

# What constitutes persecution?

Talk by Hugo Storey

# ARTICLE 1A(2) Refugee Convention

A ...The term "refugee" shall apply to any person who:

...

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

[“i anledning av välgrundad fruktan för förföljelse”]

“...[the drafters] capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.”

(A. Grahl-Madsen, *the Status of Refugees in International Law, Volume I – Refugee Character*, Leiden: Sitjhoff, 1966)

- “There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.”(G Goodwin-Gill, *The Refugee in International Law*, 2nd edition,p.69.)

[attempts to define persecution]  
“...could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind”. (V. Türk & F. Nicholson, “Refugee protection in international law: an overall perspective”, in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003 at 39)

# Section 91R of the Migration Act 1958.

## Australia (as amended): **Persecution**

[The Refugee Convention] ...does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
- (b) the persecution involves serious harm to the person; and
- (c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:

- (a) a threat to the person's life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person's capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

# Dictionary definitions

*E.g. in R v Immigration Appeal Tribunal, ex parte Jonah [1985] Imm AR 7, Nolan J sought to define persecution as:-*

“to pursue with malignancy or injurious intent especially to oppress for holding a heretical opinion or belief”.

Hermeneutical definitions: e.g. Article 33 Prohibition of expulsion or return

**No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.**



# 1979 UNHCR HANDBOOK

“51...From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of (Convention grounds) is always persecution. Other serious violations of Human rights - for the same reasons - would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will *depend on the circumstances of each case*, including the subjective element to which reference has been made in the preceding paragraph...”

In 2002 Erika Feller, UNHCR's then Director of International Protection wrote:

- “Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin”.

# 2003 Alice Edwards

“[a]s there is no internationally accepted definition of what constitutes ‘persecution’; it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law” .

(A. Edwards, “Age and gender dimensions in international refugee law”, in E. Feller, V. Türk & F. Nicholson (eds.), in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003 , *supra* n.11 at 50 and 80.)

# Hathaway, Law of Refugee Status, p.112

“In sum persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which have been recognised by the international community”.

....

“...a violation of basic human rights demonstrative of a failure of State protection.”

## Hathaway's four-fold hierarchy of human rights [obligations]

- (i) non-derogable human rights as a set out in the ICCPR;
- (ii) derogable human rights as set out in the ICCPR;
- (iii) economic, cultural and cultural rights as set out in the ICESCR;
- (iv) miscellaneous human rights found in the UDHR not codified in either of the above covenants.

# Article 9(1) QD

“1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;  
or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).”

## **ARTICLE 9(2) QD [non-exhaustive list]**

2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
- (f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.”

## CJEU Joined Cases C-199/12,C-200/12, C-201/12

*X, Y and Z:-*

53...“for a violation of fundamental rights to constitute persecution within the meaning of Article 1(a) of the [Refugee] Convention, it must be sufficiently serious. Therefore not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness.”

55...“the mere existence of legislation criminalising homosexual acts could not be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive”.



- Swedish Migration Court of Appeal case MIG 2008:21, 23 May 2008 (stateless Kurd from the group Maktumin)

- Joined Cases C-71/11 and C-99/11 *Y and Z*, cases concerning religious persecution
- 7 November 2013 it gave judgment in Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, cases concerning gay concealment

## ***Approaches to definition***

*The search for a definition of “being persecuted” and other key terms in Article 1A(2) and elsewhere in the 1951 Refugee Convention must be a search for a common universal meaning and must be informed by a holistic approach which understands that key terms – persecution and protection in particular - are interdependent.*

*Persecution is to be understood as severe violations of international law norms, in particular international human rights norms.*

*Persecution consists in acts that are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights; or that are an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner. This formulation may also serve as a short (or shorthand) definition of the term.*

*Persecution can arise even if the violations of human rights concerned are not “sustained” “systematic” or “systemic” or “persistent”*

# ***Modalities***

*Actors of persecution can be either State or non-State actors.*

*There is no requirement of persecutory intent.*

*Actors of protection can be State or de facto State entities.*

*In order to meet the refugee definition it is not necessary to show that the well-founded fear is of persecution countrywide. Conversely, establishing a well-founded fear of persecution in one's home area will not make one a refugee unless internal relocation to another part of the country is not a viable alternative.*

# *Temporal dimensions*

*Article 1A(2) imposes a requirement of current persecution: it poses the hypothetical question of whether, if return were to take place now (ex nunc), persecution would arise.*

*It is a logical corollary of the focus in Article 1A(2) on current fear of persecution that a person can have such a “sur place” fear, i.e. a fear arising out of events or his own actions that have occurred since departure from the country of origin.*

*Past persecution does not in itself constitute “being persecuted”, but the fact that an applicant has already been subject to persecution is a serious indication of such, unless there are good reasons to consider that such persecution will not be repeated.*

# ***Material scope***

*Persecution encompasses both physical and mental forms of serious harm.*

*Persecution can include indirect persecution, e.g. through serious harm caused to family members.*

*Persecution can consist in violations of basic socio-economic rights.*

*Depending on the societal context, laws which fail to conform to basic international human rights standards can be instruments of persecution.*

*Laws may also constitute persecution if applied in a discriminatory or disproportionate way.*

*Prosecution only becomes persecution if likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial (the test of flagrant denial).*

*Persecution can take specific forms, including gender-specific, child-specific, “LGBTI”-specific and disability-specific forms.*

# *Personal scope (1)*

*Assessing whether a person has a well-founded fear of being persecuted requires a person-specific or individualized approach.*

*Well-founded fear of being persecuted denotes an objective test in which fear is understood as a forward-looking expectation of risk.*

*Persecution can be actual or attributed: whether there is a well-founded fear of being persecuted is a matter to be approached from the perspective of the persecutor.*

# ***Personal scope (2)***

*Voluntary action can give rise to a well-founded fear of persecution where it consists in the exercise of basic human rights. If an applicant's actions will infringe the human rights of others, then, at least in some categories of cases, those actions will not necessarily amount to him "being persecuted".*

*A person cannot be expected to take voluntary action to avoid persecution if to do so would infringe their basic human rights. A person who may avoid persecutory harm by behaving discreetly will be at risk of persecution if one of the reasons for so behaving is fear of persecution.*

*In deciding whether contrived sur place persecution amounts to persecution there is no requirement of good faith.*

*"Being persecuted" does not require being "singled-out".*

*The fact that assessment of persecution must examine individual circumstances does not preclude group-based persecution.*



# ***International law context***

*The human rights approach to persecution must be complemented, where relevant, by norms drawn from international law, including humanitarian law (IHL).*