such as requests for educational or occupational certificates or access to personal birth, marital and other records. See UNHCR *Handbook,* above n 6 at [121], Hathaway and Foster, above n 39, at 465–466. The UNHCR *Handbook* also refers, for example, to the situation where a person may need to apply for a divorce in his home country because no other divorce may have international recognition. The Handbook states at [120] that 'such an act cannot be considered to be a 'voluntary reavailment of protection' and will not deprive a person of refugee status'.

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

43 Goodwin-Gill and McAdam, above n 24 at 137.

44 Goodwin-Gill and McAdam, above n 24 at 136.

45 *Rezaei v MIMA* [2001] FCA 1294.

Three months after being granted protection visas the applicants had been issued with new Iranian passports, in which the Australian authorities had affixed protection visa labels. Some months later the applicants returned to Iran where they had remained. While in Iran they had adopted a child and subsequently applied to the Australian authorities to sponsor the child and return to Australia. In dismissing the application, Allsop J held that there was a clear evidential basis for coming to the conclusion that there was, by the time of entry into Iran, a re-availment of protection in the relevant sense.[46]

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

> Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.[47]

This passage was cited with apparent approval in *A v MIMA*, a case relating to the deportation of a Vietnamese national, A, who had come to Australia as a refugee and had subsequently been convicted in Australia of importing heroin from Vietnam.[48] A had visited Vietnam, purportedly to visit his ill mother, using an Australian government travel document and a visa/permit obtained from the Vietnamese government for travel to Vietnam. Justice Katz considered that it would have been open on the evidence to conclude that his true purpose in travelling to Vietnam had been a business one (albeit illicit). His Honour expressed the view that if the Tribunal had so concluded, it could also have concluded, consistently with the UNHCR's approach to art 1C(1), that by travelling to Vietnam as he had, A had voluntarily re-availed himself of Vietnamese protection within the meaning of that paragraph.[49]

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

The application of art 1C(2) is limited to refugees who have previously lost their nationality, such as by an individual or collective measure by the authorities of the country of origin, and voluntarily re-acquire it.[50] As with art 1C(1), it is essential that the refugee's act be voluntary. However, in some circumstances *inaction* may result in voluntary re-acquisition. The UNHCR Handbook states:

> … The granting of nationality by operation of law or by decree does not imply voluntary re-acquisition, unless the

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

47 UNHCR, *Handbook,* above n 6 at [125].

48 *A v MIMA* [1999] FCA 227.

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

50 Goodwin-Gill and McAdam, above n 24 at 138 describe such action as constituting the 'supreme manifestation' of re-availment of protection.

> nationality has been expressly or impliedly accepted. A person does not cease to be a refugee merely because he could have reacquired his former nationality by option, unless this option has actually been exercised. If … former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality.[51]

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

Article 1C(3) - Acquisition of new nationality

Article 1C(3) applies to refugees who acquire a new nationality, and enjoy the protection of the country of that nationality. It is based on the presumption that persons who enjoy national protection do not require international protection.[52] In contrast to arts 1C(1), (2) and (4), art 1C(3) does not expressly require an element of voluntariness.[53] The new nationality must, however, be effective. Goodwin-Gill states that this means the person must enjoy at least the fundamental features of nationality including the right to return and the right to residence.[54]

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

Article 1C(4) is the corollary of the requirement in art 1A(2) that a refugee be outside the country of nationality or former habitual residence.[55] It applies to both stateless refugees and refugees with a nationality, who voluntarily take up residence in the country from which they fled. Re-establishment in such circumstances is indicative that a refugee no longer seeks protection outside their country of origin.[56]

Return alone is not sufficient to satisfy art 1C(4). Similarly, a visit or mere presence may not demonstrate voluntary re-establishment. Settlement on a more permanent basis with no evident intention of leaving, or prolonged and frequent visits may constitute re-establishment, or at least indicate that the refugee is no longer in need of international protection.[57]

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51 UNHCR, *Handbook,* above n 6 at [128].

52 UNHCR, *Handbook,* above n 6, at [129]. UNHCR have stated that where a person claims a well-founded fear of persecution in relation to the new country of nationality, this creates a new situation calling for a fresh determination of refugee status (UNHCR *Handbook*, above n 6 at [132]; UNHCR *Note on the Cessation Clauses,* above n 21 at [18]). However the reference in art 1C(3) to the *protection* of the new country of nationality suggests that, arguably, the provision could not be invoked in circumstances where the refugee has a well-founded fear of persecution in relation to that country.

53 Hathaway and Foster, above n 39 at 497. Examples of non-voluntary acquisition of a new nationality include automatic acquisition by a woman of her husband's nationality upon marriage, even if she does not wish it and has taken no steps to acquire it other than the marriage itself, and acquisition by operation of law of the nationality of a successor state to the state of origin (see Fitzpatrick and Bonoan above n 24 at 527; DIMIA, 'The Cessation Clauses (Article 1C): An Australian Perspective - a paper prepared as a contribution to the UNHCR's expert roundtable series', in *Interpreting the Refugees Convention - an Australian Contribution* (2002) ('*The Cessation Clauses*') at 13). In such cases, questions relating to 'the protection of the country' would need to be carefully considered.

54 Goodwin-Gill and McAdam, above n 24 at 138. This would involve a similar inquiry to the one posed by the second paragraph of art 1A(2) as discussed in *Koe v MIMA* (1997) 74 FCR 508. A person to whom art 1C(3) applied would also be caught by s 36(3) of the Act: see Chapter 9 – Third country protection for details.

55 Grahl-Madsen, above n 42 at 370.

56 Hathaway and Foster, above n 39 at 472.

57 Hathaway and Foster, above n 39 at 475–476; Goodwin-Gill and McAdam, above n 24 at 139; UNHCR, *Handbook,* above n 6 at [134].

The operation of art 1C(4) was briefly considered by in *Rezaei v MIMA*.[58] The Federal Court held that the delegate's finding that the applicant husband had re-established himself was clearly open, having regard to the fact that the applicants had returned to Iran for a period of two years, and had adopted a child through the Iranian legal system.[59]

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

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

> This Convention shall cease to apply to any person falling under the terms of section A if:
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> …
>
> (6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> ...

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

The words '[h]e can *no longer*' and 'the circumstances … *have ceased to exist*' make it clear that the circumstances from time to time and not merely as a matter of history are the relevant circumstances, that is, that the 'status' of a person may change as circumstances in the country which he or she has left change.[60]

The central issue presented by these provisions is whether the circumstances under which the applicant was recognised as a refugee have ceased to exist.[61] As to how that issue is to be addressed, there is extensive commentary by the UNHCR and other expert commentators.

There has also been some judicial consideration of that issue in Australia where opinion has been divided. However, the High Court majority in *MIMIA v QAAH of 2004* and *NBGM v MIMA* has made it clear that the test is the same as for art 1A(2): whether the applicant has a well-founded fear of being persecuted for a Convention reason and is unable, or owing to such fear, is unwilling to avail

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[58] *Rezaei v MIMA* [2001] FCA 1294.
[59] *Rezaei v MIMA* [2001] FCA 1294 at [60]. For further detail regarding the facts of this case refer to the discussion under art 1C(1) above.
[60] *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [43].
[61] In contrast to arts 1C(1) to (4), which relate to specified changes in personal circumstances, arts 1C(5) and (6) are usually regarded as contemplating changes in country conditions; however there appears to be no reason why they might not apply to changes in a refugee's own personal circumstances, such as his or her religion or political opinion or sexual orientation. 'Changed circumstances' are also relevant to the initial assessment of refugee status under art 1A, and consideration of country conditions at that stage may in all probability include the matters that would be relevant under arts 1C(5) and (6): see for example the discussion in *Chan v MIEA* (1989) 169 CLR 379 at 391, 399 and 406. However, while the relevant tests may be similar, arts 1C(5) and (6) specifically refer to the previous *recognition* of a person as a refugee and do not come into play during the initial assessment of refugee status: see for example *NBGM v MIMIA* (2006) 150 FCR 522 per Stone J at [132] and Allsop J at [166]–[168], referring to *R (Hoxha) v Special Adjudicator; R (B) v IAT* [2005] 1 WLR 1063.

himself or herself of the protection of his or her country.[62] As Emmett J stated at first instance in *NBGM*:

> Articles…1A(2) and 1C(5) of the Refugees Convention turn upon the same basic notion; protection is afforded to persons in relevant need, who do not have access to protection, apart from the Refugees Convention. A person is relevantly in need of protection if that person has a well-founded fear of being persecuted, for Convention Reasons, in the country, or countries, in respect of which the person has a right or ability to access.[63]

The High Court majority firmly rejected the majority opinions in the Full Federal Court, derived from statements by the UNHCR and other commentators, that the test is whether changes in the applicant's country are 'substantial', 'effective' and 'durable' and the like, and that there is an onus upon the decision-maker to show that such changes have occurred.[64] Nevertheless, the Court did comment that if a non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations.[65] As was previously explained by the Federal Court, it may be difficult to reach a conclusion that the circumstances that gave rise to a previously existing well-founded fear have 'ceased to exist', if the change in circumstances were merely transitory and could not be described as fundamental and durable.[66]

Consistently with the art 1A(2) test, changes relevant to arts 1C(5) and (6) may not necessarily extend to the whole country: the possibility of safe relocation may mean that a previously recognised refugee no longer has a well-founded fear for the purposes of art 1A(2), such that art 1C will apply.[67]

While there is generally no onus in administrative decision-making on either an applicant or the decision-maker, it should be borne in mind that the decision-maker will sometimes, perhaps often, have a greater capacity to ascertain and speak to conditions existing in another country.[68]

The provisos

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

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62 *MIMIA v QAAH of 2004* (2006) 231 CLR 1; *NGBM v MIMA* (2006) 231 CLR 52.

63 *NBGM v MIMIA* [2004] FCA 1373 at [34], cited with approval in *NBGM v MIMIA* (2006) 231 CLR 52 at [44].

64 *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [39]. In relation to the majority opinions in the Full Federal Court, see *QAAH v MIMIA* (2005) 145 FCR 363 at [58]–[59], [71], [78], [110]; *NBGM v MIMIA* (2006) 150 FCR 522 at [172], [23], [41]. In terms of statements from the UNHCR and other commentators, see for example UNHCR, *Handbook,* above n 6 at [135], *UNHCR, Interpreting Article 1*, above n 22 at [54]; UNHCR, *Ceased Circumstances Guidelines, 2003*, above n 21; UNHCR, *Refugee Protection: A Guide to International Refugee Law*, 2001; JC Hathaway, *The Law of Refugee Status,* (Butterworths, 1991) at 200–203. See also Hathaway and Foster, above n 39 at 481.

65 *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [39]. Compare *Chan v MIEA* (1989) 169 CLR 379 at 391, 399, 406.

66 *NBGM v MIMIA* (2006) 150 FCR 522 [133].

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

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

recognised under previous refugee instruments, or 'statutory refugees'.[69] They do not apply to refugees falling under art 1A(2) and therefore do not apply to modern day refugees.[70]

It has generally been accepted that the exceptions should be applied more broadly, reflecting as they do a more general humanitarian principle that persons traumatised by persecutory treatment or loss of family members cannot reasonably be expected to return to the country where such acts took place.[71] However, as stated in *Applicant A v MIEA*, it would be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.[72] As the provisos are clearly and unambiguously expressed to be limited to refugees falling under art 1A(1), and in the absence of any subsequent agreement or state practice sufficient to override the express words of limitation contained in the provisos, it would not be open to the Tribunal to apply them more generally.[73] Although the Tribunal is not at liberty to apply the provisos, it should be noted that the Australian migration regime contains other mechanisms for achieving their general humanitarian purpose.[74]

Article 1D

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

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations, other than the United Nations High Commission for Refugees, protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United

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69 According to Weis, 'They only were regarded as having been subject to "previous persecution"': Weis, above n 39 at 980, referring to Robinson, above n 21 at 61. Compare the discussion of 'at present receiving' in art 1D in *MIMA v WABQ* (2002) 121 FCR 251. Article 1D is discussed later in this chapter.

70 *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063; *QAAH v MIMIA* (2005) 145 FCR 363 at [230]; *SZCDM v MIMIA* [2006] FMCA 258.

71 The limitation has been described as 'glaring' and 'perverse'. See Goodwin-Gill and McAdam, above n 24 at 143–144; Fitzpatrick and Bonoan, above n 24 at 518. See also UNHCR *Discussion Note on the Cessation Clauses,* 1991, above n 21 at [15(ii)]; UNHCR, *Handbook,* above n 6 at [136]; UNHCR *Ceased Circumstances Guidelines,* 2003, above n 21 at [20], [21].

72 *Applicant A v MIEA* (1997) 190 CLR 225 at 248.

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

74 The Minister retains a residual discretion under s 417 of the Act, and the kinds of circumstance contemplated by the arts 1C(5) and (6) provisos are expressly recognised in the departmental guidelines relating to that discretion. Specifically, Department of Home Affairs, 'Policy: Minister's guidelines on ministerial powers (s 345, s 351, s 391, s 417, s 454 and s 501J)' refers at [4] 'Unique or Exceptional Circumstances' to the following as factors that may be relevant: 'particular circumstances or personal characteristics of a person [which] provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa. For example … the person has experienced torture or trauma in their country of origin and is likely to experience further trauma if returned to that country.' (as re-issued 29 March 2016).

Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

Almost every element of art 1D is 'pregnant with ambiguity' and its correct interpretation has been the source of ongoing debate.[75] Most, but not all, of the contentious issues have now been resolved in Australian law.

Article 1D has not been expressly incorporated into the codified definition of refugee applicable to post 16 December 2014 applications. However, issues relevant to art 1D may arise indirectly as part of the consideration of whether there are effective protection measures available to an applicant.[76]

Historical background to Article 1D and relevant UN agencies

In construing art 1D, the Full Federal Court in *MIMA v WABQ* (*WABQ*) had regard to a range of material relating to the circumstances leading up to the ratification of the Convention.[77] According to that material, art 1D was inserted to deal with a specific problem – namely the Palestinian refugees resulting from the partition of Israel. It appears to have been generally accepted that during the period leading up to the finalisation of the Convention, the Palestinians could be excluded from the operation of the protective provisions of the Convention because of the support that was then intended to be provided by the United Nations. It appears that the only relevant organs or agencies are the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency in the Near East (UNRWA).[78]

The UNCCP was established in December 1948 by UN General Assembly Resolution 194(III). The Committee was given a number of functions, including those given to the United Nations Mediator on Palestine,[79] negotiations with a view to a final settlement of the problem, the protection of and access to Holy Places, the formulation of proposals for a special international status for Jerusalem, the facilitation of economic development of the area, assistance to refugees who wished to return home and live at peace with their neighbours with compensation for those choosing not to, and the resettlement and economic and social rehabilitation of refugees.[80] During its early years of operation, the UNCCP attempted to provide legal, diplomatic and physical protection for the refugees, in addition to efforts to facilitate durable solutions. By the early 1950s it determined that it was unable to fulfil its mandate. Since this period, the UNCCP has not provided Palestinian

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75 *MIMA v WABQ* (2002) 121 FCR 251 at [18] and [68] (overturning the judgment in *MIMA v Quiader* [2001] FCA 1458). See *Abou-Loughod v MIMA* [2001] FCA 825, *Kouraim v MIMA* [2001] FCA 1824, *Jaber v MIMA* (2001) 114 FCR 506 and *Al-Khateeb v MIMA* (2002) 116 FCR 261. For commentary on art 1D see L. Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998); Goodwin-Gill and McAdam, above n 24 at 151–153, 436–438; Hathaway and Foster, above n 39 at 509–523; Grahl-Madsen, above n 42, at 140–2, 262–5; UNHCR, *Handbook,* above n 6 at [142]–[143]. A number of states party to the 1951 Convention (Canada, Austria, Switzerland and the United States) have chosen not to incorporate art 1D as they consider that as UNRWA is only operational in certain areas of the Near East and only provides its assistance in these areas, it is only there that the first sentence of art 1D is applicable. These states do not apply art 1D at all (see Takkenberg, at 101–103).

76 See ss 5J(2) and 5LA, discussed in Chapter 3 – Well-founded fear and Chapter 8 – State protection.

77 The following overview of the historical background to art 1D is drawn in part from *MIMA v WABQ* (2002) 121 FCR 251 at [21]–[51], [98], [108], [136]–[157]. See also Goodwin-Gill and McAdam, above n 24 at 153–157.

78 Although the UNHCR, *Handbook*, above n 6 at [142] refers to the former UN Korean Reconstruction Agency (UNKRA) in the context of art 1D, there is no such reference in its *Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* (December 2017) available at https://www.refworld.org/docid/5a1836804.html (accessed 10/09/19).

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

80 *MIMA v WABQ* (2002) 121 FCR 251 at [23]–[24], [141]–[142].

refugees with the basic international protection accorded to other refugees. Today the UNCCP still exists in name and produces an annual one-page report on its activities.[81]

The UNRWA was established in December 1949 by UN General Assembly Resolution 302 (IV) to carry out direct relief and works programmes for Palestine refugees.[82] The agency began operations on 1 May 1950. Its services encompass education, health care, relief and social services, camp infrastructure and improvement, microfinance and emergency assistance, including in times of armed conflict, to registered Palestine refugees in Jordan, Lebanon, Syria, the West Bank and the Gaza Strip. In the absence of a solution to the Palestine refugee problem, the General Assembly has repeatedly renewed UNRWA's mandate, most recently extending it until 30 June 2023. Today, UNRWA is the main provider of basic services to around 5.6 million registered Palestine refugees in the Middle East.[83]

According to the UNRWA website, it has in recent years significantly strengthened its capacity to provide protection to Palestine refugees through various initiatives, with a focus on vulnerable groups – women, children and persons with disabilities. It adopted a protection policy in 2012 and conducts internal protection audits every two years. It states that UNRWA undertakes a broad range of activities within the scope of its protection mandate which is acknowledged by the UN General Assembly, and that the Agency's Medium Term Strategy for 2016-2021 requires it to work to ensure Palestine refugees' rights under international law are protection and promoted.[84]

Under UNRWA's operational definition, Palestine refugees are persons whose normal place of residence was Palestine between June 1946 and May 1948, who lost both home and means of livelihood as a result of the 1948 Arab-Israeli conflict. UNRWA's services are available to all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance. UNRWA's definition of a refugee also covers the descendants on the male side of persons who became refugees in 1948.[85]

Exclusion under Article 1D

According to the first paragraph of art 1D, the Convention does not apply to 'persons' who are 'at present' receiving from organs or agencies of the United Nations other than UNHCR 'protection or

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

[82] Overview information about UNRWA is drawn from www.unrwa.org (accessed 30/07/20).

[83] See www.unrwa.org.

[84] www.unrwa.org/what-we-do/protection. It has also been noted that with the beginnings of the intifada movement in 1989, UNRWA came in practice also to exercise a significant, if limited, protection role on behalf of Palestinians against the occupying forces, as well as its role as provider of assistance: Goodwin Gill and McAdam, above n 24 p.438 referring to L Takkenberg, 'The Protection of Palestine Refugees in the Territories Occupied by Israel', (1991) 3 *International Journal of Refugee Law*, 414.

[85] www.unrwa.org. See also *MIMA v WABQ* (2002) 121 FCR 251, at [30], Goodwin-Gill and McAdam, above n 24, at 437, Takkenberg, above n 75 at 30, 77, 80, L Takkenberg, 'The Protection of Palestine Refugees in the Territories Occupied by Israel' (1991) 3 *International Journal of Refugee Law* 414, at 419–420, C Cervenak, 'Promoting inequality: Gender-based discrimination in UNRWA's approach to Palestine refugee status' (1994) 16 *Human Rights Quarterly* 300. Whether a particular applicant falls within UNRWA's operational definition will not usually be an issue, as entitlement to its assistance depends on registration. Therefore, if it is established that a Palestinian is registered with UNRWA, then art 1D will arise for consideration.

assistance'. The second paragraph deals with the situation should such protection or assistance cease for any reason.

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

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

Persons

The Full Federal Court in *WABQ* held that 'persons' in both paragraphs of art 1D refers to a class of persons, and not particular individuals. The Court emphasised that if a class of persons received protection or assistance, then the first paragraph will apply to all members of the class, even though an individual member is not actually receiving that protection or assistance.[86]

At present

The Full Court has held that the expression 'at present' refers to the circumstances in July 1951 when the Convention was signed.[87] However, the Article was not intended to fix the class of persons as an aggregation of individuals fixed in 1951. Rather, the words 'persons at present receiving' are intended to identify the group or community to whom art 1D would apply in 1951 and into the future.[88]

Receiving

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

> Once the view is taken that the word "persons" refers to Palestinians as a **group** rather than to **individual** Palestinians the distinction sought to be made between receiving and being entitled to receive largely disappears. If the "group" receives protection or assistance then all persons who compromise [sic – comprise] that group must be taken to be receiving assistance or protection even though an individual member is not actually receiving that assistance.[89]

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

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

[88] *MIMA v WABQ* (2002) 121 FCR 251 at [92], [69](2), [163].

[89] *MIMA v WABQ* (2002) 121 FCR 251 at [164]–[165] (original emphasis). See also [69](3).

Protection or assistance

The Full Federal Court has held that the expression 'protection or assistance' should be construed as it reads, namely, that assistance and protection are alternatives. The word 'or' should not be construed as 'and'.[90]

Summary of first paragraph of Article 1D

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

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

Cessation of protection or assistance – the second paragraph

The second paragraph of art 1D provides:

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

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

Protection or assistance has ceased for any reason

This expression is concerned not with individuals, but with the class of individuals referred to in the first paragraph.[91] Further, 'protection or assistance' has the same disjunctive meaning here as in the first paragraph.[92] Thus, the expression 'protection or assistance has ceased' relates to whether protection or assistance has ceased in respect of the class and not in respect of a particular individual just because, for example, the individual had left the area in which protection or assistance was being provided.[93]

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

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

[90] *MIMA v WABQ* (2002) 121 FCR 251 at [69](4), [103], [166].
[91] *MIMA v WABQ* (2002) 121 FCR 251 at [69](5), [99], [162], [170].
[92] *MIMA v WABQ* (2002) 121 FCR 251 at [69](4), [96], [170].
[93] *MIMA v WABQ* (2002) 121 FCR 251 at [69](5), [92], [102], [108], [163], [170].

paragraph.[94]

It would therefore be incorrect to find that art 1D had no application to a Palestinian who had been resident in an area where a UN agency or organ provided protection or assistance simply because the Palestinian was presently in Australia or because he or she had not actually sought protection or assistance that was available.[95]

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

The Full Federal Court has held that the expression '*ipso facto*' in the second paragraph of art 1D of the Convention does not mean that protection obligations automatically arise in relation to a Palestinian asylum seeker in circumstances where the asylum seeker is not a refugee within the meaning of art 1A.[96]

Whether protection or assistance has ceased: Factual issues

Based on the material before it, the Court in *WABQ* concluded that *in the broadest sense* it could be said that at the relevant time UNCCP provided protection to Palestinian Refugees, and that UNRWA provided assistance but not protection.[97]

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

Justice Hill held that in order to determine whether protection has ceased it is necessary to know whether protection was provided at the time of ratification. His Honour reasoned that if no agency had provided protection at that time, then there would be no agency which had 'ceased' to do so.[98] Although it was clear that those who framed the Convention intended the reference to protection to be a reference to UNCCP, it was not easy to deduce whether it ever actually embarked on the 'protection' part of its mandate, or whether it was thought that such activities as it in fact performed were sufficient to constitute the provision of protection.[99] This is despite an earlier comment from his Honour that 'in the broadest sense it may be said that UNCCP provided protection to Palestinian Refugees, at least in the significant areas of repatriation, resettlement and the proposal for the demilitarisation of and international status for Jerusalem.'[100] In any event, his Honour held

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94 *MIMA v WABQ* (2002) 121 FCR 251 at [163], [102], [108].

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

96 *WACG v MIMA* [2002] FCAFC 332; *WAED v MIMA* [2002] FCAFC 333; *WAEI v MIMA* [2002] FCAFC 334; *WACH v MIMA* [2002] FCAFC 338.

97 The majority in *MIMA v WABQ* (2002) 121 FCR 251 observed that UNRWA had never had the function of providing protection to Palestinian refugees, as distinct from assistance, and that the Tribunal had erred in finding otherwise: per Hill J at [11], [72], Tamberlin J at [140], [173], Moore J declining to express an opinion: at [94]. However, in light of the more recent information about UNRWA's current protection mandate and activities referred to above, it is not clear whether the finding that UNRWA did not provide protection remains open.

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

99 *MIMA v WABQ* (2002) 121 FCR 251 at [69](4). His Honour observed at [52]–[59], as did Moore J at [104], that little or no reference is made to UNCCP by textbook writers in the context of art 1D. His Honour remarked that perhaps this is because they formed the view that it had never embarked on a protection function with the consequence that there was never a class of persons who received protection from it: at [69](4). Goodwin-Gill and McAdam stated that by December 1950 there were already doubts as to whether UNCCP was *effective*: Goodwin-Gill and McAdam, above n 24 at 438.

100 *MIMA v WABQ* (2002) 121 FCR 251 at [23].

that it is a factual matter for the Tribunal to determine whether there ever was a UN agency which provided protection.[101]

Justice Moore held that it was **not necessary** to know whether protection was provided at the relevant time in order to determine whether protection has ceased. In his view, the framers of the Convention proceeded on the basis that protection was being provided in 1951 and it was on that footing that the complementary provisions in the two paragraphs of art 1D were adopted. Thus, the question to be addressed under the second paragraph relates to whether protection has ceased in the sense that it is no longer provided.[102]

Justice Tamberlin held that Palestinians **were** receiving protection at the relevant time, on the basis that the work of UNCCP could properly be characterised as the taking of protective measures for the benefit of Palestinians, designed to implement the objectives set out in the UNCCP mandate.[103] His Honour considered that the setting up of an active mediation process designed to provide protection to Palestinians – in the sense of permitting them to return to their homes, live in peace and protect their property rights - was a way of affording protection.[104] His Honour also commented that as used in art 1D the word 'protection' appears to embrace activities or measures extending beyond the social, educational and other types of assistance assigned to UNWRA.[105]

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

Justice Tamberlin's factual finding as to the provision of protection in 1951 does not seem to have found favour with the other members of the Court.[106] However, Tamberlin and Moore JJ were in general agreement and both appear to have regarded it as sufficient that the framers of the Convention would have been aware of the functions of UNCCP and UNRWA and proceeded on the basis that protection was then being provided.[107] Further, Tamberlin J's opinion that it is enough that UNCCP had the function of providing protection and was, in 1951, taking steps to do so is broadly consistent with Moore J's approach.

Accordingly, the legal position appears to be that when assessing whether protection has ceased, it may be accepted as a starting point that protection (in the broad sense discussed by Tamberlin J) was being provided in 1951.[108]

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

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

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

[104] *MIMA v WABQ* (2002) 121 FCR 251 at [143] and [156].

[105] *MIMA v WABQ* (2002) 121 FCR 251 at [161].

[106] *MIMA v WABQ* (2002) 121 FCR 251 at [72], [107]–[108].

[107] *MIMA v WABQ* (2002) 121 FCR 251 at [74], [157], [175].

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

The factual question that will then need to be addressed relates to whether protection has ceased. Although the Court made it quite clear that the material before it indicated that such protection as was provided by UNCCP had ceased by the end of 1951[109] or at least by 1964,[110] it also made it clear that this is a factual matter for the Tribunal to determine on the basis of all the material before it at the time of its decision.[111]

The current information available in relation to the 'protection' related mandate and activities of UNRWA pose several questions that may be the subject of further judicial consideration. Firstly, do UNRWA's current activities properly constitute 'protection' as that term appears in art 1D? Given the broad nature of what Tamberlin J in *WABQ* accepted constituted the provision of protection by the UNCCP in 1951, this may be arguable, although as noted above this question was addressed differently by the other members of the Federal Court. Also, unlike UNCCP, UNRWA does not have a mandate to seek durable solutions for Palestinian refugees.[112]

A further question that arises is whether 'has ceased' should be interpreted as meaning protection has ceased *at any time* in the past, or that protection has ceased as at the time a decision on a protection visa application is made (i.e. presently). Although it is not entirely clear, the natural meaning of the words appears to suggest the latter is the preferred interpretation, which is supported by Moore J's description of 'ceased' as meaning 'is no longer provided' in *WABQ.*[113] Further support for this approach may be gleaned by Moore J's opinion that, subject to the second paragraph, the first paragraph of art 1D renders the Convention inapplicable if UNRWA or UNCCP (or some other body created after 1951 to take over their functions) provided protection or assistance to dispossessed Palestinians, being the group or community who were to receive protection, or assistance, in 1951.[114]

There may also be a question as to whether the resumption of protection by a *different UN agency* (i.e. UNRWA) many years after the cessation of protection by the UNCCP (e.g. in 1951 or 1964) has a bearing on whether 'such protection…has ceased'. Although not free from doubt, if the cessation and recommencement of protection at a later time means that the protection has *not* ceased as per the second paragraph, it appears unlikely that the change in UN agency would of itself result in 'such protection…ceasing'. The language of art 1D overall appears to be focussed on the protection or assistance and not on the source (other than it being from UN organs or agencies other than UNHCR). Although not anticipating this particular scenario, two of the judgments in *WABQ* also provide some support for this interpretation. Justice Tamberlin held that the reference to 'organs or agencies' of the UN, in the plural, indicates that it was contemplated there was more than one organ or agency to provide protection or assistance,[115] and Moore J held

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109 *MIMA v WABQ* (2002) 121 FCR 251 at [146]–[151].
110 *MIMA v WABQ* (2002) 121 FCR 251at [27], [149].
111 *MIMA v WABQ* (2002) 121 FCR 251 at [72], [110], [168]. To the extent that the Department's Refugee Law Guidelines (relying on the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at 10) indicate that the Court in *WABQ* held that Palestinian refugees, as a class of persons, do not fall within the scope of art 1D, this appears to be inconsistent with this aspect of the judgment: see Department of Home Affairs, 'Policy: 'Refugee and Humanitarian - Refugee Law Guidelines', section 3.1.3.1, as re-issued 27 November 2022 (Refugee Law Guidelines).
112 Bartholomeusz, L. *The Mandate of the UNRWA at Sixty* (Refugee Survey Quarterly, Vol. 28, Issue 2-3, 2009).
113 *MIMA v WABQ* (2002) 121 FCR 251 at [108].
114 *MIMA v WABQ* (2002) 121 FCR 251 at [109].
115 *MIMA v WABQ* (2002) 121 FCR 251 at [168].

that a finding that one UN body had ceased providing protection does not necessarily lead to a conclusion that protection has ceased.[116]

Despite the various uncertainties described above, the Department appears to be of the view that, consistent with the reasoning in *WABQ*, the fact that protection had ceased by the UNCCP in 1951 is determinative in the sense that art 1D is not applicable, regardless of whether the current activities of UNRWA constitute 'protection' in the sense described in Article 1D.[117]

Summary: the application of Article 1D under Australian law

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

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

Article 1E

Article 1E of the Refugees Convention operates to exclude from Convention protection those persons who have the rights and obligations of a national of a third country.[118] Article 1E states:

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

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[116] *MIMA v WABQ* (2002) 121 FCR 251 at [110].

[117] In MLG2381/2017, a Tribunal decision that art 1D applied was remitted by consent on the basis that the Minister conceded that the Tribunal reasoned inconsistently with the reasoning of the Full Court in *WABQ*, and failed to consider whether the 'protection' that it found was provided by the UNCCP on 28 July 1951 had since 'ceased' to be provided. That question was not answered by considering whether, as at the date of the Tribunal's decision, the UNRWA was providing 'protection'. See also the Department's Refugee Law Guidelines, which indicate that the Court in *WABQ* held that Palestinian refugees, as a class of persons, do not fall within the scope of art 1D: Department of Home Affairs, Refugee Law Guidelines, section 3.1.3.1, as re-issued 27 November 2022.

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

This clause was originally directed at ethnic German refugees from Eastern and Central Europe who had assumed residence in Germany during and after World War II. It was aimed at those persons who had 'effective nationality' in a third country.[119] It has no direct correlation in the post 16 December 2014 protection visa scheme.

The application of Article 1E

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

'Taken residence'

Article 1E requires that the applicant has 'taken residence' in the third country. 'Taken residence' is not defined in the Convention, nor has it been the subject of judicial consideration, but it implies continued residence and not a mere visit.[120] Some commentators have taken the view that art 1E requires *de facto* nationality in a country where the person has previously resided, rather than an ability merely to enter and obtain protection from persecution.[121] UNHCR is of the view that the residence status must be secure and include the rights accorded to nationals to return to, re-enter and remain in the country concerned and the rights must be available in practice.[122]

Rights and obligations of a national

Article 1E also requires that the applicant be recognised by the authorities as having the rights and obligations of a national. Whether an applicant is recognised by the competent authorities of a country as having the relevant rights and obligations is a matter for the domestic law of the country concerned.[123]

While it is generally agreed that art 1E applies in cases where the person concerned possesses something less than formal nationality, there is a divergence of opinion as to precisely what rights and obligations are necessary to satisfy art 1E.[124] The Federal Court has given limited consideration to this aspect of art 1E, however the High Court does not regard the construction of art 1E as settled.[125]

In *Barzideh v MIEA* Hill J held that the rights and obligations with which art 1E was concerned must include *all* of the rights and obligations of a national, rather than some of them.[126] His Honour

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[119] Hathaway and Foster, above n 39 at 500; Goodwin-Gill and McAdam, above n 24 at 161.
[120] See UNHCR, *Handbook,* above n 6 at [146].
[121] Hathaway and Foster, above n 39 at 509.
[122] UNHCR *Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees*, March 2009. UNHCR RefWorld, available at <https://www.refworld.org/docid/49c3a3d12.html> ('*Note on Article 1E*') at [10] (accessed 18/09/19).
[123] *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200–201.
[124] *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200; *Barzideh v MIEA* (1996) 69 FCR 417 at 426–429.
[125] *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [48]–[53], referring to *Barzideh v MIEA* (1996) 69 FCR 417 and *MIMA v Thiyagarajah* (1997) 80 FCR 543. The joint judgment indicated that courts should not regard further consideration of the construction of art 1E as limited by what was said respecting art 1E in those cases. Also, the discussion of art 1E in each of these cases is *obiter dicta*: in *Barzideh* the Court found there was no valid application for review before it; in *Thiyagarajah* the appeal was decided on other grounds.
[126] *Barzideh v MIEA* (1996) 69 FCR 417.

considered that such rights and obligations could arise either under a general law or by application of a rule to a particular person.[127] His Honour held that the proper question to ask is:

> whether, either by force of a general law or by force of a recognition given by the relevant competent authorities on an individual basis, the person seeking to be classified as a refugee enjoys the same rights and comes under the same obligations as does a person who is a national without actually being a national of the territory.[128]

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

> I do not think that the Article is rendered inapplicable merely because a person who has de facto national status does not have the political rights of a national. That is to say, the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have de facto nationality. But short of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them.[129]

The interpretation given to art 1E in *Barzideh* was endorsed in *Thiyagarajah*, by both Emmett J at first instance and the Full Federal Court, with the qualification that 'some disability suffered by an alien might be so slight as to be negligible'.[130]

It is clear that art 1E is narrowly confined. For example, the grant of refugee status in another country is insufficient for its application.[131] As Olney J observed in *Nagalingam v MILGEA* the terms of the Convention show that refugees in a country which is a contracting state are, in some respects, to be accorded the same treatment as nationals, but in other respects the status of refugee confers only the same rights as an alien. Therefore the mere granting of refugee status in another country will not be sufficient to enliven art 1E. Whether it does will depend upon the domestic law of the country in question.[132]

Recourse to protection

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

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

128 *Barzideh v MIEA* (1996) 69 FCR 417 at 426–7.

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

130 *Thiyagarajah v MIMA* (1997) 73 FCR 176 at 185, *MIMA v Thiyagarajah* (1998) 80 FCR 654 at 568. See, however, the High Court's comments in *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161 at [48]–[53]. Guidance in the *UNHCR Note on Article 1E* is generally consistent with this approach, stating that the rights and obligations need not be identical to those enjoyed by nationals, but divergences should be few in number and minor in character. However, it addresses the example of the denial of the right to vote in more limited terms than Hill J in *Barzideh*, stating that it might be minor in character if it is only of short duration, for example, after a reasonably short period of residence the person has the right to acquire nationality: UNHCR, *Note on Article 1E*, above n 122, at [13]–[15].

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

132 *Nagalingam v MILGEA* (1992) 38 FCR 191 at 198–199. Refugee status in another country may be relevant to the question of whether the person has a right to enter and reside in a safe third country as per s 36(3) of the Act. For discussion of s 36(3), see Chapter 9 – Third country protection.

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

> The Tribunal observed that although there is nothing in the words of Art 1E to suggest that it cannot apply if there is evidence of a failure of protection in the country of residence, such a result must be assumed. It was considered to be anomalous if a strict interpretation would preclude a third state ... from offering protection to a person at risk of persecution in both his country of nationality and that where he had taken residence.
>
> Accordingly, the Tribunal considered that it was appropriate to consider whether the applicant would have recourse to the protection of the authorities in France should he fear or encounter persecution in France.[133]

Article 1F

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

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

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

The primary purpose of art 1F is said to be to protect the order and safety of receiving states and to deprive undeserving persons of international protection. It is also considered to have been intended to prevent the rights created by the Convention from being abused by fugitives from

[133] *Thiyagarajah v MIMA* (1997) 73 FCR 176 at 179.

justice.[134] Section 36(2C)(a) is intended to provide the same exclusion to the complementary protection regime as applies to those claiming protection under the Refugees Convention.[135]

As mentioned above, a decision refusing or cancelling a protection visa which relies on art 1F of the Convention[136] or s 5H(2) or 36(2C)[137] of the Act, is generally reviewable under s 500, but is not a 'reviewable protection decision', and is therefore not reviewable under s 348. However, a review of a decision made under s 197D(2), which could involve consideration of s 5H(2) or 36(2C), is not excluded from the definition of 'reviewable protection'.

Serious reasons for considering

For all three subclauses of art 1F (and for ss 5H(2) and 36(2C)(a)[138]), there is the requirement that there be 'serious reasons for considering' that a person has committed the relevant crime or act. This does not require evidence of a formal charge or conviction,[139] or a positive or concluded finding about the commission of the crime or act; rather, it is sufficient that there be strong evidence of its commission.[140]

Although the evidence needs to be 'strong', it has been held that it need not be of such weight as to persuade the decision-maker of the applicant's guilt beyond reasonable doubt, or even on the

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[134] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05, 4 September 2003 ('*Article 1F Guidelines 2003*') state at [2], that the primary purpose of the exclusion clauses 'is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts'. The Lisbon Expert Roundtable 3-4 May 2001 *Summary Conclusions – Exclusion from Refugee Status*, (EC/GC/01/2Track/1, 30 May 2001) state similarly at [1] that the drafters of the Convention 'contemplated certain types of crime to be so horrendous that they justified the exclusion of the perpetrators from the benefits of refugee status. In this sense, the perpetrators are considered "undeserving of refugee protection"'. The authors add that other reasons for exclusion include 'the need to ensure that fugitives from justice do not avoid prosecution by resorting to the protection provided by the 1951 Convention, and to protect the host community from serious criminals'. For an Australian government perspective on art 1F generally, see DIMIA, 'Persons deemed unworthy of international protection (Article 1F): an Australian Perspective – a paper prepared as a contribution to the UNHCR's expert roundtable series', in *Interpreting the Refugees Convention – an Australian contribution* (DIMIA, 2002).

[135] Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth) at [87]–[88].

[136] There is some debate as to whether it is necessary to consider art 1A before considering the applicability of art 1F in any particular case. In *MIMA v Singh* (2002) 209 CLR 533 a majority of the High Court held that the Convention did not require the General Division of the AAT (as it was at that time) to determine whether the applicant was a 'refugee' within the meaning of art 1A(2) before it considered exclusion under art 1F. However, given the current jurisdictional arrangements whereby different provisions, powers and procedures apply depending upon whether or not the Tribunal is considering a decision based on matters relevant to art 1F, this will generally not arise as an issue for the Tribunal.

[137] For the review of a decision refusing to grant or to cancel a protection visa, s 338A (1)(c) and (d) of the Act excludes these decisions from the definition of 'reviewable protection decision' and are not reviewable under Part 5 of the Act. Such matters may be reviewable by the Tribunal under s 500. ,

[138] In *ZYVZ v MICMSMA* [2020] FCA 28, the Federal Court confirmed that the phrase 'serious reasons for considering' in s 36(2C) should be interpreted in the manner described by the High Court in *FTZK v MIAC* [2014] HCA 26 (see below): at [15]–[26].

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

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

balance of probabilities, although doubts exist about the latter.[141] In *FTZK v MIAC* the High Court cautioned against using standards of proof in place of the wording of art 1F.[142]

Further, it should be emphasised that the absence of a requirement for a positive finding of the commission of conduct of the kind contemplated by art 1F is not inconsistent with the need for 'meticulous investigation and solid grounds' in order to meet the standard of 'serious reasons for considering that' the conduct has been engaged in.[143] For example, a Tribunal should not, in an art 1F case, merely extrapolate from the criminality of an organisation to that of an individual within it without undertaking any clear analysis of purpose or complicity.[144] As per the High Court's judgment in *FTZK v MIAC*, the matters relied on by the decision-maker must be rationally connected to or logically probative of the commission of the alleged crime or act.[145]

More recently, the Federal Court in *GZCK v MHA* held that that the case law establishes that 'serious reasons for considering' requires a rational foundation for a strong inference of guilt; clear and credible or strong evidence; and a considered judgment, or meticulous investigation, by and actual persuasion of the decision-maker.[146] The Court also confirmed that although the generally serious consequences of refoulement are taken into account in giving meaning and content to the 'serious reasons for considering' requirement, the particular consequences in an individual case are not. Further, those particular consequences are not to be taken into account in the construction of the elements of the relevant crime(s).[147]

The decision-maker needs to precisely identify and address the elements of the relevant crime.[148] However it may be unnecessary, for a finding that the applicant committed a war crime or a crime against humanity, that there be a finding with respect to a specific incident, if there are findings of

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[141] *Arquita v MIMA* (2000) 106 FCR 465 at [54], cited with approval in *FTZK v MIAC* [2014] HCA 26 by French CJ and Gageler J at [14]. However, in *ZYVZ v MICMSMA* [2020] FCA 28, Colvin J held that care must be exercised in considering the language used by Weinberg J in *Arquita* to the effect that evidence may be properly characterised as strong without being of such weight as to satisfy the decision-maker on the balance of probabilities. His Honour held that this language was not approved by the majority of the High Court in *FTZK* and its adoption by French CJ and Gageler J must be understood in the context of the whole of their Honours' joint reasons: at [20]. See also *VWYJ v MIMIA* [2006] FCAFC 1 at [25]; and *SRYYY v MIMIA* (2005) 147 FCR 1 at [79]. The UK Supreme Court in *Al-Sirri (FC) v SSHD and DD (Afghanistan) (FC) v SSHD* [2013] 1 AC 745 (in the context of art 1F(c)), draws together international consensus about the standard of satisfaction required to establish 'serious reasons for considering' which is not derived from domestic standards of proof, at [75].

[142] *FTZK v MIAC* [2014] HCA 26. In their respective judgments, French CJ and Gageler J held at [15] that standards of proof are not substitutes for the application of the ordinary words of art 1F(b) and there is a degree of risk in using them as parameters defining the necessary or sufficient conditions for the application of the Article; Crennan and Bell JJ at [79] and [81] observed that 'serious reasons for considering' does not derive from or replicate a standard of proof in any domestic legal system, but there is no error in simply referring to it as a standard of proof; Hayne J similarly noted at [33]–[36] that to describe 'serious reasons for considering' as providing a 'standard of proof' is apt to mislead, but it is not an error in itself.

[143] *WAKN v MIMIA* (2004) 138 FCR 579 at [52], cited with approval by French CJ and Gageler J in *FTZK v MIAC* [2014] HCA 26 at [16].

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

[145] *FTZK v MIAC* [2014] HCA 26 at [6], [13], [16]–[18], [40], [91], [96].

[146] *GZCK v MHA* (2021) 290 FCR 96 at [149].

[147] *GZCK v MHA* (2021) 290 FCR 96 at [143], [150].

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

many such incidents and a finding that the applicant took steps knowing that such acts would be the consequence of his steps.[149]

Whether there are serious reasons for considering that the crime has been committed will depend upon the whole of the evidence and other material before the decision-maker.[150] While there is no requirement that there be evidence of a charge or conviction, such evidence may be strongly probative of serious reasons for considering that the person has committed the crime in question.[151] In other cases, even though a person has been charged with an offence, it may be clear that there are no serious reasons to consider that the person has committed the crime.[152]

An applicant's own confession will normally suffice to establish serious reasons for considering that he or she has committed a relevant crime.[153] Where an applicant subsequently resiles from such a confession, the outcome will depend upon the circumstances. In *MIMA v Singh*[154] the AAT's General Division had rejected the applicant's evidence in which he had sought to resile from his own earlier accounts of criminal activities. Chief Justice Gleeson held that the Tribunal was entitled to reject his later evidence and that once it had done so his own evidence provided serious reasons for considering that he was an accessory to the crimes in question.[155] The applicant in *Shokar and MIMA*[156] had similarly sought to resile from earlier evidence. In that case, however, the Tribunal was not satisfied that his evidence at the original interview, in which his overriding objective was to persuade the department that he was a refugee, was an accurate account. The Tribunal noted that apart from the applicant and his brother's unreliable and self-serving statements, there was *no* other evidence before it which could suggest that there were *any* reasons, let alone *serious* reasons, for considering that the applicant had committed any act that may be relevant for the purposes of art 1F. The Tribunal regarded it as essential, in the circumstances of that case where the applicant's veracity was questionable, that there should be at least *some* evidence of an extrinsic and objective nature to assist it in its deliberations.[157]

The Department of Home Affairs' 'Policy: Refugee and Humanitarian - Refugee Law Guidelines' ('Refugee Law Guidelines') state that while a conviction will usually be sufficient to establish that a crime has been committed, caution should be exercised in relation to convictions recorded *in absentia* or without a 'proper trial', or where the confession on which the conviction is based may have been obtained under duress. The Guidelines state that a conviction may be questionable where current country information supports a view that certain persons are targeted for false

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

150 *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179, 186, 187. See *ZYVZ and MIBP* [2018] AATA 3967 (upheld in *ZYVZ v MICMSMA* [2020] FCA 28) as an example of the Tribunal's consideration of the evidence in determining whether there were 'serious reasons for considering' that the applicant committed the serious non-political crimes of rape, abduction and people smuggling before entering Australia (under s 36(2C)(a)(ii)).

151 *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179. See for example *'WAT' and MIMIA* [2002] AATA 1150.

152 *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179. The AAT found *Al-Habr and MIMA* [1999] AATA 150 to be such a case. See also *Arquita and MIMA* [1999] AATA 410.

153 Grahl-Madsen, above n 42 at 175. Examples are *NADB v MIMA* [2002] FCA 200; *MIMA v Singh* (2002) 209 CLR 533 at [6].

154 *MIMA v Singh* (2002) 1209 CLR 533.

155 *MIMA v Singh* (2002) 1209 CLR 533 at [6]. See also for example *SRLLL and MIMIA* [2002] AATA 795; and *'SRNN' and DIMA* [2000] AATA 983.

156 *Shokar and MIMA* [1998] AATA 144.

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

charges and convictions, or that trials proceed *in absentia*, although the latter does not inherently mean there are not serious reasons for considering the person committed the crime.[158]

The phrase 'serious reasons for considering' applies only in relation to questions of fact.[159] Whether particular acts constitute a class of crime specified in art 1F, and whether a defence is available which would absolve a person from criminal responsibility, are questions of law to which the 'serious reasons for considering' test does not apply.

Crimes against peace, war crimes, crimes against humanity

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

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

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

There has been some consideration of art 1F(a) (and its statutory equivalents) in Australia by the General Division of the AAT[160] and limited consideration by the Federal Court.[161] It has also been the subject of judicial consideration in other jurisdictions, and extensive academic commentary.[162]

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158 Department of Home Affairs, Refugee Law Guidelines, section 3.21.1, as re-issued 27 November 2022.

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

160 See for example *W97/164 and MIMA* [1998] AATA 618; *N96/1441 and MIMA* [1998] AATA 619; *N1998/532 and MIMA* [1999] AATA 116; *SRL and MIMA* [2000] AATA 128; *VZL and MIMA* [2000] AATA 191; *'SRNN' and DIMA* [2000] AATA 983; *SAH and MIMIA* [2002] AATA 263; *'AXOIB' and MIMA* [2002] AATA 365; *SRLLL and MIMIA* [2002] AATA 795; *SAL and MIMIA* [2002] AATA 1164; *'VAG' and MIMIA* [2002] AATA 1332; *'SRYYY' and MIMIA* [2003] AATA 927 (upheld by the Federal Court: *SRYYY v MIMIA* [2003] FCA 1588); *SRHHH and MIMIA* [2005] AATA 1020; *'SRYYY' and MIMA* [2006] AATA 320 (upheld by the Federal Court: *SZITR v MIMA* (2006) 221 FCR 583); *WBR and MIMA* [2006] AATA 754; *WBV and MIAC* [2007] AATA 2046; and *YYMT and MIAC and FRFJ and MIAC* (2010) 115 ALD 590.

161 See in particular *SRYYY v MIMIA* (2005) 147 FCR 1, allowing an appeal from *SRYYY v MIMIA* [2003] FCA 1588; *SZCWP v MIMIA* [2006] FCAFC 9, *VWYJ v MIMIA* [2006] FCAFC 1; *SZITR v MIMA* (2006) 221 FCR 583 and *MZYVM v MIAC* [2013] FCA 79; *GZCK v MHA* (2021) 290 FCR 96.

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

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

In order to identify crimes against peace, war crimes and crimes against humanity it is necessary to have recourse to definitions contained in international instruments drawn up to make provision in respect of such crimes.[163] Article 1F(a) is not limited to those international instruments promulgated either in 1951 or in 1967 when the Protocol was agreed upon.[164] Nor does the relevant international instrument need to have been in existence at the time the crime in question was committed.[165] *Any* international instrument drawn up to provide for, and which contains a definition of, 'a crime against peace, a war crime, or a crime against humanity' is an instrument that is potentially relevant to an art 1F(a) decision.[166] In contrast, ss 5H(2)(a) and 36(2C)(a) refer to international instruments prescribed by the regulations.[167]

Crimes falling under art 1F(a) are defined in a wide variety of international instruments, notably, the 1945 London Agreement and Charter of the International Military Tribunal (the Nuremberg Charter),[168] the four Geneva Conventions of 1949 and Additional Protocols of 1977[169] and, more recently, the Statutes of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia

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

[164] See for example, Goodwin Gill and McAdam, above n 24 at 166–167; UNHCR, *Summary Conclusions – Exclusion from Refugee Status,* Lisbon Expert Roundtable, 3–4 May 2001, (EC/GC/01/2Track/1, 30 May 2001) at [5]. See also the discussion in *SRYYY v MIMIA* (2005) 147 FCR 1 at [28]–[32], [72]. The AAT has accepted this approach on a number of occasions: see for example *VZL and MIMA* [2000] AATA 191; *'SRNN' and DIMA* [2000] AATA 983 and *SAL and MIMIA* [2002] AATA 1164.

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

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

[167] For the purposes of ss 36(2C)(a)(i) and 5H(2), each international instrument that defines a crime against peace, a war crime, and a crime against humanity is prescribed by reg 2.03B of the *Migration Regulations 1994* (Cth). The regulation provides the following non-exhaustive list of instruments as examples: *Rome Statute of the International Criminal Court*, done at Rome on 17 July 1998; the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, signed at London on 8 August 1945; the *Charter of the International Military Tribunal*, signed at London on 8 August 1945; the *Convention on the Prevention and Punishment of the Crime of Genocide*, approved in New York on 9 December 1948; *The First Convention within the meaning of the Geneva Conventions Act 1957* (Cth); *The Second Convention within the meaning of the Geneva Conventions Act 1957* (Cth); *The Third Convention within the meaning of the Geneva Conventions Act 1957* (Cth); *The Fourth Convention within the meaning of the Geneva Conventions Act 1957* (Cth); *The Protocol I within the meaning of the Geneva Conventions Act 1957* (Cth); *the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), done at Geneva on 8 June 1977; the *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted by the United Nations Security Council on 25 May 1993; and the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, adopted by the United Nations Security Council on 8 November 1994.

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

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

(ICTY) and Rwanda (ICTR)[170] and the Rome Statute of the International Criminal Court (the Rome Statute), which was adopted in Rome in July 1998 and came into force on 1 July 2002.[171]

In view of the range of relevant international instruments, it is clear that there is no one accepted definition of the art 1F(a) crimes and a difficult question may arise as to the definition to be applied where these instruments contain inconsistent definitions of the relevant crimes.[172] Without definitively settling this question, the Federal Court has held that it is open to a decision-maker to select the instrument that is appropriate to the circumstances of the case.[173] In general, the more recent documents are considered to carry weight as a consequence of the more recent analysis made for their preparation.[174]

Crimes against peace

There is currently no international consensus on what constitutes a crime against peace; and little or no jurisprudence on this element of art 1F(a).[175] Most commentators suggest that responsibility for crimes against peace is limited to those in a position of high authority in a state.[176]

'Crimes against Peace' are defined in art 6 of the Nuremberg Charter as:

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

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

[171] For commentary on the Rome Statute, see Triffterer, above n 162. Other well known, relevant international instruments are listed in Annex VI to the UNHCR, *Handbook,* above 6, and Annexes to UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Geneva, 4 September 2003 ('*Background Note Article 1F 2003*'); Control Council Law No 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes Against Humanity, Control Council for Germany, December 20, 1945 (Control Council Law No 10) is often mentioned in the context of art 1F(a); however Grahl-Madsen argues that it is not an international instrument in the relevant sense: Grahl-Madsen, above n 42, at 275–6. The *Draft Code of Crimes against the Peace and Security of Mankind*, prepared by the International Law Commission (ILC) pursuant to UNGA Resolution 177(II) of 1947 and provisionally adopted in 1991, contains definitions of, inter alia, war crimes and crimes against humanity. Commentary on the definitions is contained in the 1996 Report of the ILC to the General Assembly. However, in *Re W97/164 and MIMA* (1998) 51 ALD 432 President J Mathews stated at 443–4 that the Draft Code of the ILC lacks the status of an international instrument and therefore cannot be used to provide an authoritative definition for the purposes of art 1F(a).

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

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

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

[175] There is no Australian jurisprudence on this aspect of art 1F(a). As at September 2003 UNHCR was not aware of any jurisprudence dealing with crimes against peace in this context: UNHCR, *Background Note Article 1F 2003*, above n 171.

[176] See UNHCR *Article 1F Guidelines, 2003,* above n 134; UNHCR, *Background Note Article 1F 2003*, above n 171; Gilbert suggests that if individual responsibility for the crime against peace is to be consistent with the 1974 Resolution on the Definition of Aggression, then, as well as the leaders of a state, it might include the leaders of rebel groups in non-international armed conflicts which seek secession, but few if any others: G Gilbert, 'Current issues in the application of the exclusion clauses' and 'Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001' in Feller, Turk and Nicholson, above n 24 at 434–5.

Drawing on this definition, Control Council Law No 10 defines crimes against peace as the '[i]nitiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to' the crimes specified in art 6 of the Nuremberg Charter.[177]

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

> … the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations ....[178]

The 'crime of aggression' is listed in the Rome Statute as a crime within the jurisdiction of the ICC.[179]

Article 8 *bis*[180] defines a 'crime of aggression' as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'

An 'act of aggression' is defined to mean:

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

Article 8 *bis* goes on to specify that the following acts qualify, regardless of a declaration of war, as an 'act of aggression': invasion or attack by the armed forces of a State of the territory of another State; military occupation resulting from such invasion or attack; annexation by the use of force of the territory of another State; bombardment or use of weapons against the territory of another State; blockade of ports or coasts of a State; attack on the land, sea or air forces, or marine and air fleets of another State; the use of armed forces in the territory of a receiving State, in contravention of the conditions of the relevant agreement; a State allowing its territory to be used by another State for perpetrating an act of aggression against a third State; and the sending by or on behalf of a State of armed bands, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to the other acts listed in the article.

As is apparent from this definition, crimes of aggression do not encompass crimes committed during a civil war or by insurgent groups, and only includes crimes that have been committed in the context of an international armed conflict by a State actor.

The Department's Refugee Law Guidelines equate the definition of a 'crime of aggression' with a 'crime against peace', and specify that the Rome Statute should be given greater weight as a definitional source as it is the most recent embodiment of international criminal law.[181]

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[177] Article II(1)(a).
[178] UNGA res 3314 (XXIX), 1974.
[179] Article 5(1)(d), Rome Statute of the International Criminal Court.
[180] Article 8 *bis* was inserted into the Rome Statute by resolution RC/Res.6 of 11 June 2010, but did not enter into force until 17 July 2018, following a decision at the sixteenth session of the Assembly of States Parties to the Rome Statute in December 2017. The amendment applies to member states who have ratified the Rome Statute and the amendments on the crime of aggression. As at 2 February 2023, 44 state parties have ratified the amendments but Australia has not: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en
[181] Department of Home Affairs, Refugee Law Guidelines, section 3.20.1, as re-issued 27 November 2022.

Although there is no current universally accepted treaty definition of crimes against peace, in most situations where charges of aggression may be brought there will be an overlap with the other categories of crimes within art 1F(a) and also, possibly, art 1F(c).[182]

War crimes

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

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

This definition is not static, but takes into account new developments respecting the laws and customs of war.[183]

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

- wilful killing; torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or other protected person of the right of fair and regular trial; unlawful deportation or transfer or unlawful confinement of other protected person; and
- taking civilians as hostages.[184]

Under the Geneva Conventions and Protocol I 'grave breaches' apply only to international armed conflicts.[185] In the case of armed conflict *not* of an international character, common art 3 of the Geneva Conventions and art 4 of Additional Protocol II prohibit the following acts committed with respect to persons taking no active part in the hostilities:[186]

> violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted

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[182] Pejic, above n 162, at 16.
[183] Weisman, above n 162, at 116.
[184] *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* art 50; see also *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* Arts 50, 51; *Convention relative to the Treatment of Prisoners of War* Arts 129, 130; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* Arts 146, 147; Additional Protocol 1 Arts 11, 85. The term 'war crimes' is not used in the Conventions, but art 85 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol 1) (1977) provides that grave breaches shall be considered as such: art 85(5). Cited in Goodwin-Gill and McAdam, above n 24 at 166–167.
[185] See common art 2 of the Geneva Conventions.
[186] Including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.

court, affording all judicial guarantees which are generally recognized as indispensable by civilized peoples.

These prohibited acts are not technically 'war crimes' or 'grave breaches' under the Geneva Conventions and Additional Protocol II[187]; however they are covered by the definition of 'war crime' in the Rome Statute. Under art 8 of the Rome Statute, 'war crimes' means:

- grave breaches of the 1949 Geneva Conventions;[188]
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;[189]
- in the case of an armed conflict *not* of an international character, serious violations of art 3 common to the four Geneva Conventions, committed against persons taking no active part in the hostilities;[190] and
- other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.[191]

Although the Rome Statute definition of 'war crimes' is not limited to armed conflicts of an international character, it expressly excludes acts that occur in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.[192]

It is established under international law that an individual may be responsible for war crimes, regardless of whether that person belongs to the armed forces.[193] Thus, the laws relating to war crimes apply equally to civilians as to combatants in the conventional sense.

Crimes against humanity

This category of crime, potentially the broadest of those covered by art 1F(a) of the Refugees Convention, ss 5H(2)(a) and 36(2C)(a)(i) of the Act, was first defined in the Nuremberg Charter.[194]

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[187] Weisman, above n 162 at 117.

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

[189] Rome Statute art 8(2)(b). The provision contains an exhaustive list of the relevant acts.

[190] Rome Statute art 8(2)(c). The war crimes of murder and torture under art 8(2)(c)(i) were considered in *GZCK v MHA* [2021] FCA 1618. *GZCK* was a Sri Lankan applicant who admitted to having worked as an intelligence officer for the Liberation Tamil Tigers of Eelam (LTTE) and that he had, amongst other things, arranged the accommodation and travel of young combatants who were involved in suicide bombings, reported on suspected spies, assisted in the interrogation of detainees, deprived detainees of sleep and beaten detainees with a stick. The Federal Court held that the Tribunal's conclusion that the applicant was excluded from refugee status under s 5H(2)(a) and from complementary protection under s 36(2C)(a)(i) was not infected by jurisdictional error insofar as it was based on there being serious reasons for considering that the applicant committed the war crime and the crime against humanity of murder, in relation to the applicant's involvement in the accommodation and transport of suicide bombers. This was despite the Court finding that the Tribunal's conclusions that there were serious reasons for considering that the applicant committed various other war crimes and crimes against humanity were not available on the evidence (at [258]). The judgment considered and/or summarised the legal principles concerning various other aspects of the Rome Statute including art 22(1) (the definition of a crime should be strictly construed) (see [154]), art 25(3)(c) (aiding or abetting) (see [173]), art 25(3)(d) (common purpose or joint criminal enterprise) (see [187]), and art 31(1)(d) (the defence of duress) (see [239]).

[191] Rome Statute art 8(2)(e). The provision contains an exhaustive list of the relevant acts. The war crime of attacking civilians under art 8(2)(e)(i) was considered in *GZCK v MHA* (2021) 290 FCR 96. For more details about this case see fn 190. The war crime of using children under the age of 15 years to participate actively in hostilities under art 8(2)(e)(vii) was considered in *BYJB v MICMSMA* [2022] FCA 734, a case which concerned a Sri Lankan applicant who was a commander of an LTTE camp during the civil war.

[192] Rome Statute arts 8(2)(d), (f).

[193] Pejic, above n 162 at 18.

[194] On crimes against humanity generally, see Bassiouni, above n 162.

It has subsequently been provided for in a number of international instruments including, most recently, the Statutes of the ICTY and ICTR and the Rome Statute.[195] The Rome Statute incorporates most of the provisions of the earlier international instruments and in general, may be taken to reflect customary international law, including developments in the case law of the ICTY and ICTR.[196]

The essential feature of crimes against humanity is the desire to prohibit only crimes "which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied … endangered the international community or shocked the conscience of mankind".[197]

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

> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[198]

The list of specified crimes against humanity was subsequently expanded to include imprisonment, torture and rape[199] and has now been further expanded to include other sexual crimes, enforced disappearance and apartheid.[200]

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

> (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…[201] or other grounds that are universally recognized as impermissible under international law…[202] (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[203]

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

[196] Pejic, above n 162 at 31, H von Hebel, 'Crimes Against Humanity under the Rome Statute', in van Krieken, above n 162 at 105, 118; R Dixon, in O Triffterer, above n 162, art 7, margin No 4. There are exceptions, however they are not to be construed as an amendment of customary law: see art 10. Note, too, that ICTY and ICTR case law has developed in some respects since the Rome Statute came into force.

[197] *History of the United Nations War Crimes Commission and the Development of the Laws of War 179* (UN War Crimes Commission, 1948), cited by R Dixon, in O Triffterer, above n 162 art 7, margin No 4.

[198] Similar definitions in the Tokyo Charter and Control Council Law No 10 were derived from this definition: see von Hebel, above n 196, at 117.

[199] For example, Control Council Law No 10 art II(1)(c), and ICTY and ICTR Statutes arts 5 and 3 respectively.

[200] Rome Statute art 7(1).

[201] For the purposes of the Statute, 'gender' is defined in paragraph 3 of art 7.

[202] The persecution must be in connection with any act referred to in paragraph 2 of art 7 or any crime within the jurisdiction of the Court.

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

Each of the recent statutes specifies threshold requirements that serve to distinguish ordinary crimes such as murder from crimes against humanity. For the purposes of the ICTY, the specified crimes qualify as crimes against humanity 'when committed in armed conflict, whether international or internal in character, and directed against any civilian population'.[204] For the purposes of the ICTR, the specified crimes are crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. The chapeau to the Rome Statute definition of 'crimes against humanity' refers to specified acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Importantly, the chapeau does not require a nexus with an armed conflict (whether internal or international), or refer to a discriminatory intent. Thus, it is now generally accepted that crimes against humanity can be committed in times of absolute or relative peace.[205]

Decisions of the ICTY[206] and the ICTR[207] have clarified some of the customary international law principles now reflected in the statutory definitions. There has been some judicial consideration of the application of art 7(1) of the Rome Statute in Australia in the context of crimes committed during the Sri Lankan civil war.[208]

Defences

In general, the defences that are normally available under the relevant international instrument should be available in the context of examining the applicability of art 1F(a).[209]

Neither the Nuremberg Charter, nor the 1948 Geneva Conventions nor the Statutes of the ICTY and ICTR expressly recognise any defences to the crimes they deal with.[210] Nevertheless, in certain circumstances, defences are available under the relevant international instruments. The

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

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

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

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

[208] See *GZCK v MHA* (2021) 290 FCR 96 where the crimes against humanity of murder (under art 7(1)(a)) and of torture (under art 7(1)(f)) were considered. For more details about this case see fn 190. See also *MZYVM v MIAC* [2013] FCA 79, where the Court upheld a recommendation by an Independent Merits Reviewer that there were serious reasons for considering the appellant had committed the crime against humanity of murder while a member of the LTTE. However, the focus was on procedural fairness obligations and no issue was taken with the application of art 7(1)(a) of the Rome Statute.

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

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

grounds for defence derive their origins from criminal law and have the effect that a person cannot be held responsible for a crime where the mental element, or *mens rea*, of the crime, is absent.[211] However, as one commentator has observed, where the necessary *mens rea* is not present, then the crime has not been committed so it is inappropriate to talk of defences.[212] Article 31 of the Rome Statute recognises a number of 'grounds for excluding criminal responsibility'. They include circumstances relating to mental incapacity, self-defence, duress, and other grounds derived from applicable treaties and the principles and rules of international law, or general principles of law derived by the Court from national laws and legal systems. In addition, mistake of fact and mistake of law are recognised as grounds for excluding criminal responsibility where the mistake negates the mental element required by the crime.[213] Further, a defence of 'superior orders' is available under the Statute only in certain limited circumstances.[214]

Serious non-political crimes

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

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> ...
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

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

It is generally accepted that the purpose of art 1F(b) is to protect the interests of the receiving state.[215]

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

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

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211 Weisman, above n 162 at 128.
212 Gilbert, above n 176 at 472.
213 Rome Statute art 32.
214 Rome Statute art 33. For discussion of this defence, see *SRYYY v MIMIA* (2005) 147 FCR 1; and *SZITR v MIMIA* (2006) 221 FCR 583; and *VWYJ v MIMIA* [2006] FCAFC 1.
215 See for example *Dhayakpa v MIEA* (1995) 62 FCR 556 at 565; *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179, 185; *MD Shahidul and MIMA* [1998] AATA 331; and *YYMT and MIAC and FRFJ and MIAC* (2010) 115 ALD 590.

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

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

It should be noted that some judicial consideration of art 1F(b) in Australia predates the introduction of the statutory definition.[216]

The elements of Article 1F(b)

'Crime'

Given the different connotations of the term 'crime' in different legal systems, it is not easy to define what constitutes a 'crime' under art 1F(b)[217] (and ss 5H(2)(b) and 36(2C)(a)(ii)), and the categories of conduct capable of amounting to a 'crime' in this context have not been exhaustively determined in Australian law.[218]

On one view, 'crime' in art 1F(b) means an offence for which the maximum penalty in the majority of countries of Western Europe and North America is imprisonment for more than 5 years, or death.[219] On another view, the qualification 'serious' denotes that the word 'crime' was used in the broader sense (i.e. every punishable act) and then qualified by the addition of the word 'serious'.[220]

In *Ovcharuk v MIMA* a question arose as to whether the conduct in question (conspiracy to import a large quantity of heroin into Australia) must be criminal in the place where it occurred or whether it may include conduct that constitutes an offence under a law of the country of refuge with extraterritorial application. Rejecting the contention that art 1F(b) is confined to fugitives from foreign justice, the Court held that it can include a crime for which the person is open to be convicted in the country in which refuge is sought, and does not require identification of a crime which is justiciable according to the law of the foreign jurisdiction in which it was committed.[221] However, Sackville J expressed the opinion that where the conduct committed outside the country of refuge does *not* constitute a crime under the law of that country, it would not be enough that the conduct would have been criminal had it taken place within that country. Rather, art 1F(b) would

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

[217] UNHCR, *Handbook,* above n 6 at [155], Goodwin-Gill and McAdam, above n 24 at 178. See also the discussion in Grahl-Madsen, above n 42 vol. 1 at 292–4.

[218] *Ovcharuk v MIMA* (1998) 88 FCR 173 at 186.

[219] Grahl-Madsen, above n 42 vol. 1, at 294.

[220] Robinson, above n 21 at 68.

[221] For example, a conspiracy to import drugs into Australia, which is committed outside of Australia but punishable under Australian law: *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179, 186, ; see also 190–191. The crime must have constituted a crime at the time it was committed: *SRYYY v MIMIA* (2005) 147 FCR 1.

not be satisfied in those circumstances unless the conduct was criminal under the laws of the country where it occurred. His Honour reasoned:

> It is not difficult to imagine conduct that would have been regarded as a crime (and perhaps a serious crime) had it occurred in the country of refuge, yet was not criminal in the place where it occurred.[222] …
>
> It is hardly a beneficial construction of the Refugees Convention to exclude a person who has never engaged in conduct for which he or she is liable to prosecution on the ground that he or she has committed a serious crime.[223]

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

'Serious'

The UNHCR Handbook states that in the context of art 1F(b) a 'serious' crime must be a capital crime or a very grave punishable act.[224] However, whether serious criminality for the purposes of art 1F(b) is to be assessed according to international or local standards is not entirely clear. According to UNHCR, in determining whether a particular crime is serious, international rather than local standards are relevant.[225] Professor Goodwin-Gill and Dr McAdam similarly state that the standard finally to be applied is an international standard, in that a provision of a multilateral treaty is involved, although standards relating to criminal prosecution and treatment of offenders current in the potential country of asylum are also relevant.[226] Elsewhere the learned authors state that each state must determine what constitutes a serious crime, according to its own standards, considered against the objectives of the Convention.[227]

In *Ovcharuk v MIMA*[228] the Full Federal Court held that the question of whether there are serious reasons for considering that a person 'has committed a serious non-political crime outside the country of refuge' may be answered by reference to notions of serious criminality accepted within the receiving state.[229] Justice Branson made it clear that the question of whether conduct undertaken in a country from which refuge is sought amounts to 'a serious non-political crime' should certainly not be answered solely by reference to the notions of serious criminality accepted within that country.[230]

UNHCR has identified a number of indicators that might point to the seriousness of a common crime, including the nature of the act, the actual harm inflicted, the form of procedure used to

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

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

224 UNHCR, *Handbook,* above n 6 at [155].

225 UNHCR *Article 1F Guidelines 2003*, above n 134 at [14].

226 Goodwin-Gill and McAdam, above n 24 at 178.

227 Goodwin-Gill and McAdam, above n 24 at 176.

228 *Ovcharuk v MIMA* (1998) 88 FCR 173.

229 *Ovcharuk v MIMA* (1998) 88 FCR 173 at 185; see also 191. Sackville J did suggest at 190–191 that if the conduct outside the country of refuge did not constitute a crime under the laws of that country, **or** under the laws of the country where it took place, it would not be enough that it would have been a crime, even a serious one, had it taken place in the country of refuge. In *Jayasekara v Canada* (2008) 305 DLR (4th) 630 the Canadian Federal Court of Appeal stated that '[w]hile regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime' (at [43]).

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

prosecute the crime (i.e. whether the crime is an indictable offence or dealt with summarily), the prescribed punishment, the nature of the penalty, and whether most jurisdictions would consider it a crime.[231] Commentators and jurisprudence indicate that serious crimes are those against physical integrity, life and liberty.[232] Thus, for example, murder, rape, armed robbery, wounding, arson, and drug trafficking would qualify, whereas petty theft would not.[233] Other offences such as burglary, stealing, embezzlement and assault may also be considered as raising a presumption of serious crime if other factors such as the use of weapons, injury to persons and property damage were present.[234] Elements suggested as tending to rebut a presumption of serious crime include the age of the offender, parole, a lapse of five years since the conviction or completion of sentence, generally good character, the offender being merely an accomplice, and other circumstances such as provocation and self-defence.[235]

Article 1F(b) was considered by the AAT in *SRCCCC and MIMIA*.[236] In that case, the applicant had been found guilty in Australia of 'people smuggling', a crime carrying the maximum penalty of twenty years imprisonment. The Tribunal was of the view that the applicant's crime was a more modest one when one considered the circumstances and nature of his involvement, including the circumstance that the applicant did not initially know the principal purpose of the trip (he learnt of this when the boat was already at sea). The Tribunal found that neither by Australian standards nor by the standards espoused by the UNHCR could his criminal conduct be described as of such a serious nature as to negate any protection obligations Australia may have pursuant to the Refugees Convention.[237]

The Department's Refugee Law Guidelines state that as the term 'serious' is not defined, the definitions of 'serious foreign offence' and 'serious Australian offence' in s 5(1) of the Act may assist decision-makers in determining what is to be considered a 'serious' non-political crime, but cautions that these definitions ought be used as a guide only.[238]

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231 UNHCR, *Interpreting Article 1*, 2001, at [45], *Article 1F Guidelines 2003* above n 134 at [14].

232 Goodwin-Gill and McAdam, above n 24 at 177.

233 See for example UNHCR *Article 1F Guidelines 2003*, above n 134 at [14], Goodwin-Gill and McAdam, above n 24 at 179 referring to UNHCR's proposed approach to art 1F(b) in a joint UNHCR/US State Department exercise in 1980, Grahl-Madsen, above n 42 vol 1, at 294. For discussion of the application of art 1F(b) to drug trafficking, see M Gottwald, 'Asylum claims and drug offences: the seriousness threshold of art 1F(b) of the 1951 Convention relating to the status of refugees and the UN Drug Conventions', *New Issues in Refugee Research*, Working Paper No 112, UNHCR, Evaluation & Policy Analysis Unit, March 2005.

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

235 Goodwin-Gill and McAdam, above n 24 at 179–180. See *Hapugoda and MIMA* [1997] AATA 108 at [30]. In *Jayasekara v Canada* (2008) 305 DLR (4th) 630 the Canadian Federal Court of Appeal stated that it 'believe[d] there is a consensus among the courts that the interpretation of the exclusion clause in art 1F(b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S. v. Refugee Status Appeals Authority*; *S. & Ors v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157; *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), August 29, 2007, at pages 945 and 946–947. In other words, whatever presumption of seriousness may attach to a crime internationally or under legislation of the receiving state, that presumption may be rebutted be reference to the above factors': at [44].

236 *SRCCCC and MIMIA* [2004] AATA 315.

237 *SRCCCC and MIMIA* [2004] AATA 315 at [59]. See also the similar cases of *SRBBBB and MIMIA* [2003] AATA 1066. In contrast, in *JSDW and MIBP* [2017] AATA 2420 the Tribunal found that the applicant's active, albeit low-level involvement in people smuggling did amount to a serious non-political crime, distinguishing *SRBBBB* on the facts. See also *ZYVZ and MIBP* [2018] AATA 3967 (upheld in *ZYVZ v MICMSMA* [2020] FCA 28, however the appeal did not turn on the Tribunal's findings regarding people-smuggling offences).

238 Department of Home Affairs, Refugee Law Guidelines, section 3.21.3, as re-issued 27 November 2022.

The Guidelines also indicate that if a person has been convicted of an offence and that offence is categorised as a serious offence in the enactment creating it, then the crime will be 'serious' by that fact.[239] To the extent this seems to suggest that the label used in a foreign enactment creating an offence is determinative of that offence being 'serious' or not for the purposes of art 1F(b) or ss 5H(2)(b) or 36(2C)(a)(ii), it appears to be inconsistent with the authorities outlined above including the judgment of Branson J in *Ovcharuk*. It is also difficult to reconcile with the next sentence of the Guidelines, which state that is also worth having regard to the penalties applicable for the offence to determine seriousness. It is therefore unclear what the effect of a foreign enactment labelling an offence as 'serious' would be, if the penalty for that offence was minor or insignificant in nature.

Where the enactment creating the offence for which there has been a conviction has no title or express reference it being a 'serious' one, the Guidelines set out the following factors it states may be relevant in evaluating whether or not the crime is a serious one:

- Comparison of the maximum penalty for the crime in the statute creating the offence relative to offences widely accepted to be among the most serious (e.g. murder or manslaughter);
- If the crime does not compare to some of the most serious, consider other crimes where there are similar penalties that may be classed as 'serious', and the underlying policy intent to class those crimes as serious; and
- Sentencing remarks may indicate whether the crime is a serious crime, however caution needs to be used not to mistake 'serious offending' on the offending scale where the crime itself is not serious.[240]

The Guidelines indicate that where there has been no conviction, decision- makers will have to undertake a meticulous evaluation of the type of offence, the applicant's role in the offence, and potential defences that may arise.[241]

Seriousness of crimes versus possible harm feared

It is established in Australian law that there is no obligation to weigh up the degree of seriousness of the crime against possible harm to the applicant if returned to the country of reference.[242] In *Dhayakpa v MIEA*, French J stated:

> It has been said that the operation of Article 1F confers upon the potential State of refuge a discretion to determine whether the criminal character of the applicant for refugee status in fact outweighs his character as a *bona fide* refugee and so constitutes a threat to its internal order… The adjective "serious" in Article 1F (b) involves an evaluative judgment about the nature of the allegedly disqualifying crime. A broad concept of discretion may encompass such evaluative judgment. But once the non political crime committed outside the country of refuge is

[239] Department of Home Affairs, Refugee Law Guidelines, section 3.21.3, as re-issued 27 November 2022. The example given in the Guidelines is Part 9.1 of the *Criminal Code Act 1995* (Cth) entitled 'serious drug offences'.
[240] Department of Home Affairs, Refugee Law Guidelines, section 3.21.3, as re-issued 27 November 2022.
[241] Department of Home Affairs, Refugee Law Guidelines, section 3.21.3, as re-issued 27 November 2022.
[242] *Applicant NADB of 2001 v MIMA* (2002) 126 FCR 453 at [41], [42]. Contrast the position of UNHCR, *Interpreting Article 1*, 2001, at [48]: 'If the well-founded fear is of very severe persecution endangering the applicant's life or freedom, the crime committed must be very grave indeed to exclude the person from status'. See also Goodwin-Gill and McAdam, above n 24 at 176. Hathaway and Foster, above n 39 at 565 revised the endorsement of a balancing test in an earlier edition (see Hathaway (1991), above n 64 at 224–225).

properly characterised as "serious" the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the Applicant if returned to the state of origin.[243]

His Honour did not decide whether the evaluative characterization of an offence as 'serious' attracts elements of a balancing exercise;[244] however it has been stated that in determining whether the disqualifying crime is 'serious' it is appropriate to have regard to the fact that it must be of such a nature as to result in Australia not having protection obligations to persons who commit such crimes.[245]

Meaning of 'non-political crime'

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

non political crime:

(a) subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and

(b) includes an offence that, under paragraph (a), (b), or (c) of the definition of ***political offence*** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.[246]

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

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

(a) an offence that involves an act of violence against a person's life or liberty; or

(b) an offence prescribed by regulations for the purposes of this paragraph to be an extraditable offence in relation to the country or all countries; or

(c) an offence prescribed by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries.[247]

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

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

[245] *Applicant NADB of 2001 v MIMA* (2002) 126 FCR 453 at [41].

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

[247] Amended by the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act* 2012 (Cth) (No 7 of 2012), with

Various offences are prescribed in reg 2B of the *Extradition Regulations 1988* (Cth) as extraditable offences for the definition of 'political offence' in s 5 of the Extradition Act.[248] Some offences are specified by reference to Australian legislation and/or international Conventions, for example, art 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, the English text of which is set out in Schedule 1 to the *Crimes (Aviation) Act 1991* (Cth).[249] Other offences are specified by reference to particular conduct in specified countries, such as taking or endangering, attempting to take or endanger, or participating in the taking or endangering of, the life of a person in circumstances in which the conduct creates a collective danger, whether direct or indirect, to the lives of other persons.[250]

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

The Explanatory Memorandum to the Bill that introduced s 91T indicates that the purpose of the amendment was that 'Court judgments had set too low a threshold when determining the degree of political motivation needed in order for a criminal act to fall outside the art 1F exclusion clause'.[251]

In the leading Australian case predating s 91T, *Singh v MIMA*,[252] the High Court considered the meaning of 'non-political crime' in art 1F(b). The case concerned a 'Commander of Information' in the Khalistan Liberation Front who was involved as an accessory in the revenge killing of a police officer. The majority upheld the decision of the Full Federal Court, finding that the Tribunal erred in characterising the crime as 'non-political' on the basis that it was a revenge killing.[253] The High Court essentially confirmed the position of the Full Federal Court that simply classifying an act as revenge would not necessarily preclude it from being a political one.[254]

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

While there is no 'bright line' differentiating political and non-political crimes,[255] a political crime must in some appropriately close way be linked with a **political purpose**, such as changing the political environment, commonly the government, or altering the practices or policies of those who exercise power or political influence in the country in which the crime is committed.[256] In deciding

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effect from 20 September 2012.

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

249 reg 2B(1)(a) of the *Extradition Regulations 1988* (Cth).

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

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

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

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

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

255 *Singh v MIMA* (2002) 209 CLR 533 at [21], [141].

256 *Singh v MIMA* (2002) 209 CLR 533 at [21]–[22], [45], [141]. Egregious acts of violence, such as acts those commonly considered to

whether a crime is 'political' or 'non-political' for the purposes of art 1F(b), relevant factors may include the weapons and means used; whether the 'target' of the crime is a public official or a government agent as distinct from unarmed civilians chosen indiscriminately; and whether the crime is proportionate to the political end propounded. It will usually be necessary to also examine the alleged objectives of any organisation involved and the applicant's connection if any with that organisation.[257]

According to Gleeson CJ achievement of the political objective must be the **substantial** purpose of the act.[258] Even if a killing occurs in the course of a political struggle, it will not be regarded as an incident of the struggle if the **sole or dominant** motive is the satisfaction of a personal grudge against the victim.[259] According to Gaudron J, a crime is political if a **significant** purpose of the act or acts involved is political; but there is no reason why the political purpose should be the sole or even the dominant purpose.[260] Justice McHugh suggested that murdering a policeman because he has tortured or killed a member of the group cannot be regarded as so remote from furthering the political objectives of the group that the murder is necessarily non-political.[261] However, it will be non-political if the only motivation for the murder is personal revenge, divorced from the political struggle.[262]

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

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

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

The Department's Refugee Law Guidelines refer to the need for 'a close and direct causal link' between the nature and circumstances of the crime and the claimed political purpose (to amount to a political crime), however this does not reflect the language used in *Singh's* case and should be treated with caution. Nonetheless, the Guidelines indicate that in determining whether a crime is political in nature decision-makers should consider:

- whether there is a political struggle in existence within the State where the crime was committed;

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be of a 'terrorist' nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective according to UNHCR *Article 1F Guidelines 2003*, above n 134 at [15].

257 *Singh v MIMA* (2002) 209 CLR 533 at [141], [46]

258 *Singh v MIMA* (2002) 209 CLR 533 at [21]–[22].

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

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

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

262 *Singh v MIMA* (2002) 209 CLR 533 at [54].

- whether commission of the offence was an incident of the political struggle; and
- whether the nature of the crime was in proportion to the claimed political purpose. For example, it may be reasonable to expect that a crime committed for a political purpose would be aimed at a military or Government target, rather than civilian property.[263]

'Committed … outside the country of refuge'

Article 1F(b) requires that the serious non-political crime be committed 'outside the country of refuge'. This would normally be the country of origin but may be any country apart from the country of refuge (that is, Australia).[264]

The place where a crime was 'committed' may become difficult to determine where an element of the crime is international - for instance, when drugs are taken from one country and imported into another. This was the issue in *Dhayakpa v MIEA* where the Court held that the fact that the crime (conspiracy to import heroin) was committed both inside and outside Australia, the country of refuge, did not preclude the operation of art 1F(b).[265] Justice French stated:

> The elements of that offence [conspiracy to import heroin] were complete when the criminal agreement had been concluded ... the criminal agreement to import heroin into Australia was concluded outside Australia. It continued in effect and the offence thereby continued after the applicant entered Australia.
>
> …
>
> A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Article 1F(b) if it were shown that such a person had a record of serious non-political criminal offences whether in the country of origin or elsewhere. In my opinion it makes no difference that the offence, in this case a continuing offence, was committed both outside and within Australia.[266]

Individuals who commit 'serious non-political crimes' within the country of refuge are subject to that country's criminal law process and, in the case of particularly grave crimes, to arts 32 and 33(2) of the Convention.[267] Similarly, for the complementary protection criterion and the post 16 December 2014 protection visa criteria generally, there are specific exclusions for applicants who commit certain crimes in Australia: ss 36(1C) and 36(2C)(b).

The significance of prior punishment for the crime

Some commentators consider that art 1F(b) is intended to bring refugee law into line with extradition law by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment. On that view, the provision should not be applied to an individual who has already been convicted and punished, pardoned or amnestied, or has benefited from a statute of limitations.[268] However, this has not been accepted in Australia. In

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[263] Department of Home Affairs, Refugee Law Guidelines, section 3.21.4.3, as re-issued 27 November 2022.
[264] UNHCR, *Handbook*, above n 6 at [153]. In the context of ss 5H(2)(b) and 36(2C)(a)(ii), the legislation specifies that the crime must be committed 'before entering Australia'.
[265] *Dhayakpa v MIEA* (1995) 62 FCR 556. This position was upheld in *Ovcharuk* at first instance: (1998) 153 ALR 385 at 389. The issue was not specifically dealt with on appeal.
[266] *Dhayakpa v MIEA* (1995) 62 FCR 556 at 565.
[267] UNHCR Article 1F Guidelines, 2003, at [16].
[268] See Hathaway and Foster, above n 39, at 543, Grahl-Madsen, above n 42, vol. 1, 290–2, UNHCR, *Background Note Article 1F 2003*, above n 171 at [73]. Grahl-Madsen states that 'it stands to reason to submit that crimes for which punishment has been suffered ...

Australian law, it makes no difference that the applicant has already been punished for the offence, or the offence is no longer justiciable.[269] In *Dhayakpa v MIEA*, French J explained that the difficulty with the suggestion that the exemption in art 1F(b) does not extend to crimes for which punishment had been suffered or which were no longer justiciable was that it imports into the provision limitations not able to be found in its language.[270]

Acts contrary to the purposes and principles of the UN

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

The purposes and principles of the UN are proclaimed in arts 1 and 2 of the *United Nations Charter* respectively.[271]

The **purposes** of the UN are (1) to maintain international peace and security; (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; (3) to achieve international co-operation in solving economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion; and (4) to be a centre for harmonizing the actions of nations directed to those ends.[272]

Its **principles** are essentially the sovereign equality of its members; good faith fulfilment of Charter obligations; peaceful settlement of international disputes; refraining from the threat or use of force against the territorial integrity or political independence of any state; assisting the UN in its actions under the Charter and withholding assistance to states against which it is taking preventive or enforcement action; and ensuring that non Members act in accordance with these principles so far as may be necessary to maintain international peace and security.[273]

These purposes and principles offer little clarification of the types of act which would deprive a person of refugee status and there has been some debate as to the scope of art 1F(c), both in

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should not be held against persons seeking recognition as refugees'. See also European Council on Refugees and Exiles, above n 162 at 257–285. See also the discussion in Goodwin-Gill and McAdam, above n 24 at 173–176, and *Ovcharuk v MIMA* (1998) 88 FCR 173 at 184–186.

269 *Dhayakpa v MIEA* (1995) 62 FCR 556 at 564–565; *Ovcharuk v MIMA* (1998) 88 FCR 173.

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

271 Some commentators (e.g. Goodwin-Gill and McAdam, above n 24 at 185–186, cf Grahl-Madsen, above n 42 at 283–284) also refer to the Preamble of the UN Charter in the context of art 1F(c). Commentators have observed that art 1F(c) appears in embryonic form in Annex I to the IRO Constitution, which refers to 'the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations'. The Preamble refers to a determination to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, to establish conditions under which justice and respect for the obligations arising from international law can be maintained and to promote social progress, and for those ends to practice tolerance and live together in peace, to unite strength to maintain international peace and security, to ensure that armed force shall not be used safe in the common interest and to employ international machinery to promote economic and social advancement of all peoples, and a resolve to combine efforts to accomplish these aims (see Grahl-Madsen, above n 42 at 282).

272 Article 1 of the UN Charter.

273 Article 2 of the UN Charter.

relation to the kinds of act it covers and who can perpetrate them. The *travaux preparatoires* reflect a lack of clarity in its formulation and a concern that the phrase was so vague as to be open to abuse.[274]

On one view, as most of the purposes and principles enumerated in the UN Charter are addressed to governments and not to individuals, the art 1F(c) exclusion would normally be limited to persons in positions of power.[275] Other commentators favour the view that the UN Charter has a dynamic aspect and that in certain areas the practical content of the declared purposes and principles must be determined in the light of more general developments.[276]

In France, art 1F(c) was initially applied only to serious violations of human rights by heads of state and other senior state officials but was gradually extended to include lower ranking officials, as well as persons who did not hold positions of power but personally committed acts contrary to the purposes and principles of the United Nations by carrying out orders from superiors.[277] Article 1F(c) has also been applied in cases where there was no link with the authorities. For example, it was applied in the 1950s against individuals who, during the Second World War, had denounced individuals to the occupying forces with extreme consequences including death, in 1969 against a person who had carried out a bombing campaign to reunite South Tyrol with Austria,[278] and in 1997 it was applied against a person who had attempted to overthrow the democratically elected Shevardnadze regime in Georgia.[279]

Article 1F(c) was applied in a line of Canadian cases in relation to drug trafficking offences on the basis that the UN initiatives to counter traffic in illegal drugs[280] could form part of the UN's purposes

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[274] In debate, it was variously suggested that the provision was 'not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of States, ministers and high officials', that it was intended to bar enemy collaborators in the Second World War, that it meant 'such acts as war crimes, genocide and the subversion or overthrow of democratic regimes', and that it involved a violation of human rights that fell short of a crime against humanity. See Goodwin-Gill and McAdam, above n 24 at 184; Grahl-Madsen, above n 42 at 283, UNHCR, *Background Note Article 1F, 2003*, above n 171 at [46]; Hathaway and Foster, above n 39 at 587.

[275] See for example UNHCR, *Handbook,* above n 6 at [162]–[163] and UNHCR, *Background Note art 1F, 2003*, above n 171 at [50] (although note that UNHCR subsequently revised its position: UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to cases Bundesrepublik Deutschland v. B and D pending before the Court of Justice of the European Union*, July 2009, at [29]); Grahl-Madsen, above n 42 at 286. See also E Kwakwa, 'Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations', (2000) 12 *International Journal of Refugee Law* 79, at 84–5, Weisman, above n 162 at 110–1, *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193 at 230–1. In *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745 in considering the general approach to Art 1F(c), the UK Supreme Court considered that '[t]he article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security"' (quoting from UNHCR, *Background Note Article 1F, 2003*, above n 171 at [47]) (at [16]). It also stated 'there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character' (at [16]).

[276] See for example Goodwin-Gill and McAdam, above n 24 at 185, Hathaway and Foster, above n 39 at 589. This view has been accepted by the majority of the Supreme Court of Canada in *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193. Bastarache J, speaking for the majority, stated at [62] that the statement found in the Preamble and arts 1 and 2 of the UN Charter is 'principally organizational; its general wording also allows for a dynamic interpretation of state obligations, which must be adapted to the changing international context'.

[277] See for example, *Muntumosi Mpemba*, CRR No 238.444 (29 October 1993) (case of member of the Garde civile zairoise), cited in Kwakwa, above n 275 at 89.

[278] See Gilbert, above n 176 at 22.

[279] *Avetisan*, 303164 CRR (France, 4 April 1997), referred to in Gilbert, above n 176 at 23. Kwakwa, above n 275 at 90, argues that this is an erroneous interpretation of art 1F(c).

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

and principles.[281] However, a majority of the Supreme Court of Canada has held that conspiring to traffic in narcotics is not within the provision.[282] The majority reasoned that the purpose of art 1F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting, and that it will apply where there is consensus in international law that particular acts constitute violations of that kind, or are explicitly recognised as contrary to the purposes and principles of the United Nations. The majority held that there was no indication that drug trafficking formed part of the corpus of fundamental human rights.[283] However the Court did not rule out the possibility that non-state actors could fall within art 1F(c).[284]

Some actions have been characterised by the UN as contrary to the UN Charter. The UN General Assembly has expressly condemned torture or other cruel, inhuman or degrading treatment or punishment and enforced disappearance as forms of denial of the purposes of the UN Charter.[285] Similarly, terrorism has also been declared contrary to the purposes and principles of the UN on a number of occasions.[286] In the aftermath of the 11 September 2001 attacks in the USA, the UN Security Council reaffirmed that such acts, 'like any act of international terrorism' constituted a threat to international peace and security, and declared acts of terrorism and related acts to be contrary to the purposes and principles of the United Nations.[287] Under paragraph 5 of Resolution 1373 (2001), the Security Council declared:

> that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.[288]

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

[282] *Pushpanathan v Canada (MCI)* 160 DLR (4th) 193.

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

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

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

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

[287] The Security Council determined in Resolutions 1373(2001) and 1377(2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations: UNHCR, *Background Note Article 1F, 2003*, above n 171, at [49].

[288] UN Security Council Resolution 1373 (2001), enacted under Chapter VII of the UN Charter and adopted on 28 September 2001. See also UN General Assembly Resolution 49/60 Declaration on Measures to Eliminate International Terrorism (A/RES/49/60, 9 December 1994), reaffirmed in Resolution 51/210 (A/RES/5/210, 16 January 1997), to similar effect. Although some recent UN documents have attempted to define terrorism, there is no internationally agreed definition: see Gilbert, above n 176, at 11–13. In *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745 in considering acts of terrorism and Art 1F(c), the Court said at[39] '[t]he essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose

In *SRLLL & MIMIA* the AAT held that the applicant, an Indian citizen who had been involved in a Sikh terrorist organisation for a number of years, was excluded under all three paragraphs of art 1F by reason of his involvement in the murder of three police officers. The Tribunal held that his involvement in these murders was terrorist activity and regarded paragraph 5 of Security Resolution 1373 as a statement that terrorist acts are contrary to the purposes and principles of the UN, so that art 1F(c) applied.[289]

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

Articles 32 and 33(2)

The contracting states to the Refugees Convention accept significant obligations under arts 32 ('Expulsion') and 33 ('Prohibition of expulsion or return ('*refoulement*')'). These provisions, and others dealing with the content of a refugee's rights under the Convention, do not purport to define a refugee, or touch upon how a refugee is to be defined or accorded recognition as such, as these matters are expressly and exhaustively the subject of art 1 of the Convention.[290] Accordingly, they are not provisions that arise for consideration in the context of the pre 16 December 2014 refugee criterion under s 36(2)(a) of the Act. Nevertheless, the Act as it applies to such applications does refer to the same concepts in the related complementary protection context.[291]

For protection visa applications made on or after 16 December 2014, similar considerations are contained in the s 36(1C) criterion for the grant of a protection visa but do not form part of the refugee definition itself in s 5H of the Act, or the refugee criterion in s 36(2)(a). Rather, they serve to provide a basis on which a protection visa cannot be granted, regardless of whether an applicant may meet the refugee or complementary protection criteria. Concepts clearly drawn from art 33 also form the basis for s 36(2C)(b) which operates to prevent certain persons who would otherwise meet the 'complementary protection' criterion in s 36(2)(aa) from being granted a protection visa.[292]

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of intimidating a population or compelling a government or international organisation to act or not to act in a particular way…It is, it seems to us, very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR' (referring to the UNHCR Guidelines at para 17, set out above, n 286).

289 *SRLLL & MIMIA* [2002] AATA 795. However, when dealing with most so-called terrorist offences, any unduly expansive interpretation of the 'purposes and principles of the United Nations' should be avoided to prevent abuse of the exclusion clauses according to the European Council on Refugees and Exiles, above n 162, at 259. The general approach to art 1F(c) has been considered by the United Kingdom Supreme Court in *Al-Sirri (FC) v SSHD, DD (Afghanistan)(FC) v SSHD* [2013] 1 AC 745. The Court stated, (at [16]): '[t]he article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security"' (quoting from the UNHCR Background Note on the Application of Exclusion Clauses: Article 1F" (September 2003) at para 47). It also stated 'there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.'

290 *NAGV and NAGW of 2002 v MIMIA* (2005) 222 CLR 161; *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at [47]–[49]; *SZOQQ v MIAC* (2013) 251 CLR 577. The expression 'a person to whom Australia has protection obligations' in s 36(2)(a) means no more than a person who is a refugee under art 1 of the Convention and does not call for consideration of art 33 or s 91U: *SZOQQ v MIAC* (2013) 251 CLR 577 at [30]–[31]. The Court unanimously rejected the Minister's argument that s 91U somehow changes the operation of s 36(2)(a).

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

292 See Chapter 10 – Complementary protection for discussion of s 36(2C).

To that extent, the matters relevant to art 33(2) will be applicable to the consideration of ss 36(1C) and 36(2C).[293]

As discussed in, decisions to refuse to grant or to cancel a protection visa relying upon ss 36(1C) or 36(2C) are reviewable under s 500.[294] However, these provisions may not be considered by the Tribunal exercising its jurisdiction under s 348, unless it is in relation to reviews of decisions made under s 197D(2).[295]

Article 32

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

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

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

Article 33

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

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

On one view, the *non-refoulement* principle in art 33(2) only applies where a person has already been granted refugee status under the Convention,[296] however, this is not universally accepted.[297]

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

[294] Sections 500(1)(c) and 500(4)(c).

[295] Sections 338A, 348

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

[297] See E Lauterpacht QC and D Bethlehem, 'The scope and content of the principle of non-refoulement' in Feller, Turk and Nicholson,

It is established in Australian law that in determining whether the terms of art 33(2) apply, there is no scope to undertake any balancing of the consequences for the individual upon being removed from Australia. If the circumstances specified in art 33(2) are present, then the benefit of the duty against *refoulement* in art 33(1) cannot be claimed.[298]

Reasonable grounds

Article 33(2), ss 36(1C) and 36(2C)(b) each impose a standard of 'reasonable grounds' for believing that the circumstances outlined in those provisions exist. There are conflicting Federal Court authorities as to whether 'reasonable grounds' in art 33(2) refers only to the first circumstance it sets out (a refugee who is a danger to the security of the country in which he is) and not to the second circumstance (having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country).[299] In contrast, the structure of ss 36(1C) and 36(2C)(b) appear to require that there be 'reasonable grounds' for considering that either of these circumstances exist. Thus, a different threshold may apply to the test in the Convention and those in the Act. It has been held that in the context of s 36(1C), '"reasonable grounds" for a state of mind 'requires the existence of facts which are sufficient to induce that state of mind in a reasonable person"'.[300]

Meaning of 'danger to the security of the country'

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

The Federal Court has suggested that it may not be sufficient to rely solely on an assessment by ASIO or another Australian intelligence agency. The requirement that there be 'reasonable grounds' to believe the person poses a 'danger to the security of the country' suggests that an objective assessment of any information or report may be required.[301]

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above n 24 at 116.

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

299 In *SZOQQ v MIAC* (2012) 200 FCR 174 it was suggested in *obiter* that 'reasonable grounds' would not apply to the second circumstance in art 33(2): at [49], [11]. Although the High Court subsequently held that the earlier proceedings in *SZOQQ* had miscarried, the Full Federal Court's reasoning on art 33 was left undisturbed: *SZOQQ v MIAC* (2013) 251 CLR 577. Conversely, although the judgment in *DMQ20 v MICMSMA* [2023] FCAFC 84 concerned the interpretation of s 36(1C)(b), Rares J made *obiter* findings to the effect that the standard of 'reasonable grounds' does apply to the second circumstance in art 33(2): at [44]–[45], [67] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159).

300 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [45], quoting from *George v Rockett* (1990) 170 CLR 104 at 112 (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159).

301 *Kaddari v MIMA* (2000) 98 FCR 597 at [23]–[24]. Compare *Director General Security v Sultan* (1998) 90 FCR 334. This element of art 33(2) was considered at length by the Supreme Court of New Zealand in *Attorney-General v Zaoui (No 2)* [2006] 1 NZLR 289. The Court held that the assessment to be made under art 33(2) is to be made in its own terms, by reference to danger to the security of

Further guidance may be gleaned from the High Court's comments in *Plaintiff M47/2012 v Director General of Security* (*Plaintiff M47*).[302] In *Plaintiff M47*, French CJ referred to the Canadian Supreme Court judgment of *Suresh*,[303] where it was held that the threat to the country must be 'serious', in the sense that it must be grounded on objectively reasonable suspicion based on evidence and that the threatened harm must be substantial rather than negligible.[304] His Honour also referred to the Court's acknowledgement in *Suresh* that although historically it had been argued that threats to the security of another State would not enliven art 33(2), as matters have evolved, courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on the security of the country in which the person is residing.[305]

Also in *Plaintiff M47*, Heydon J commented that: 'it would be incumbent on the decision-maker to reach a higher level of satisfaction about the matters listed in Art 33(2) than about the matters in an adverse security assessment, where the outcome is not *refoulement*. In other jurisdictions, that circumstance has led courts to construe Art 33(2) as requiring a belief on objectively reasonable grounds that the refugee poses "a serious threat to [national] security", and that the threatened harm is substantial.'[306]

Although the term 'security' in s 36(1C)(a) is not defined, the Federal Court has held that s 36(1C) should be read in context with s 36(1B) and that it should be taken to mean 'security' as defined in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).[307] That provision provides that:

> ***security*** means:
> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
> (i) espionage;
> (ii) sabotage;
> (iii) politically motivated violence;
> (iv) promotion of communal violence;
> (v) attacks on Australia's defence system; or
> (vi) acts of foreign interference;
> whether directed from, or committed within, Australia or not; and
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

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the country (in that case, New Zealand), and without any balancing or weighing or proportional reference to the matter dealt with in art 33(1). As to the relevant test, the Court held that to come within art 33(2), the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

302 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.
303 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, 2002 SCC 1.
304 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [68].
305 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [67].
306 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [319].
307 *ENT19 v MHA* (2021) 289 FCR 100 at [122], [139] (application for special leave to appeal dismissed: *MHA v ENT19* [2022] HCASL 94).

'Convicted by a final judgment'

The term 'convicted' is not defined in the Convention or Act, nor is it defined in Australian State and Territory criminal legislation.

In the High Court judgment of *Maxwell v The Queen*, Gaudron and Gummow JJ held that 'conviction only occurs when the court does some act which indicates that it has determined guilt or, which is the same thing, that it has accepted that the accused is criminally responsible for the offence in question'.[308] Similarly, Dawson and McHugh JJ held that '[I]t is the disposal of the case which results in the judgment of the court embodying a determination of guilt.'[309]

The Department's Refugee Law Guidelines indicate that decision-makers should not generally question the correctness of a conviction made by a court. However, 'further guidance' should be sought where there is evidence that the relevant country has a pattern of fabricating charges and convictions and the applicant may be affected, or if there is country information questioning the competency of the courts or the corruptibility of relevant officials.[310] The Guidelines also caution decision-makers against making a finding on s 36(1C)(b) until sentencing is completed and the outcome of any appeal is known, noting that an appeal may relate to various aspects of a criminal matter.[311] Conversely, if no appeal against the conviction has been made, and the period within which an appeal may be made in that jurisdiction has lapsed, the judgment may be considered 'final'.[312]

The Guidelines indicate that where the presiding judicial officer or a jury finds that the person accused of a crime is not guilty by reason of mental illness, or the person is found unfit to stand trial, there is no 'conviction' for the purposes of s 36(1C)(b).[313]

Meaning of 'particularly serious crime'

For protection visa applications made prior to 16 December 2014, for the purposes of the Act and the Regulations, s 91U[314] specifies that a reference to a 'particularly serious crime' in art 33(2) includes a reference to a crime that consists of the commission of a 'serious Australian offence' or a 'serious foreign offence'. A similar specification is contained in s 5M of the Act in respect of the reference to 'particular serious crime' in s 36(1C)(b), applicable to protection visa applications made on or after 16 December 2014. This definition is also effectively reflected in the terms of s 36(2C)(b)(ii) which identifies a 'particularly serious crime' as including a 'serious Australian offence' or a 'serious foreign offence'.

Both 'serious Australian offence' and 'serious foreign offence' are further defined in s 5(1) of the Act.[315]

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308 *Maxwell v The Queen* (1996) 184 CLR 501 at 531
309 *Maxwell v The Queen* (1996) 184 CLR 501 at 509, quoting from Lord Reid in *S v Recorder of Manchester* [1971] AC 481 at 488.
310 Department of Home Affairs, Refugee Law Guidelines, section 3.26.1.1, as re-issued 27 November 2022.
311 Department of Home Affairs, Refugee Law Guidelines, section 3.26.1.2, as re-issued 27 November 2022.
312 Department of Home Affairs, Refugee Law Guidelines, section 3.26.1.6, as re-issued 27 November 2022.
313 Department of Home Affairs, Refugee Law Guidelines, section 3.26.1.4, as re-issued 27 November 2022.
314 Inserted by *Migration Legislation Amendment Act (No 6) 2001* (Cth) (No 131 of 2001), and amended by *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011).
315 Both definitions inserted by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121 of 2011), Schedule 1, items 6 and 7, from 24 March 2012. The definitions are in the same terms as that which previously appeared in s 91U.

‘Serious Australian offence’ means:

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

‘Serious foreign offence’ means:

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

In both cases, the offence is characterised not only by its type, but also the severity of the associated penalty. In the case of the serious foreign offence, the penalty is measured by comparison with domestic offences. The term ‘is punishable by’ refers to the maximum penalty prescribed for a particular crime, not the penalty that could have been imposed on a particular person or groups of persons, such as a child.[316] Likewise, where an applicant has had an indictable offence dealt with by a court summarily, it seems that the decision-maker is to consider the maximum penalty under the legislation that creates the offence, rather than the legislation that limits the sentence upon the exercise of summary jurisdiction.[317]

Section 5M (and s 91U) does not purport to provide an exhaustive definition of what constitutes a ‘particularly serious crime’.[318] It is possible that other types of crimes may fall within the meaning of ‘particularly serious crime’, depending on the circumstances of the particular case. The introduction of the definition in s 91U was originally aimed at ensuring that certain types of criminal offences which are regarded by the community as being particularly serious are treated as ‘particularly

[316] *AFF20 v MICMSMA* [2022] FCA 1564 at [30]–[31]; Department of Home Affairs, Refugee Law Guidelines, sections 3.26.1.5 and 3.26.2.2, as re-issued 27 November 2022. The Guidelines note that the fact the person who committed the offence was a minor will be a relevant consideration when evaluating whether that person is a danger to the community of Australia.
[317] *AFF20 v MICMSMA* [2022] FCA 1564 at [30]–[31]; Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.2, as re-issued 27 November 2022. The Guidelines also indicate that if an indictable offence is dealt with summarily it will usually indicate that the circumstances of the offence are in the lesser range of offending, and that the circumstances that led to the offence being dealt with summarily will be relevant in considering whether the person is a danger to the community of Australia.
[318] *AFF20 v MICMSMA* [2022] FCA 1564 at [45].

serious crimes' for the purpose of art 33(2).[319] It was not intended to affect the requirement that a person must be convicted by final judgment of a particularly serious crime and must be assessed as representing a risk to the community in order to be excluded from protection.[320]

Judicial consideration of the meaning of the phrase 'particularly serious crime' is limited.[321] The Federal Court has suggested that the decision-maker needs to consider not only the crime itself, but the circumstances surrounding its commission.[322]

Violence against a person

A particularly serious crime includes offences which 'involve violence against a person'. The ordinary meaning of 'violence' includes: 'rough force or action', 'rough or injurious treatment or action', and 'any unjust or unwarranted exertion of force or power, as against rights, laws, etc.; injury; wrong; outrage'.[323] The World Health Organization defines violence as: 'the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.'[324]

The Refugee Law Guidelines state that a threat that involves putting a person in fear of immediate and unlawful personal violence may constitute a crime 'involving violence against a person', and that such offences may include stalking and traffic offences that involve a person engaging in a course of conduct with an intention to cause a person in another vehicle actual bodily harm. However, drink driving, speeding, negligent or reckless driving may not constitute a 'particularly serious crime' given the lack of intention to cause harm.[325]

The Guidelines state that the offence of people smuggling will not normally come within the meaning of 'particularly serious crime', but that the aggravated offence of people smuggling that also has the offence of subjecting a victim to cruel, inhuman or degrading treatment[326] will be an offence that 'involves violence against a person'.[327]

Serious drug offences

According to the Refugee Law Guidelines, generally drug related crimes that are summary offences (as opposed to indictable offences dealt with summarily) - such as possession of prohibited drugs without lawful authority, possession of equipment for the administration of prohibited drugs, and obtaining prescriptions by false representation - will not constitute 'serious drug offences'. Conversely, offences involving cultivation or possession of a commercial quantity or trafficable quantity of 'prohibited drugs' or 'drugs of dependence' will amount to serious drug

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[319] Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No 6) 2001 (Cth).
[320] Revised Explanatory Memorandum to the Migration Legislation Amendment Bill (No 6) 2001 (Cth).
[321] See *MIMIA v Betkhoshabeh* [1999] FCA 980, *A v MIMIA* [1999] FCA 227 and *Vabaza v MIMIA* (Federal Court of Australia, Goldberg J, 27 February 1997).
[322] *Betkhoshabeh v MIMA* (1998) 84 FCR 463 at 467, followed in *Betkhoshabeh v MIMA* [1999] FCA 16. Compare *Vabaza v MIMIA* (Federal Court of Australia, Goldberg J, 27 February 1997). The Full Court in *MIMA v Betkhoshabeh* [1999] FCA 980 found it unnecessary to consider the issue.
[323] Macquarie Dictionary Online, accessed 25 January 2023.
[324] E G Krug, L L Dahlberg, J A Mercy, A B Zwi and R Lozano (eds), *World report on violence and health* (World Health Organization, Geneva, 2002), p 5.
[325] Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.1, as re-issued 27 November 2022.
[326] As per s 233B(1) of the Act.
[327] Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.1, as re-issued 27 November 2022.

offences. The offence of supply of drugs causing death is an offence that may be construed as either 'involving violence against a person' or as a 'serious drug offence'.[328]

Serious damage to property

The ordinary meaning of 'damage' is 'injury or harm that impairs value or usefulness',[329] and the Refugee Law Guidelines state that 'serious' connotes 'something that is significant rather than slight'. The Guidelines state that the damage done must bring about an alteration to the physical integrity of the property rather than merely impede its use.[330] Citing case law, the Guidelines state that arson and insurance fraud involving the destruction of a motor vehicle may amount to crimes that involve serious damage to property, whereas damage to a vehicle described as 'not badly damaged', and deliberately blocking toilets in criminal detention may not be.[331]

Immigration detention offences

Escaping from immigration detention (s 197A), and the manufacture, possession, use or distribution of a weapon[332] in immigration detention by a detainee (s 197B), are also 'serious Australian offences' as defined in s 5(1).

Danger to the community

The second element of the second limb of art 33(2), which is also reflected in ss 36(1C)(b) and 36(2C)(b)(ii), is that the person constitutes a danger to the community of the host country. This element has been considered in several Federal Court judgments and an AAT decision, although each has approached it from a slightly different perspective.

In *DMQ20 v MICMSMA*, the Full Federal Court considered the meaning of the terms 'danger' and 'the Australian community' in the context of s 36(1C)(b). In a joint judgment, Thomas and Snaden JJ referred to the difficulty in precisely defining what does and does not constitute 'danger'. Their Honours held that 'it is a concept without technical meaning that falls for consideration under the light of the whole of the relevant facts and circumstances that present in any given matter.'[333] Nonetheless, their Honours commented that it is likely that Parliament intended that it should involve harm of 'non-trivial kinds', and that 'the likelihood…or certainty…that a person might cause others to feel anxious, offended, embarrassed, miserable or despondent is unlikely to suffice. "Danger" implies a prospect (howsoever measured) of injury (at least), most likely of physical or psychological kinds.'[334] They concluded that '[a] finding that somebody poses a real, significant, serious and present risk of visiting physical harm very squarely suffices to establish that they constitute a "danger" for the purposes of s 36(2C)(b).'[335]

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328 Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.1, as re-issued 27 November 2022.
329 Macquarie Dictionary Online, accessed 27 January 2023.
330 Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.1, as re-issued 27 November 2022, citing *Grajewksi v Director of Public Prosecutions (NSW)* (2019) 264 CLR 470.
331 Department of Home Affairs, Refugee Law Guidelines, section 3.26.2.1, as re-issued 27 November 2022.
332 'Weapon' is defined in s 197B(2)
333 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [118] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159).
334 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [111]. This reasoning was subsequently adopted by the Full Federal Court in *SLGS v MICMSMA* [2023] FCAFC 104: at [1], [82], [92].
335 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [120] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL

In a separate judgment in *DMQ20*, Rares J commented that in the context of art 33(2) and s 36(1C)(b), a danger 'conveys a threat of a substantial kind to Australia's security or the Australian community', and that it 'connotes that there are reasonable grounds to perceive a threat of serious, or potentially serious, consequences if the situation said to pose the danger were ignored'.[336] His Honour held that art 33(2) or s 36(1C)(b) apply where there are reasonable grounds for regarding (or considering) that the person 'poses a serious threat of causing substantial, rather than negligible, harm because he or she would, or be likely to, commit a crime or crimes or act in such a way that offended significant social norms in that society.'[337]

Other Federal Court judgments have confirmed that the standard of 'danger' does not rise to the level of 'very serious danger'[338] or import notions of 'exceptional criminality' or 'most serious criminality'.[339]

In *DMQ20* the appellant's contention that 'the Australian community' ought to be understood as a reference to the community collectively or as a whole, rather than to one or some of the individuals who comprise it, was rejected by the Full Court. Justices Thomas and Snaden jointly held that the term is 'apt to encompass any and all members of the population of Australia'[340], and Rares J commented that '[a] particularly serious crime…has a potential to impact on and adversely affect the whole community, even though there may be only a single individual victim of the offending conduct.'[341]

Further guidance about the application of art 33(2), s 36(1C)(b) and s 36(2C)(b)(ii) can be found in the *obiter* comments of the AAT's General Division in *WKCG and MIAC* and in the judgment of Logan J in *DOB18 v MHA*.[342] In *WKCG*, Tamberlin J, sitting as a Deputy President of the AAT, held that in assessing whether a danger to the community exists it will be sufficient if there is 'a real or significant risk or possibility of harm to one or members of the Australian community'.[343] Having regard to the expression 'danger' used in art 33(2), probability of harm was considered by the Tribunal to be too high a threshold.[344] As summarised by the Full Federal Court in *FSKY v MICMA*,[345] the Tribunal also found that:

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159).

336 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [52], [54] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159).

337 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [67] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159). In *SLGS v MICMSMA* [2023] FCAFC 104, Rares J stated that '[a]lthough I adhere to the construction of s 36(1C)… that I gave in *DMQ20*…, to the extent that this differed from that of Thomas and Snaden JJ, I consider that those reasons must now be applied': at [1].

338 *LKQD v MICMSMA* [2019] FCA 1591 at [62]. The Court noted the interpretation of 'danger' of Logan J in *DOB18 v MHA* (2019) 269 FCR 636 and the suggestion that this may be inconsistent with *WCKG and MIAC* but did not address this further, as even that standard did not rise to the level of 'very serious danger' submitted on behalf of the applicant in *LKQD*.

339 *WGKS v MICMSMA* [2020] FCA 1060 at [25].

340 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [127] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159). See also [144], [151]. This reasoning was subsequently adopted in *SLGS v MICMSMA* [2023] FCAFC 104, with the Full Federal Court finding that in terms of the object of the danger, 'it is the Australian community conceived of as the community as a whole and/or any person or persons who are part of it': at [83]. See also [1], [82], [92].

341 *DMQ20 v MICMSMA* [2023] FCAFC 84 at [58] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159).

342 *WKCG and MIAC* (2009) 110 ALD 434 at [25]–[31]; *DOB18 v MHA* (2019) 269 FCR 636 at [72]–[87] (application for special leave to appeal dismissed: *DOB18 v MHA* [2019] HCASL 331).

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

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

345 *FSKY v MICMA* [2023] FCAFC 2 at [41].

a. The question of whether a person constitutes a 'danger to the Australian community' is one of fact and degree, and in deciding this question regard must be had to all of the circumstances of each individual case;[346]

b. The person's criminal record must be considered as a whole and their prospects of rehabilitation must be assessed;[347]

c. Relevant considerations include the seriousness and nature of the crimes committed, the length of the sentence(s) imposed, and any mitigating and aggravating circumstances. The extent of the criminal history is relevant as is the nature of the prior crimes, together with the period over which they took place;[348]

d. The risk of re-offending and recidivism and the likelihood of relapsing into crime is a primary consideration, which involves a consideration of the person's previous general conduct and total criminal history;[349]

e. The assessment, which includes future conduct, involves a consideration of character and the possibility or probability of any threat which could be posed to a member or members of the Australian community;[350]

f. Once it is found that the person has been convicted of a particularly serious offence, it is then necessary to consider separately whether the person constitutes or is a danger to the Australian community;[351]

g. Whilst the nature and circumstances of the conviction(s) will be highly relevant to the question as to whether the person can be described as being a 'danger', it is not conclusive and it will be necessary to look at the person's conduct in light of all the circumstances that have occurred up to the time of making the tribunal decision;[352] and

h. It is not necessary to establish that there is a probability of a real and immediate danger of present harm – the provision seeks to protect the community from both immediate harm and harm in the reasonably foreseeable future.[353]

The 'multifactorial assessment of considerations' articulated in *WKCG* was expressly approved by the Full Federal Court in *FSKY v MICMA* in the context of a Tribunal decision concerning the

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346 *WKCG and MIAC* (2009) 110 ALD 434 at [25].
347 *WKCG and MIAC* (2009) 110 ALD 434 at [26].
348 *WKCG and MIAC* (2009) 110 ALD 434 at [26].
349 *WKCG and MIAC* (2009) 110 ALD 434 at [26]–[27]. As stated in the Refugee Law Guidelines, the question to be addressed is not whether a person is likely to re-offend, but whether the likelihood of re-offending involves criminal behaviour that would be a danger to the Australian community: Department of Home Affairs, Refugee Law Guidelines, section 3.26.3.1, as re-issued 27 November 2022.
350 *WKCG and MIAC* (2009) 110 ALD 434 at [26].
351 *WKCG and MIAC* (2009) 110 ALD 434 at [29].
352 *WKCG and MIAC* (2009) 110 ALD 434 at [29].
353 *WKCG and MIAC* (2009) 110 ALD 434 at [31]. In *DOB18 v MHA* (2019) 269 FCR 636, the Federal Court held that 'the satisfaction must be that the person is and will into the *indefinite future* be a danger' (emphasis added): at [75], see also [88] (application for special leave to appeal dismissed: *DOB18 v MHA* [2019] HCASL 331). Purportedly quoting from *DOB18*, the Refugee Law Guidelines also refer to the need for decision-makers to determine whether the applicant is at 'present and for the indefinite future' a danger to the Australian community: Department of Home Affairs, Refugee Law Guidelines, section 3.26.3, as re-issued 27 November 2022. Although the Tribunal's comments in *WCKG* were cited with approval in *FSKY v MICMA* [2023] FCAFC 2, this issue was not squarely addressed by the Full Federal Court and therefore there remains some uncertainty as to whether the danger must exist for the 'reasonably foreseeable future', or the 'indefinite future', although in a practical sense little may turn on this distinction.

application of s 36(1C)(b).[354] The Court held that this assessment is 'an intrinsically evaluative task' that 'is not susceptible to a great explication of the calibration of risk up and down according to each factor', and that 'the decision-maker's task does not involve "moving discs on an abacus" but rather comprises a "melting pot" in which all factors, by instinctive synthesis, are given consideration.'[355]

The considerations set out at (a) - (e) above were also accepted by Logan J in *DOB18 v MHA* as pertinent to the consideration of s 36(1C)(b).[356] However, his Honour considered in *obiter* that the expression 'danger' in s 36(1C) was unlikely to refer 'to a risk that is discernible but which is trivial, nothing more than a bare possibility', but means 'present and serious risk' and carries a narrower and more restrictive meaning than just 'risk'. His Honour disagreed with the observations made in *WKCG* about 'danger' to the extent that it might be thought to suggest otherwise.[357] His Honour clarified that a finding that there is a 'danger' is necessarily a conclusion based on an assessment of the present 'level of risk', however the word 'danger' does not carry a meaning that differs from case to case, but is fixed. Whether it is present in respect of a person applying for a protection visa will depend on the circumstances of a given case.[358]

In *WGKS v MICMSMA*, the Federal Court held that two parts of the test posed in s 36(1C)(b) (i.e. the conviction for a 'particularly serious crime' and the danger to the Australian community) are not related in any proportionate or balancing way.[359] The Court held that whether there are reasonable grounds for finding an applicant is a danger to the Australian community will be fact-specific in each case, and that it does not necessarily follow that because a person has a conviction for a 'particularly serious crime' there are reasonable grounds to consider that the person is a 'danger to the Australian community'. In some cases, the nature of the 'particularly serious crime' may be sufficient in itself for a decision-maker to consider on reasonable grounds that the person is a danger to the Australian community, but in other cases it may not.[360] It is likely that the Court's reasoning would apply equally in respect of the very similarly worded provisions in art 33(2) and s 36(2C)(b)(ii)).[361]

It is important to note that in the Full Court judgment in *DMQ20*, Rares J held that the primary judge in that case had correctly found that the relevant observations in *WKCG* and *DOB18* were

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354 *FSKY v MICMA* [2023] FCAFC 2 at [40]–[41]. These principles were also considered with apparent approval by the Federal Court in *EWG17 v MIBP* [2018] FCA 1536 at [52]. See also *LKQD v MICMSMA* [2019] FCA 1591, where the Federal Court rejected an argument that the Tribunal erred in following the test in *WKCG*, although it held that the Tribunal erred for failing to consider a claim relevant to that test: at [47] and [50]–[62]. In *SLGS v MICMSMA* [2023] FCAFC 104 the Full Federal Court also commented that the none of the principles arising from the Full Court's judgment in *DMQ20* (and adopted by the Court in *SLGS*) were inconsistent with the approach taken by Tamberlin J, sitting as a Deputy President of the AAT, in *WKCG*: at [1], [85], [92].

355 *FSKY v MICMA* [2023] FCAFC 2 at [65].

356 *DOB18 v MHA* (2019) 269 FCR 636 at [78] (application for special leave to appeal dismissed: *DOB18 v MHA* [2019] HCASL 331).

357 *DOB18 v MHA* (2019) 269 FCR 636 at [72], [83]–[84] (application for special leave to appeal dismissed: *DOB18 v MHA* [2019] HCASL 331).

358 *DOB18 v MHA* (2019) 269 FCR 636 at [87] (application for special leave to appeal dismissed: *DOB18 v MHA* [2019] HCASL 331).

359 *WGKS v MICMSMA* [2020] FCA 1060 at [26].

360 *WGKS v MICMSMA* [2020] FCA 1060 at [25]. See also *EFZ21 v MICMSMA* [2022] FCA 1033, where the Federal Court held that in circumstances where the Tribunal was plainly aware of the details of the applicant's offending and the sentences imposed, it was not necessary for it to ascribe a particular degree or level of seriousness to the applicant's offending in considering whether he was a danger to the Australian community: at [51].

361 See also the decision of the AAT in *WKCG and MIAC* (2009) 110 ALD 434, where the Tribunal rejected submissions that the particular offences for which the person has been convicted must always somehow be causally linked to the type of danger to the community (at [29]).'

both *dicta*, could not be said to conclusively define the meaning of 'danger to the Australian community' and do no more than provide guidance in respect of the ordinary meaning of the words in s 36(1C)(b) (or art 33(2) or s 36(2C)(b)(ii)).[362] However, none of the judges in *DMQ20* expressly referred to *LQKD*, *FSKY* or *WGKS* (as discussed above) and there does not appear to be anything arising from the reasoning or findings in *DMQ20* that casts doubt on the correctness or reliability of these other judgments.

Patterns of offending, mitigating and aggravating circumstances

The Department's Refugee Law Guidelines indicate that decision-makers should consider an applicant's pattern of offending when looking at the totality of that person's criminal history. Where there are common pleas of mitigating circumstances made across all crimes committed, such as drug or alcohol addiction, the Guidelines suggest this may indicate that the person has done little, if anything, to address the underlying issue(s). The Guidelines also indicate that if the person has endeavoured to address the pattern of behaviour it may lead to an inference that the person may not re-offend, or if the person cannot demonstrate any steps taken to change the behaviour, it may lead to an inference the person may re-offend. The pattern of offending will also indicate whether there is escalation in criminal behaviour, pre-meditation or opportunism, and the extent to which the crimes themselves represent a danger to the community. The 'topography' of the offending should be considered, including factors such as:

- whether weapons were involved and/or whether that became a later development;
- whether the offences occurred in company (gangs or other associates);
- relative differences in ages between the perpetrator of the crime and the victims at the time of the commission of the offences; and
- generally, who was involved, what was done, how it was done, and when it was done.[363]

The Guidelines indicate that decision-makers should consider the circumstances surrounding the commission of the crimes and the aggravating and mitigating circumstances, including what the applicant has claimed led to the offending and what matters the court has taken into account in determining sentencing. The Guidelines state that a mitigating circumstance, such as being a member of a neighbourhood gang when young, may also be an aggravating circumstance. In such an example, the issue for the decision-maker to address will be the applicant's age and life situation at the time of offending, whether those associations have continued or discontinued, and what relationships the applicant has formed since that time.[364]

Previous criminal sentences and sentencing remarks

The Refugee Law Guidelines suggest that a sentence that does not include a period of imprisonment is a likely indicator that the court did not view the applicant as posing any real danger to the community. The Guidelines indicate that if the court did not impose a term of imprisonment

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[362] *DMQ20 v MICMSMA* [2023] FCAFC 84 at [23], referring to the primary judge's comments in *DMQ20 v MICMSMA* [2022] FCA 514 at [38] (application for special leave to appeal dismissed: *DMQ20 v MICMSMA* [2023] HCASL 159). The other judges of the Full Court (Thomas and Snaden JJ) did not directly address this point but did cite parts of *WKCG* and *DOB18* without apparent disapproval.

[363] Department of Home Affairs, Refugee Law Guidelines, section 3.26.3.2, as re-issued 27 November 2022.

[364] Department of Home Affairs, Refugee Law Guidelines, section 3.26.3.3, as re-issued 27 November 2022.

for earlier convictions but did so for later crimes, this may suggest that the court believes re-offending is more likely.[365]

The Guidelines also indicate how previous sentencing remarks from a court may set a 'benchmark' from which it may be determined whether the factors prevalent in the commission of the crime still exist, or whether mitigating circumstances were such that it was a relatively isolated crime peculiar to the circumstances at the time. The mitigating circumstances accepted by the court (e.g. alcohol or drug addiction) may also indicate whether those factors are still an issue for the applicant and whether there is a risk of relapse into crime or those factors have been addressed.[366]

[365] Department of Home Affairs, Refugee Law Guidelines, section 3.26.3.4, as re-issued 27 November 2022.
[366] Department of Home Affairs, Refugee Law Guidelines, section 3.26.4, as re-issued 27 November 2022.