

## Nexus to civil or political status

The text of the Refugee Convention requires that a person's well-founded fear of being persecuted be "for reasons of" an enumerated ground: race, religion, nationality, membership of a particular social group, or political opinion.<sup>1</sup> Under the Convention, if the peril a claimant faces – however wrongful it may be – cannot somehow be linked to her civil and political status and resultant marginalization, the claim to refugee status must fail.<sup>2</sup> Put succinctly, refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of being persecuted in her home state.<sup>3</sup> 5

In practice the corollary is that many involuntarily displaced persons do not fall within the ambit of the Refugee Convention. As recognized by the drafters,

[t]he text . . . obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, flood, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion, or political opinion. Nor did the text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by Article 1 of the Convention.<sup>4</sup>

The ethical basis for the nexus criterion may be questioned given that the human consequences for a person at risk of detention due to her ethnicity are identical to those confronting a person at risk of detention due to indiscriminate oppression.<sup>5</sup> But given the perception of states that global asylum capacity is insufficient to accommodate all those who would be likely to advance refugee claims based simply on the risk of serious harm, 10

<sup>1</sup> Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 ("Refugee Convention" or "Convention"), at Art. 1(A)(2).

<sup>2</sup> The harshness of this result is attenuated to some extent by express and implied *non-refoulement* obligations derived from international human rights treaties: see in general J. McAdam, *Complementary Protection in International Refugee Law* (2007).

<sup>3</sup> This analysis in J. C. Hathaway, *The Law of Refugee Status* (1991) ("*Refugee Status*"), at 137, was adopted by the New Zealand Refugee Status Appeals Authority in *Re GJ*, 1312/93, [1998] INLR 387 (NZ RSAA, Aug. 30, 1995), at [56]–[57]; see also *Refugee Appeal No. 71427/99*, [2000] NZAR 545 (NZ RSAA, Aug. 16, 2000), at [104].

<sup>4</sup> Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.22 (Jul. 16, 1951), at 6. See also *Ward v. Canada (Attorney General)*, [1993] 2 SCR 689 (Can. SC, Jun. 30, 1993), at 732: "the international community did not intend to offer a haven for all suffering individuals," and *Fornah v. Secretary of State for the Home Department*, [2007] 1 AC 412 (UKHL, Oct. 18, 2006), at 462 [97], per Baroness Hale: "Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven."

<sup>5</sup> This discussion draws on J. C. Hathaway, "Is Refugee Status Really Elitist? An Answer to the Ethical Challenge," in J.-Y. Carlier and D. Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997) 79.

the need for a principled limiting criterion becomes clear. The non-discrimination principle that underpins the nexus clause is a core value at the heart of the international system of human rights protection. It thus represents a principled and sound means of drawing a regrettably necessary distinction since it identifies those potential human rights victims who are fundamentally marginalized in their state of origin.

The dilemma, though, is that while the non-discrimination principle itself remains meaningful, its precise formulation in terms of civil or political status (race, religion, nationality, membership of a particular social group, or political opinion) may be unduly anchored in a particular era. While seen by the drafters of the Convention as sufficiently inclusive to meet the claims of all known European refugees at the close of the Second World War,<sup>6</sup> these categories may be thought inadequate to capture the spectrum of disfranchisement today. But in truth, and notwithstanding the particular historical context which led to the linkage between refugeehood and civil or political status, the analysis which follows shows that it is possible for a liberal interpretation of the five enumerated grounds to sustain the Convention’s vitality. In particular, an evolutive approach to the “membership of a particular social group” category which embraces disfranchisement on such bases as gender, sexual orientation, family, age, and disability has been especially critical to the Convention’s ability to remain meaningful to the modern victims of socio-political marginalization.

In this chapter we first explore the meaning of the causal link inherent in the phrase “for reasons of” before analyzing each of the Convention grounds – race, nationality, religion, political opinion, and membership of a particular social group. We set out what we believe to be the most principled approach to defining and interpreting these terms in order to ensure that the Convention is responsive to contemporary refugee flows while remaining true to the non-discrimination norms fundamental to its object and purpose.

### 5.1 “For reasons of”

The key function of the “for reasons of” clause is to establish a link between a risk of being persecuted and one of the Convention grounds. In other words, it is not sufficient to establish that a person is at risk of being persecuted and that she has a Convention-related attribute; there must rather be a causal relationship between the risk of being persecuted and the protected ground.<sup>7</sup> Yet such a simple statement belies the complexity that has bedeviled this area of refugee status determination in recent decades.<sup>8</sup> Before identifying the

<sup>6</sup> “The United States delegation had said before, and must say again, that in its opinion all persons in need of protection at the present time were fully covered by the definition provided in article 1 of the draft Convention”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.166, at 14 (Aug. 22, 1950).

<sup>7</sup> *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), at 240.

<sup>8</sup> As Kirby J. noted in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, (2000) 201 CLR 293 (Aus. HC, Apr. 13, 2000), “[c]ausation bedevils the law in many of its aspects”: at 314 [67]. Legomsky and Rodriguez note that “the refugee definition is inherently indeterminate,” but “perhaps the single greatest source of logical confusion has been the phrase ‘on account of’”: S. Legomsky and C. Rodriguez, *Immigration and Refugee Law and Policy* (5th edn., 2009), at 985 (emphasis in original) (“on account of” being the US statutory equivalent of the phrase “for reasons of” in Art. 1(A)(2) of the Convention). Many courts have commented on the “difficult issue of causation” in the refugee context: see e.g. *Montoya v. Secretary of State for the Home Department*, [2002] EWCA Civ 620 (Eng. CA, May 9, 2002), at [28].

various complex issues inherent in establishing the causal link, we first set out those general principles that have been widely accepted and established.

First, it is not necessary that an applicant for refugee status correctly identify the ground upon which her well-founded fear of being persecuted is based.<sup>9</sup> Consistent with the shared duty of fact-finding in the refugee status determination context,<sup>10</sup> there is a duty to recognize a link to a Convention ground borne out by the evidence notwithstanding that it may not have been specifically adverted to by the applicant.<sup>11</sup> As the Full Federal Court of Australia has explained, the decision-maker “should not limit its determination to the case articulated by an applicant if the evidence it accepts or does not reject raises another possible basis for considering that refugee status arises.”<sup>12</sup> Since the “erroneous rejection of a [refugee status] application could involve risk of death, injury or other serious consequences to the applicant,”<sup>13</sup> a court in exercising its review role “cannot limit attention to the issues and the evidence which the applicant has raised before the tribunal.”<sup>14</sup> For this reason, procedural rules and devices that inhibit the consideration of new Convention grounds at the appellate level risk a violation of the duty of *non-refoulement* where refugee status is improperly denied as a result.<sup>15</sup>

<sup>9</sup> See *Ward* (Can. SC, 1993): “[I]t is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground”: at 745. See also *Suvorova v. Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 443 (Can. FC, Apr. 14, 2009); United Nations High Commissioner for Refugees (“UNHCR”), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) (“*Handbook*”), at [67]; UNHCR, “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs” (Mar. 31, 2010) (“*Guidance Note on Victims of Organized Gangs*”), at [29]. See also text *supra*, Ch. 2, at nn. 189–91.

<sup>10</sup> See *supra* Ch. 2.4.2.

<sup>11</sup> See UNHCR, *Handbook, supra* n. 9, at [67]: “It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect.” See also “The Michigan Guidelines on Nexus to a Convention Ground,” (2002) 23 Mich. J. Intl. L. 211 (“*Michigan Guidelines on Nexus*”), at [3].

<sup>12</sup> *Kalala v. Minister for Immigration and Multicultural Affairs*, (2001) 114 FCR 212 (Aus. FFC, Nov. 12, 2001), at 221 [24], per North and Madgwick JJ. See also *Minister for Immigration and Multicultural Affairs v. Applicant S*, (2002) 124 FCR 256 (Aus. FFC, Aug. 21, 2002), at 270–71 [48]–[54], per North J.; 275 [73], per Stone J. (with whom Whitlam J. agreed); *SDAQ v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 129 FCR 137 (Aus. FFC, May 30, 2003), at 146 [18], 149 [33], and 151–54 [39]–[42]; and *NABE v. Minister for Immigration and Multicultural and Indigenous Affairs (No. 2)*, (2004) 144 FCR 1 (Aus. FFC, Sept. 16, 2004), at 19–20 [61].

<sup>13</sup> *Applicant S* (Aus. FFC, 2002), at 270 [50], per North J., in dissent.

<sup>14</sup> *Ibid.*, at 271 [54], per North J., in dissent. In *Ward* (Can. SC, 1993), the Supreme Court noted that the ultimately successful ground, political opinion, “was not raised as a ground . . . either before the board or the Court of Appeal. It was raised for the first time in this court by the intervener, the United Nations High Commissioner for Refugees”: at 744.

<sup>15</sup> See e.g. *Cordon-Garcia v. Immigration and Naturalization Service*, (2000) 204 F.3d 985 (USCA, 9th Cir., Mar. 3, 2000), in which the US Court of Appeals for the Ninth Circuit held that “[b]ecause Petitioner failed to present her ‘social group’ argument to the BIA, this court is limited to considering only her ‘imputed political opinion’ argument”: at 988, citing *Farhoud v. Immigration and Naturalization Service*, (1997) 122 F.3d 794 (USCA, 9th Cir., May 30, 1997), at 794. In that case the claim was allowed, but the potential for the dismissal of claims on this basis is real. For a more recent example, see *Da Silva v. Attorney General*, (2012) 459 Fed. Appx. 838 (USCA, 11th Cir., Feb. 29, 2012), at 841: “as to the Petitioners’ argument that Da Silva’s persecution was based on her membership in the purported social group ‘family’, the argument was not exhausted before the BIA, and we therefore lack jurisdiction to address it.” See also *Shaikh v. Holder*, (2012) 702 F.3d 897 (USCA, 7th Cir., Nov. 26, 2012), at 902–3.

Second, while a causal connection need only be shown to a single Convention ground, there may well be a causal link to two or more protected grounds.<sup>16</sup> As noted by the Full Federal Court of Australia, the Convention grounds “are not discrete, independent categories but rather categories that can overlap.”<sup>17</sup> For example, a claim by a Nepalese girl from the Dalit caste at risk of sexual enslavement may engage several Convention grounds including gender, age, race, and class.<sup>18</sup> Similarly, Sri Lankan Tamils have been variously understood to hold a well-founded fear of being persecuted for reasons of race, nationality, political opinion, and even membership of a particular social group.<sup>19</sup>

Third, a claim cannot be rejected because the applicant and persecutor share a common protected characteristic.<sup>20</sup> Although “usually persecution is carried out by those who are not members of the persecuted group . . . that is not always so.”<sup>21</sup> Rather, as observed by Lord Rodger in *Fornah*,

[f]or various reasons – compulsion, or a desire to curry favour with the persecuting group, or an attempt to conceal membership of the persecuted group – members of the persecuted group may be involved in carrying out the persecution. Here, for whatever misguided reasons, women inflict the mutilation on other women. The persecution is just as real and the need for protection in this country is just as compelling, irrespective of the sex of the person carrying out the mutilation.<sup>22</sup>

<sup>16</sup> J. C. Hathaway and M. Foster, “The Causal Connection (‘Nexus’) to a Convention Ground,” (2003) 15 Intl. J. Ref. L. 461, at 462, citing *Calado v. Minister for Immigration and Multicultural Affairs*, (1998) 89 FCR 59 (Aus. FFC, Dec. 2, 1998). See also UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, UN Doc. HCR/GIP/06/07 (Apr. 7, 2006) (“*Guidelines on International Protection No. 7*”), at [33], and “Michigan Guidelines on Nexus,” *supra* n. 11, at [4]. The UNHCR *Handbook* noted that “[i]t is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail”: UNHCR, *Handbook*, *supra* n. 9, at [66].

<sup>17</sup> *Calado* (Aus. FFC, 1998), at 67.

<sup>18</sup> M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), at 304–13. The UNHCR *Handbook* notes that: “It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear”: UNHCR, *Handbook*, *supra* n. 9, at [67].

<sup>19</sup> The UNHCR notes that this is often an issue in the context of claims involving sexual orientation and gender identity: “Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status”: *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09 (Oct. 23, 2012) (“*Guidelines on International Protection No. 9*”), at [3].

<sup>20</sup> *Maini v. Immigration and Naturalization Service*, (2000) 212 F.3d 1167 (USCA, 9th Cir., May 19, 2000), at 1174. A good example is persecution of Tamils by the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka: see e.g. *Perampalam v. Minister for Immigration and Multicultural Affairs*, (1999) 84 FCR 274 (Aus. FFC, Mar. 1, 1999).

<sup>21</sup> *Fornah* (UKHL, 2006), at 458 [81].

<sup>22</sup> *Ibid.* See also at 466 [110] (per Baroness Hale): “It cannot make any difference that it [FGM] is practised by women upon women and girls. Those who have already been persecuted are often expected to perpetuate the persecution of succeeding generations, as any reader of *Tom Brown’s Schooldays* knows.”

Fourth, a person may be at risk for one of the Convention reasons notwithstanding that not all persons defined by that ground are at risk.<sup>23</sup> As Lord Steyn noted in *Shah*,

[h]istorically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negating a Convention ground under article 1A(2) would drive a juggernaut through the Convention.<sup>24</sup>

Accordingly, the fact that not all women in a certain country are at risk of being persecuted does not detract from the cogency of a claim by a woman whose gender puts her at risk of harm.<sup>25</sup>

Fifth, the applicant need not in fact possess the relevant Convention-related characteristic; it is rather sufficient that a potential persecutor has attributed, or will attribute, the ground to the applicant.<sup>26</sup> This foundational proposition<sup>27</sup> is neatly encapsulated in Art. 10(2) of the European Union's Qualification Directive:

When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.<sup>28</sup>

<sup>23</sup> As Baroness Hale noted in *Fornah*, “[i]t is well settled that not all members of the group need be at risk. There is nothing in the Convention to say that all members have to be susceptible”: *Fornah* (UKHL, 2006), at 467 [113].

<sup>24</sup> *R v. Immigration Appeal Tribunal; Ex parte Shah*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999), at 644–45 (per Lord Steyn), also noting in support that “[a]fter all, following the New Zealand judgment in *Re GJ* [(NZ RSA, 1995),] I regard it as established that depending on the evidence homosexuals may in some countries qualify as members of a particular social group. Yet some homosexuals may be able to escape persecution because of their relatively privileged circumstances. By itself that circumstance does not mean that the social group of homosexuals cannot exist”: at 644. See also *Sahi v. Gonzales*, (2005) 416 F.3d 587 (USCA, 7th Cir., Jul. 25, 2005).

<sup>25</sup> *Shah* (UKHL, 1999), at 644, per Lord Steyn.

<sup>26</sup> *Ward* (Can. SC, 1993), at [120]. See also *HJ (Iran) v. Secretary of State for the Home Department*, [2011] 1 AC 596 (UKSC, Jul. 7, 2010), at 630–31 [35] (per Lord Hope), 647–48 [82] (per Lord Rodger); *RT (Zimbabwe) v. Secretary of State for the Home Department*, [2012] 3 WLR 345 (UKSC, Jul. 25, 2012), at 363 [53]; *Singh v. Gonzalez*, (2005) 406 F.3d 191 (USCA, 3rd Cir., May 5, 2005), at 196. See also UNHCR, *Handbook*, supra n. 9, at [80]; UNHCR, *Guidelines on International Protection No. 7*, supra n. 16, at [29]; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01 (May 7, 2002) (“*Guidelines on International Protection No. 1*”), at [20]; UNHCR, *Guidelines on International Protection No. 9*, supra n. 19, at [1], [39], and [41]. For a similar proposition in international human rights law, see Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20 (Jul. 2, 2009) (“CESCR General Comment No. 20”), at [16]: “Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).”

<sup>27</sup> *Danian v. Secretary of State for the Home Department*, [2000] Imm AR 96 (Eng. CA, Oct. 28, 1999), at 123, per Buxton L.J.

<sup>28</sup> Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 (Dec. 20, 2011) (“Qualification Directive”), at Art. 10(2).

For example, a persecutor may mistakenly assume that a person holds the same political opinion as a family member, placing her at risk on the basis of a perceived or imputed political opinion.<sup>29</sup> In such a case, as the US Court of Appeals for the Ninth Circuit has recognized, “whether the political opinion is actually held or implied makes little difference when the alien’s life is equally at risk.”<sup>30</sup> Indeed, the claimant may explicitly reject affiliation with the relevant Convention ground, yet nonetheless face a real chance of harm due to its attribution to her. As Lord Rodger explained,

the Nazi period showed all too clearly [that] a secular Jew, who rejected every tenet of the religion and did not even think of himself as Jewish, was ultimately in as much need as any Orthodox rabbi of protection from persecution as a Jew.<sup>31</sup>

Finally, refugee status is not restricted to persons who are members of a political, religious, or other numerical minority. While members of minorities are in practice more commonly exposed to the risk of being persecuted than are persons who are part of majority populations, Chief Justice Gleeson observed in *Khawar* that “[t]here are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur.”<sup>32</sup>

Having set out these well-established propositions, we now turn to two issues that remain difficult. We first address the fundamental question of the function of the nexus clause and, in particular, whether it requires only a causal link or whether something additional – specifically an intention element – is required. We then turn to the question whether it is possible to quantify the strength of the requisite causal connection.

## 5.2 The nature of the causal link

It is well accepted that the “for reasons of” clause requires a causal connection between the risk of being persecuted and one or more Convention grounds. However, there is still some controversy surrounding what precisely is required in order to establish the causal link. Specifically, the difficulty centers on whether the Convention ground must be linked to the intention of the persecutor; to the intention of the persecutor or of the state withholding protection; or whether it is sufficient for there to be a link simply to the applicant’s predicament of being persecuted. We do not suggest that these three options are mutually exclusive categories. After all, in many cases the nexus clause will be straightforwardly satisfied by direct or circumstantial evidence of the persecutor’s intent to harm or of the state’s refusal to protect for a Convention reason. However, in this sub-chapter we take the view that while evidence of intention, either to harm or to withhold protection, is relevant and *sufficient* to satisfy the nexus clause, it is not a *necessary* condition for establishing that the risk of being persecuted is linked to a Convention ground.<sup>33</sup> Rather, the nexus requirement is satisfied

<sup>29</sup> As Anker notes, this issue particularly arises in the context of political opinion: “Imputed political opinions may be based on specific family, organizational, governmental, or personal affiliations”: D. Anker, *Law of Asylum in the United States* (2011), at 309.

<sup>30</sup> *Desir v. Ilchert*, (1988) 840 F.2d 723 (USCA, 9th Cir., Mar. 7, 1988), at 728, cited by Anker, *ibid.*, at 306.

<sup>31</sup> *HJ (Iran)* (UKSC, 2010), at 646 [79].

<sup>32</sup> *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 210 CLR 1 (Aus. HC, Apr. 11, 2002), at 13–14 [33].

<sup>33</sup> For a similar articulation of the point, see G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn., 2007), at 100–2.



where the applicant's predicament – the reason for exposure to her well-founded fear of being persecuted – is linked to a Convention ground.

### 5.2.1 *Intention of the persecutor*

In many refugee claims a persecutor's intention to harm for a Convention reason is self-evident or easily ascertainable and hence satisfies, in a straightforward manner, the nexus requirement. When an applicant has been subjected to past persecution, evidence of intent may be available: for example, where homophobic or racially inspired insults or taunts were uttered in the course of inflicting harm.<sup>34</sup> Alternatively, other circumstantial evidence, including the location and timing of attacks – for example where a person was attacked on leaving church or participating in a political rally – may indicate the Convention reason for the harm. Where an applicant has not suffered previous persecution, evidence of others similarly situated may provide proof of the Convention reason for the applicant's well-founded fear of being persecuted,<sup>35</sup> or country condition reports may suggest relevant institutionalized or widespread discrimination against certain groups that make clear why the applicant is at risk.<sup>36</sup> Accordingly, establishing nexus via persecutory intent may be straightforward. The question, however, is whether this *sufficient* condition for satisfying nexus is appropriately elevated into a *necessary* one.<sup>37</sup>

In some jurisdictions, courts have explicitly taken the view that *only* the persecutor's intention can supply the link to a Convention ground. In the leading US decision of *Elias-Zacarias*, for example, the Supreme Court determined that the language of nexus in the relevant statute “makes motive critical”;<sup>38</sup> hence it is not possible to establish a successful refugee claim unless an applicant can proffer direct or circumstantial evidence of the persecutor's motive.<sup>39</sup> Similarly, in a frequently cited decision of the Full Federal Court of Australia, the court explained that in its view,

<sup>34</sup> See e.g. *Maldonado v. Attorney General*, (2006) 188 Fed. Appx. 101 (USCA, 3rd Cir., Jul. 18, 2006), where the court found the homophobic language used by the police and their targeting of the applicant only when he left gay discos made it “clear that the police were motivated by Maldonado's sexuality”: at 104.

<sup>35</sup> See Anker, *supra* n. 29, at 274, citing US Citizenship and Immigration Services Instructions on this issue.

<sup>36</sup> *Ibid.* See *supra* Ch. 2.5.

<sup>37</sup> In *NACM of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 134 FCR 550 (Aus. FC, Dec. 22, 2003), Madgwick J. of the Australian Federal Court noted, in relation to intention, that “[b]ecause this is a sufficient condition of refugee status associated with political opinion, it is often stated, in one form or another, as if it were a necessary condition”: at 561 [50].

<sup>38</sup> *Immigration and Naturalization Service v. Elias-Zacarias*, (1992) 502 US 478 (USSC, Jan. 22, 1992).

<sup>39</sup> Hathaway and Foster, *supra* n. 16, at 463. It is said that because “the statutory definition makes the motive for persecution ‘critical’, an applicant ‘must provide *some* evidence of it, direct or circumstantial””: *Mambwe v. Holder*, (2009) 572 F.3d 540 (USCA, 8th Cir., Jul. 16, 2009), at 545 (emphasis in original), and that “the motive of those engaging in oppressive actions is a ‘critical’ element of the asylum laws”: *Kholyavskiy v. Mukasey*, (2008) 540 F.3d 555 (USCA, 7th Cir., Aug. 28, 2008), at 574. See also US Department of Homeland Security, “Asylum Officer Basic Training, *Female Asylum Applicants and Gender-Related Claims*” (Mar. 12, 2009) (“*Training Guidelines on Gender*”), at 26: “the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics.” For a discussion of the pre-*Elias* position, see Anker, *supra* n. 29, at 268–69. For a critique of *Elias-Zacarias*, see K. Musalo, “Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms,” (1994) 15 Mich. J. Intl. L. 1179.

[p]ersecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.<sup>40</sup>

Although the Qualification Directive employs neutral language in this regard, requiring only that there be “a connection,”<sup>41</sup> which might be said not to “require a form of intent on behalf of the persecutor,”<sup>42</sup> the German Federal Administrative Court has, like the American and Australian courts, held that persecution “requires that the conduct must aim to violate a protected legal right.”<sup>43</sup>

A fixation with the persecutor’s intentions as the *exclusive* method of establishing nexus has led to three key problems in practice.

First, it initially evolved in some jurisdictions – particularly Australia and the United States – into an “intention plus animosity” requirement, such that where a persecutor’s motives did not display “any malignity, enmity or other adverse intention towards [the applicant],”<sup>44</sup> refugee status was denied. Hence, for example, the claim of a Russian lesbian was rejected at first instance because, although she had been “subjected to involuntary psychiatric treatments, the militia and psychiatric institutions intended to ‘cure’ her, not to punish her.”<sup>45</sup> Such an extreme view of the nexus criterion has, however, been reined in

<sup>40</sup> *Ram v. Minister for Immigration and Ethnic Affairs*, (1995) 130 ALR 213 (Aus. FFC, Jun. 27, 1995), at 568. See also *De Silva v. Minister for Immigration*, (2000) 98 FCR 364 (Aus. FFC, Jun. 9, 2000), at 369 [12]; *Minister for Immigration and Multicultural and Indigenous Affairs v. SZANS*, (2005) 141 FCR 586 (Aus. FFC, Mar. 17, 2005), at 593 [42].

<sup>41</sup> Qualification Directive, *supra* n. 28, at Art. 9(3).

<sup>42</sup> Battjes concludes as such: H. Battjes, *European Asylum Law and International Law* (2006), at 255. Although Hailbronner, *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (2010) notes that the Commission explained in relation to the draft Directive “that acts must be intentional, sustained or systematic”: at 1078.

<sup>43</sup> 10 C 52.07 (Ger. BverwG [German Federal Administrative Court], Jan. 19, 2009), at [22] (unofficial translation). The court went on to state: “Targeting refers not only – as the court below appears to believe – to the characteristics relevant for asylum, or in the present case to the reasons for persecution within the meaning of Article 10 of the Directive”; thus affirming this position of intent. This appears to be inconsistent with an earlier decision of the Federal Constitutional Court in which the court “reasoned that the administrative courts, by looking into the motives of the Syrian authorities for arresting and detaining the applicant, had applied the wrong standard. The motivation of the (persecuting) authorities was not relevant for asylum purposes: political persecution existed when the persecutory acts were linked to certain characteristics of the victims, such as race, religion, membership in a social group, nationality or political opinion”: 2 BvR 525/90 (Ger. BverfG, Dec. 7, 1990), reported as Abstract No. IJRL/0098, (1992) 4 Intl. J. Ref. L. 94, at 95. See also Written Submission on Behalf of the UNHCR in the Court of Appeal (Dec. 21, 2000), in *Sepe v. Secretary of State for the Home Department*, [2001] Imm AR 452 (Eng. CA, May 11, 2001), reproduced in K. Musalo, J. M. Moore, and R. A. Boswell, *Refugee Law and Policy* (3rd edn., 2007), at 338–39, where the UNHCR also discusses this position taken by the German Federal Constitutional Court in 2 BvR 478, 962/86, 130 ILR 571 (Ger. BverfG, Jul. 1, 1987). The Austrian Administrative Court appears to have adopted a different approach in *M v. Independent Federal Asylum Board (UBAS)*, 2006/19/0082 (Au. VwGH, Aug. 24, 2007), where it held that persecution “need not at all be caused, not even ‘centrally intended,’ by any governmental or social authorities” (unofficial translation).

<sup>44</sup> This was the decision of the Refugee Review Tribunal in *Chen Shi Hai v. Minister for Immigration*, as described in the judgment of Gleeson C.J., Gaudron, Gummow, and Hayne JJ. in *Chen Shi Hai* (Aus. HC, 2000), at 297 [7].

<sup>45</sup> *Pitcherskaia v. Immigration and Naturalization Service*, (1997) 118 F.3d 641 (USCA, 9th Cir., Jun. 24, 1997), at 645, finding reviewable error in the decision below, quoted here.



by appellate courts, recognizing that persecution “may be carried out coolly, efficiently and with no element of personal animus directed at its objects”;<sup>46</sup> indeed it may “result from the highest of motives, including an intention to benefit those who are its victims.”<sup>47</sup> For example, US Guidelines now provide that

the inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such . . . A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic.<sup>48</sup>

As explained by the US Court of Appeals for the Ninth Circuit, “[h]uman rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”<sup>49</sup> In any event, the malignancy requirement makes no sense in the many cases where harm is inflicted not by individual actors but by states or other organizations or entities, since the “attribution of subjectively flavoured states such as ‘enmity’ and ‘malignity’ to governments and institutions risks a fictitious personification of the abstract and the impersonal.”<sup>50</sup>

Second, even assuming rejection of an animus requirement, those jurisdictions where a claim cannot be established without clear evidence of the persecutor’s motive<sup>51</sup> routinely deny recognition of refugee status where the applicant is unable “to provide any information about the motivation of her alleged persecutors.”<sup>52</sup> Insistence on intention as a necessary

<sup>46</sup> *Chen Shi Hai* (Aus. HC, 2000), at 304 [34], where the plurality judgment cited with approval the decision of French J. below. See also *Fornah* (UKHL, 2006), at 433 [17]: “The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution.”

<sup>47</sup> *Chen Shi Hai* (Aus. HC, 2000), at 305 [35]. See also Kirby J. at 313 [63]: “Some of the most fearsome persecutions of people on the grounds of race, sex, religion, sexuality and otherwise have been performed by people who considered that they were doing their victims a favour. Persecution is often banal.” See also *Applicant S v. Minister for Immigration and Multicultural Affairs*, (2004) 217 CLR 387 (Aus. HC, May 27, 2004), at [38]. It should be noted that there is still sometimes a suggestion that animus is required where courts focus on whether there was any “intent to persecute”: see e.g. *Santhalingam v. Ashcroft*, (2003) 71 Fed. Appx. 911 (USCA, 3rd Cir., Jul. 29, 2003), at 913; *Harchenko v. Immigration and Naturalization Service*, (2001) 22 Fed. Appx. 540 (USCA, 6th Cir., Nov. 9, 2001), at 544.

<sup>48</sup> US Department of Justice, *Guidelines for Children’s Asylum Claims* (Dec. 10, 1998) (“*Guidelines for Children*”), at 21. See also *Fornah* (UKHL, 2006), at 433 [17], per Lord Bingham.

<sup>49</sup> *Pitcherskaia* (USCA, 9th Cir., 1997), at 649. See also UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [39]: “Perpetrators may rationalize the violence they inflict on LGBTI individuals by reference to the intention of ‘correcting’, ‘curing’ or ‘treating’ the person,” but “[t]here is no need for the persecutor to have a punitive intent to establish the causal link.”

<sup>50</sup> Cited with approval in *Chen Shi Hai* (Aus. HC, 2000), at 304 [34].

<sup>51</sup> See *Mambwe* (USCA, 8th Cir., 2009). Even in the context of children, the US Department of Justice, *Guidelines for Children*, *supra* n. 48, note that a child “may express fear or have experienced harm without understanding the persecutor’s intent,” but the focus is nonetheless on whether “the objective circumstances support the child’s claim that the persecutor targeted the child based on one of the protected grounds”: at 21.

<sup>52</sup> *Cruz de Iraheta v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 25623 (USCA, 9th Cir., Oct. 13, 1999), at 6. See also *Girma v. Immigration and Naturalization Service*, (2002) 283 F.3d 664 (USCA, 5th Cir., Feb. 20, 2002), at 669; *Orobio v. Ashcroft*, (2003) 71 Fed. Appx. 113 (USCA, 3rd Cir., Jul. 24, 2003), at 115; and *Gilca v. Holder*, (2012) 680 F.3d 109 (USCA, 1st Cir., May 23, 2012). We note that Anker points out that the REAL ID Act 2005 (US) used the word “reason” rather than “motive.” She also detects a move away from the initial “motivational focus” and more towards a treatment of “motive as a proxy for objective indicia of causation”: see Anker, *supra* n. 29, at 267. By contrast, Musalo, Moore, and Boswell, *supra* n. 43, state that the position that “all applicants [must] provide evidence of the persecutor’s

element of establishing refugee status often imposes an impossible burden on applicants who are expected to explain the motivations of their past and future persecutors.<sup>53</sup> For example, in *Mambwe*,<sup>54</sup> the US Court of Appeals for the Eighth Circuit relied on the fact that the applicant had been unable to “explain why the soldiers kidnapped her and several other women”<sup>55</sup> as a reason for upholding the decision to dismiss her claim for refugee status. Yet how could she have been aware of the soldiers’ subjective intention in the absence of a calling card?

The core difficulty lies in identifying the kind of evidence that will suffice to establish the requisite intention. It is acknowledged that direct evidence cannot be required since “persecutors are hardly ‘likely to submit declarations explaining exactly what motivated them to act,’”<sup>56</sup> and of course “are obviously not present at the hearing . . . and cannot testify as to their own subjective state of mind.”<sup>57</sup> Yet in many cases the search for intention appears akin to the search for direct and unequivocal evidence of the persecutor’s motives.<sup>58</sup> For example, in *Parussimova* the applicant testified that during their assault on her, the assailants “called her a ‘Russian pig’ and told her to get out of their country,”<sup>59</sup> an obvious reference to her ethnicity (a form of race or nationality).<sup>60</sup> However, the court upheld the determination below that she was not attacked for reasons of a protected ground on the basis that “[s]uch

intent . . . remains central to U.S. jurisprudence”: at 292. They state that “proving the persecutor’s intent or motivation is not an easy evidentiary requirement, and an increasing number of cases are denied on this basis”: *ibid.* One method of minimizing the extreme impact of *Elias-Zacarias* (USSC, 1992) was adopted in *Navas v. Immigration and Naturalization Service*, (2000) 217 F.3d 646 (USCA, 9th Cir., Jun. 20, 2000), where the US Court of Appeals for the Ninth Circuit considered a wide range of contextual factors in establishing imputed political opinion (at 658–59), and also stated that nexus may be satisfied “where there appears to be no other logical reason for the persecution at issue”: at 656, citing *Sangha v. Immigration and Naturalization Service*, (1997) 103 F.3d 1482 (USCA, 9th Cir., Jan. 9, 1997), at 1490.

<sup>53</sup> Anker notes in the context of the US that “[m]otivational inquiries are a quagmire”: Anker, *supra* n. 29, at 284. In *Refugee Appeal No. 72635/01* (NZ RSAA, Sept. 6, 2002), the New Zealand Refugee Status Appeals Authority recognized that “the Convention cannot be interpreted so as to impose on the claimant the often impossible task of establishing intent”: at [171].

<sup>54</sup> *Mambwe* (USCA, 8th Cir., 2009).

<sup>55</sup> *Ibid.*, at 547. See also *Basova v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 15715 (USCA, 10th Cir., Jul. 14, 1999), where the claim was dismissed, *inter alia*, because “Ms Basova testified that her attackers never explained anything to her.”

<sup>56</sup> *Parussimova v. Mukasey*, (2009) 555 F.3d 734 (USCA, 9th Cir., Jan. 26, 2009), at 742, citing *Gafoor v. Immigration and Naturalization Service*, (2000) 231 F.3d 645 (USCA, 9th Cir., Nov. 3, 2000), at 654. See also *Fei Mei Cheng A/K/A Pei Kwan Lee v. Attorney General*, (2010) 623 F.3d 175 (USCA, 3rd Cir., Oct. 6, 2010), at 195, explaining that a pattern or accumulation of persecutory treatment might “provide circumstantial evidence of the alleged persecutor’s motive.” In *Chavarria v. Gonzales*, (2006) 446 F.3d 508 (USCA, 3rd Cir., May 3, 2006), at 521, the court recognized that “it would be patently absurd to expect an applicant . . . to produce . . . documentary evidence” of a persecutor’s motive: cited in *Espinosa-Cortez v. Attorney General*, (2010) 607 F.3d 101 (USCA, 3rd Cir., Jun. 2, 2010), at 109.

<sup>57</sup> *Shahiraj v. Canada (Minister of Citizenship and Immigration)*, (2001) 205 FTR 199 (Can. FCTD, May 9, 2001), at [19].

<sup>58</sup> Musalo, Moore, and Boswell, *supra* n. 43, observe that notwithstanding the principle that direct or circumstantial evidence may be sufficient, “the reality has been that cases are frequently denied in the absence of compelling direct evidence”: at 322. For a good example, see *Tecun-Florian v. Immigration and Naturalization Service*, (2000) 207 F.3d 1107 (USCA, 9th Cir., Mar. 14, 2000), at 1109, where the court upheld the rejection of refugee status notwithstanding strong circumstantial evidence that the guerrillas were motivated by religion. See also *Gomez-Zuluaga v. Attorney General*, (2008) 527 F.3d 330 (USCA, 3rd Cir., May 30, 2008), at 345.

<sup>59</sup> *Parussimova* (USCA, 9th Cir., 2009), at 742. <sup>60</sup> See *infra* Ch. 5.6.

statements indicate that the men were aware of Parussimova's ethnicity and used it as a means to degrade her. Yet the record reveals no causal connection between this characteristic and the men's attack."<sup>61</sup> If contemporaneous statements by those who persecuted the applicant in the past are not deemed sufficient, it is unclear how an applicant could ever establish intention short of the assailants providing sworn evidence as to their motives.<sup>62</sup>

More generally, the difficulties inherent in establishing intention in the refugee context are well recognized:

[T]here is a special reason in the context of the Convention to refrain from importing concepts of personal motivation as essential to the context. By definition, the Convention will ordinarily be invoked in a foreign country where an inquiry into the motives and feelings of the alleged "persecutors" will be extremely difficult or impossible to perform.<sup>63</sup>

Not only can it be onerous to establish the subjective motive of persecutors where past persecution has occurred, but in the context of a future risk of being persecuted – the explicit focus of the Convention – inquiry into motive can amount to "pure conjecture."<sup>64</sup> This led the UNHCR to conclude that the imposition of a requirement to establish persecutorial intention can "have a severely debilitating effect on the development and application of the 1951 Convention."<sup>65</sup>

The third problem with an exclusive focus on persecutorial intention is that it tends to divert attention from the wider societal context of discrimination and oppression that often explains why an applicant is at risk.<sup>66</sup> For example, a focus on the subjective intention of the individual man who had vowed to kill his sister due to her supposed violation of

<sup>61</sup> *Parussimova* (USCA, 9th Cir., 2009), at 742.

<sup>62</sup> It appears that the "central factor" test was also at play here: *infra* n. 132. For a contrasting decision, see *Baballah v. Ashcroft*, (2003) 335 F.3d 981 (USCA, 9th Cir., Jul. 11, 2003), where the applicant's evidence that his (past) persecutors called him a derogatory ethnic-based word during an assault constituted "credible, nonspeculative insight into the motivation of his persecutors": at 990. These concerns are exacerbated where the (past) persecutors have not identified themselves: for example, in *Khakhnelidze v. Holder*, (2011) 432 Fed. Appx. 564 (USCA, 6th Cir., Aug. 8, 2011), the Court of Appeals for the Sixth Circuit affirmed the decision to reject the claim below on the basis that "the motives of the alleged persecutors – whoever they were – are unknown": at 572. Yet, as noted by White J. in dissent, the applicants had "presented ample circumstantial evidence that the Georgian parliament/government attempted to stop Lead Petitioner from . . . actively rooting out government corruption": at 575–76.

<sup>63</sup> *Chen Shi Hai* (Aus. HC, 2000), at 313 [64].

<sup>64</sup> R. Germov and F. Motta, *Refugee Law in Australia* (2003), at 212. The New Zealand Refugee Status Appeals Authority has explained that, "[a]t a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence": *Refugee Appeal No. 72635/01* (NZ RSA, 2002), at [168].

<sup>65</sup> *Sepe v. Secretary of State for the Home Department*, House of Lords, UNHCR, "Case for the Intervener" (Jan. 8, 2003), at [4.1].

<sup>66</sup> For an example of the erroneous approach engendered by the focus on intention, see *Molina-Morales v. Immigration and Naturalization Service*, (2001) 237 F.3d 1048 (USCA, 9th Cir., Jan. 19, 2001), in which the dissenting judgment of Fletcher J. noted that the majority's finding that nexus had not been established "can only be believed if one turns a blind eye to the recent political and socio-economic history of El Salvador": at 1052, thereby highlighting the problems in the focus on one individual persecutor's intention. Similarly in *Lata v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 21616 (USCA, 9th Cir., Sept. 7, 1999), the majority's conclusion that there was no nexus was said by the dissenting judge to "ignore[] the State Department's profile which states that racial tension between the ethnic Fijian and Indian Fijian communities remain[s] a problem, and that the Fijian police are sometimes unable or unwilling to protect Indians in Fiji from race-based crime": at 6.

the Jordanian “honor code” led initially to the conclusion that he was motivated by “purely personal retribution.”<sup>67</sup> On appeal, however, the US Court of Appeals for the Seventh Circuit recognized that the applicant “faces death because of a widely-held social norm in Jordan – a norm that imposes behavioral obligations on her and permits [the brother] to enforce them in the most drastic way.”<sup>68</sup> Yet a blinkered focus on the subjective motivations of the individual persecutor remains prevalent in a range of other contexts, including domestic violence, sexual violence, and the risk of being trafficked, and often leads to a rejection of refugee status on the basis that the applicant’s risk is due to personal motivations such as greed, lust, or revenge rather than understanding that it is the wider context of the subordination of women that explains the reasons for the applicant’s risk of being persecuted.<sup>69</sup> Even where a law, policy, or practice impacts differentially or disproportionately on a person because of her Convention ground, the intention of the persecutor approach often results in a denial of refugee status.

In short, evidence that the persecutor intends to inflict harm for a Convention reason will normally satisfy the nexus clause, regardless of whether there is any animosity or malignancy towards the applicant. However, viewing persecutory intention as the *exclusive* method of establishing nexus imposes a difficult and, in some cases, impossible burden on applicants for refugee status.

### 5.2.2 *Intention of the persecutor or of the state*

The risks of associating nexus with persecutorial intent have been ameliorated to some extent by the recognition in some jurisdictions that the risk of “being persecuted” involves an assessment both of the risk of serious harm *and* of failure of the state to protect against such harm.<sup>70</sup> Since it is the risk of “being persecuted” that must be linked to a Convention ground, nexus is established where *either* of the two constituent elements of this notion – the risk of harm *or* failure of state protection – is linked to a Convention ground.

The critical importance of the shift to the bifurcated approach is vividly illustrated in one of the most frequently cited passages on this topic, namely Lord Hoffmann’s judgment in *Shah*:

[S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed immunity was that the victim was a Jew. Is he being persecuted on grounds

<sup>67</sup> *Sarhan v. Holder*, (2011) 658 F.3d 649 (USCA, 7th Cir., Sept. 2, 2011), at 655.

<sup>68</sup> *Ibid.*, at 656. The reasoning in the decisions below also rested on the sole versus mixed motives issue: see text *infra*, at nn. 112–30. The US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, acknowledge that “circumstantial evidence” of motive may be constituted by “evidence that such patterns [of violence against women] are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society.” It is said that such circumstantial evidence “would be relevant to determining whether the abuser believes he has the authority to abuse and control the victim ‘on account of’ her status in the relationship”: at 22. However, this is not always applied in practice.

<sup>69</sup> *Foster*, *supra* n. 18, at 265. <sup>70</sup> See text *supra*, Chs. 3.1, 4.2.

of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business.” But another answer and in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that he would receive no protection because he was a Jew.”<sup>71</sup>

Accordingly, even where the perpetrator of the serious harm is thought to be motivated by personal or other non-Convention reasons, nexus is still established where the state is unwilling to protect for a Convention reason.<sup>72</sup>

As a matter of principle this must be correct. The invidious action of a state discriminatorily to deny protection to an at-risk person is at least as indicative, if not more so, of fundamental socio-political disfranchisement – the rationale at the core of the nexus clause – as persecution by non-state actors for Convention reasons. It is hence not surprising that the bifurcated approach has been explicitly or implicitly adopted in an extensive range of state parties, both common law<sup>73</sup> and civil law,<sup>74</sup> as well as endorsed by the UNHCR.<sup>75</sup> In the first incarnation of the Qualification Directive, Art. 9(3) provided that there must be a

<sup>71</sup> *Shah* (UKHL, 1999), at 653–54 (per Lord Hoffmann); at 646 (per Lord Steyn); at 658 (per Lord Hope). In *Horvath v. Secretary of State for the Home Department*, [2001] 1 AC 489 (UKHL, Jul. 6, 2000), Lord Clyde adopted similar reasoning: at 516.

<sup>72</sup> For a particularly lucid explanation of the principle, see *Refugee Appeal No. 71427/99* (NZ RSAA, 2000), at [112]–[113].

<sup>73</sup> The US appears to be the only major common law jurisdiction not to have adopted this approach: see *Re RA*, [1999] 22 I & N Dec. 906 (USBIA, Jun. 11, 1999), at 906: “Societal attitudes and the concomitant effectiveness (or lack thereof) of governmental intervention may very well have contributed to the ability of the respondent’s husband to carry out his abusive actions over a period of many years. But this argument takes us away from looking at the motivation of the husband and focuses instead on the failure of the government to offer protection”: at 922. For the subsequent procedural history of this case, see Anker, *supra* n. 29, at 363. For further discussion of *Re RA*, see 71427/99 (NZ RSAA, 2000), at [114]. However, some scholars have noted that there are a “few recent U.S. decisions [which] suggest a bifurcated analysis”: Anker, *supra* n. 29, at 286. For authority for the bifurcated approach in other common law jurisdictions, see text *supra*, Ch. 4.2. In Australia, in *Minister for Immigration and Citizenship v. SZONJ*, (2011) 194 FCR 1 (Aus. FC, May 24, 2011), at 85, the Full Federal Court recently described “the *Khawar* Principle” as follows: “Where persecution consists of two elements, the criminal conduct of private citizens and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state”: at [7].

<sup>74</sup> See *supra* Ch. 4.2.

<sup>75</sup> Significantly, the Expert Roundtable (comprising thirty-three experts from twenty-three countries) organized by the UNHCR in 2001 on Gender-Related Persecution concluded that, “[i]n cases where there is a real risk of serious harm at the hands of a non-State actor (eg husband, partner, or other non-State actor) for reasons unrelated to any Convention ground, and the lack of State protection is for reason of a Convention ground, it is generally recognized that the nexus requirement is satisfied”: “Summary Conclusions: Gender-Related Persecution,” in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003), at 352 [6]. This approach was explicitly adopted in UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [21]. See also UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/02 (May 7, 2002) (“*Guidelines on International Protection No. 2*”), at [21]–[23]; UNHCR, *Guidelines on International Protection No. 7*, *supra* n. 16, at [30]; and UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [39].

connection “between the reasons mentioned in [the Convention] and the acts of persecution,” which was thought to “rule[] out” the bifurcated approach.<sup>76</sup> However, this position was acknowledged to be deficient because it risked creating “protection gaps”<sup>77</sup> and hence Art. 9(3) of the Qualification Directive has now been revised to provide that “there must be a connection between the reasons mentioned in Article 10 and the acts of persecution . . . or the absence of protection against such acts.”<sup>78</sup>

Recognition of the bifurcated approach has been particularly crucial in securing refugee status for women, in relation to which there is still an unfortunate tendency to relegate persecutory motives, though often arguably based on wider societal discrimination, to the “personal.”<sup>79</sup> Where the motives of the persecutor are so characterized but evidence establishes that “the state would not assist them because they were women,”<sup>80</sup> refugee status is appropriately recognized under the bifurcated approach to understanding the nexus clause.

However, despite representing an important advance, even on this approach intention to harm for a Convention reason is still the focus of analysis. This is made clear in the reasoning of the leading common law courts that have adopted the bifurcated analysis. In the seminal *Shah* decision, for example, Lord Hoffmann provided, as an example of a case in which nexus would not be established, a situation where

during a time of civil unrest, women are particularly vulnerable to attack by marauding men, because the attacks are sexually motivated or because they are thought weaker and less able to defend themselves. The government is unable to protect them, not

<sup>76</sup> Battjes, *supra* n. 42, at 258.

<sup>77</sup> Hailbronner notes that the Commission argued in its Proposal for Amendment of the Directive that “in many cases where the persecution emanates from non-State actors, such as militia, clans, criminal networks, local communities or families, the act of persecution is not committed for reasons related to a Geneva Convention ground but . . . the state is unable or unwilling to provide protection to the individual concerned because of a reason related to the Geneva Convention”: Hailbronner, *supra* n. 42, at 1078. For a strong critique, see Battjes, *supra* n. 42, at 258–60, who concluded that the original Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12 (Sept. 30, 2004) (“2004 Qualification Directive”)) was, in this regard, an “overly restrictive interpretation[] of the Refugee Convention”: at 260.

<sup>78</sup> Qualification Directive, *supra* n. 28, at Art. 9(3) (emphasis added). Importantly, this amendment was explicitly founded upon the notion that “[o]ne of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts”: Qualification Directive, Preamble, para. 29 (emphasis added).

<sup>79</sup> However, this may be questioned on the basis that, as Anthea Roberts has said, “if the motivation for harm were gender neutral, why would the harm take a gender specific form?”: A. Roberts, “Gender and Refugee Law,” (2002) 22 Aust. Y. B. I. L. 159, at 189. See also P. Mathew, “*Islam v. Secretary of State for the Home Department*, and *Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 AC 629,” (2001) 95(3) Am. J. Intl. L. 671, at 674–77, and G. Clayton, *Textbook on Immigration and Asylum Law and Practice* (5th edn., 2012), at 475. To be preferred is the approach in *Mohammed v. Gonzales*, (2005) 400 F.3d 785 (USCA, 9th Cir., Mar. 10, 2005), where the court held that: “Moreover there is little question that genital mutilation occurs to a particular individual because she is female. That is, possession of the immutable trait of being female is a motivating factor – if not a but-for cause – of the persecution”: at [29].

<sup>80</sup> *Shah* (UKHL, 1999), at 653, per Lord Hoffmann.



because of any discrimination but simply because its writ does not run in that part of the country.<sup>81</sup>

In other words, even though a woman's gender may be the reason that she has a well-founded fear of being persecuted, an approach that focuses only on the intention – whether of the persecutor or of the state in withholding protection – means that she may not be recognized as a refugee.

### 5.2.3 *The predicament approach*

Acceptance of the view that one can satisfy the nexus criterion by establishing *either* intention of the persecutor or of the state in withholding protection leaves open the question whether it is possible to satisfy the nexus clause without evidence of intention of any kind. Framed simply, if a Convention ground explains why the applicant is exposed to the risk of being persecuted, is that sufficient to establish that there is a causal connection between a Convention ground and the reason for the applicant's well-founded fear of being persecuted?<sup>82</sup>

The question is well illustrated by reference to claims involving a risk of forced military conscription (conscientious objection) or forced recruitment by a non-state entity. In such cases, although a risk of being persecuted may be established,<sup>83</sup> a claim may nonetheless fail at the nexus stage depending on which approach to nexus is adopted by the decision-maker. This is because although there are cases in which intention is readily established, for example, where “a law is applied in a discriminatory manner to persons within the protected categories,”<sup>84</sup> most cases involve a law or policy of *general application* which embodies no persecutory intention yet has a disproportionate impact on those who hold either a religious or conscientious belief opposed to military service, or a relevant express or implied political opinion or belief.<sup>85</sup> Hence, if one takes the view that a persecutory intent or motivation

<sup>81</sup> *Ibid.*, at 654. See also *Khawar* (Aus. HC, 2002), at [26]. For a clear application of this approach, see *SZONJ* (Aus. FC, 2011), at [34]. Zimmermann and Mahler also note that this is the German position: see A. Zimmermann and C. Mahler, “Article 1A, para. 2 (Definition of the Term ‘Refugee’),” in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 281, at 374 [332].

<sup>82</sup> In *NACM* (Aus. FC, 2003), at 565 [63], the court observed: “The question conventionally asked has been: Is the motivation of the persecutor the actual or perceived political opinion of the claimant? A more practical and properly inclusive question would appear to be: Is it the claimant's actual or perceived political opinion that accounts for the persecution the claimant fears? The latter question includes the former and is a closer paraphrase of the actual Convention language.”

<sup>83</sup> See *supra* Ch. 3.5.2.

<sup>84</sup> *Erduran v. Minister for Immigration and Multicultural Affairs*, (2002) 122 FCR 150 (Aus. FC, Jun. 27, 2002), at 154. This analysis, set out in Hathaway, *Refugee Status*, at 180, was approved by the Canadian Federal Court in *Lebedev v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 728 (Can. FC, Jul. 9, 2007), at [29]–[30]. For a recent example, see *Davytan v. Holder*, (2011) 415 Fed. Appx. 88 (USCA, 10th Cir., Mar. 4, 2011), in which the court remanded the decision on the basis that the decision below had not adequately considered the significance that there was “*some* evidence in the record that Jehovah's Witnesses may be sentenced to a longer term of imprisonment than others who have failed to comply with the conscription laws”: at 92 (emphasis in original). For cases from other jurisdictions, see P. Mathew, “Draft Dodger/Deserter or Dissenter? Conscientious Objection as a Ground for Refugee Status,” in S. S. Juss and C. Harvey (eds.), *Contemporary Issues in Refugee Law* (2013) 165, at 170.

<sup>85</sup> See *Krotov v. Secretary of State for the Home Department*, [2004] 1 WLR 1825 (Eng. CA, Feb. 11, 2004), for the view that conscientious objection can constitute an implied political opinion: at 1842, citing Hathaway, *Refugee Status*, at 152–56 and 180–82.

is required, nexus will be difficult, if not impossible, to establish despite the reasons of conscience or belief that motivate the resistance to conscription.<sup>86</sup>

Yet it is possible to see the logic of recognizing nexus in such cases given that the Convention ground may explain the reason why the applicant is at risk despite not explaining the intention of the persecutor or of the state in withholding protection. Indeed so much has been acknowledged in judicial reasoning which insists on analyzing the issue from the perspective of the applicant's predicament:

The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the conscientious belief, which could be political opinion, not merely the failure to comply with a law of general application.<sup>87</sup>

<sup>86</sup> This is particularly so in the US: see *Canas-Segovia v. Immigration and Naturalization Service*, (1992) 970 F.2d 599 (USCA, 9th Cir., Jul. 10, 1992); *Nguyen v. Reno*, (2000) 211 F.3d 692 (USCA, 1st Cir., May 16, 2000); and *Tesfu v. Ashcroft*, (2003) 322 F.3d 477 (USCA, 7th Cir., Mar. 14, 2003). This has also been held to be the case in relation to recruitment by non-state entities such as insurgent and guerrilla groups: see e.g. *Reyes-Bonilla v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 32530 (USCA, 9th Cir., Dec. 14, 1999); *Sebastian-Sebastian v. Immigration and Naturalization Service*, (1999) 195 F.3d 504 (USCA, 9th Cir., Oct. 25, 1999); *Rivera-Moreno v. Immigration and Naturalization Service*, (2000) 213 F.3d 481 (USCA, 9th Cir., May 23, 2000); *Tecun-Florian* (USCA, 9th Cir., 2000). On the other hand, Musalo notes several cases where intention was able to be established in US cases: see K. Musalo, "Conscientious Objection as a Basis for Refugee Status: Protection for the Fundamental Right of Freedom of Thought, Conscience and Religion," (2007) 26(2) Ref. Survey Q. 69, at 72 n. 27. See in particular, *Gutierrez v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 29235 (USCA, 9th Cir., Nov. 3, 1999). Interestingly, in *Martinez-Buendia v. Holder*, (2010) 616 F.3d 711 (USCA, 7th Cir., Aug. 10, 2010), the court placed considerable emphasis on the fact that the applicant "politically opposed the [Revolutionary Armed Forces of Colombia ("FARC")]" and that her political beliefs were the reason for her refusal to cooperate with the FARC": at 716. She had not communicated those beliefs to FARC, hence suggesting the implicit acceptance by the court of a predicament analysis. However, the claim was resolved also on the basis of imputed political opinion due to her humanitarian work: see at 716–17.

<sup>87</sup> *Applicant N403 v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1088 (Aus. FC, Aug. 23, 2000), at [23], per Hill J. For a similar approach, see also *Erduran* (Aus. FC, 2002), at 154–57 [19]–[28], per Gray J. (in which his Honour argues that this line of authority is unaffected by *Minister for Immigration and Multicultural Affairs v. Yusuf*, (2001) 206 CLR 323 (Aus. HC, May 31, 2005): at 156 [27]). See also *Magyari v. Minister for Immigration and Multicultural Affairs*, (1997) 50 ALD 341 (Aus. FC, May 22, 1997), at 342; *Okere v. Minister for Immigration and Multicultural Affairs*, (1999) 87 FCR 112 (Aus. FC, Sept. 21, 1998); *Applicant VEAZ of 2002 v. Minister for Immigration and Multicultural Affairs*, [2003] FCA 1033 (Aus. FC, Oct. 2, 2003); *VCAD v. Minister for Immigration and Multicultural Affairs*, [2004] FCA 1005 (Aus. FC, Aug. 4, 2004); *SZAOG v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2004) 86 ALD 15 (Aus. FFC, Nov. 26, 2004). It has also been held that "there is no reason to doubt that conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a 'particular social group': *Mehenni v. Minister for Immigration and Multicultural Affairs*, (1999) 164 ALR 192 (Aus. FC, Jun. 24, 1999), at 198, although in that case Lehane J. rejected the claim on the grounds that intention is required to establish nexus: see *ibid.*, at 200; see also *Yusuf* (Aus. HC, 2005). For further authority relating to conscientious objectors as constituting a particular social group, see *Applicant M v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1412 (Aus. FC, Oct. 5, 2001), at [31]–[34]. For a similar position in New Zealand, see *Refugee Appeal No. 75378* (NZ RSAA, Oct. 19, 2005), at [115]: "Once it is accepted that the refugee claimant genuinely subscribes to the religious or other belief informing the claimed objection to military service, there can be no doubt that this contributes to the predicament of the claimant." In Canada, see

This “predicament approach” focuses attention not simply on the intent of the persecutor or of the state in failing to protect, but more broadly on the reason for exposure to the risk. As the Federal Court of Australia concluded in the conscription context, “even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason.”<sup>88</sup> This follows from the fact that “the equal application of the law to all persons may impact differently on some of those persons” and the “result of the different impact might be such as to amount to persecution for a Convention reason.”<sup>89</sup>

There are, in our view, three compelling reasons to adopt the predicament approach to understanding the Refugee Convention’s nexus requirement.

First, at the level of text, the Convention requirement is not that *persecution* be linked to a Convention ground, but rather that the condition of “*being persecuted*” – the predicament of the applicant – be “for reasons of” a Convention ground.<sup>90</sup> The New Zealand tribunal has thus appropriately concluded that “[t]he employment of the passive voice (‘being persecuted’) establishes that the causal connection required is between a Convention ground and the *predicament* of the refugee claimant.”<sup>91</sup>

Second, consideration of the object and purpose of the Convention argues strongly against any intention requirement.<sup>92</sup> The goal of the Convention is not to prosecute those responsible for persecution, but to provide surrogate protection to those at risk of being persecuted. Intention may well be critical if one’s goal is to hold a person accountable; hence, for example, the general need to show *mens rea* in order to establish criminal liability. But where the sole objective is to identify those needing and deserving international protection, of what possible relevance is the intention of either the future persecutor or the home state? Indeed, as the UNHCR explained in its *amicus* brief to the US Supreme Court in *Elias-Zacarias*, an intention requirement is misplaced because “refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is

M. Jones, “The Refusal to Bear Arms as Grounds for Refugee Protection in the Canadian Jurisprudence,” (2008) 20 Intl. J. Ref. L. 123, at 129–31. For discussion of other jurisdictions, see Mathew, *supra* n. 84, at nn. 35–55. See also Qualification Directive, *supra* n. 28, Art. 2(e).

<sup>88</sup> *Erduran* (Aus. FC, 2002), at 157 [28], where the court said that “[f]orcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason”: at 157 [28].

<sup>89</sup> *Applicant VEAZ of 2002* (Aus. FC, 2003), at [26], citing *Wang v. Minister for Immigration and Multicultural Affairs*, (2000) 179 ALR 1 (Aus. FFC, Nov. 10, 2000), at 15 [63]–[65]. For a fascinating recent example in the US, see *Stserba v. Holder*, (2011) 646 F.3d 964 (USCA, 6th Cir., May 20, 2011), where the court noted that although the relevant policy was not explicitly based on ethnicity, “the policy disproportionately impacted ethnic Russians, who are more likely than other Estonians to have the language skills to attend and the interest in attending a Russian school”: at 977.

<sup>90</sup> “The use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted”: *Minister for Immigration and Multicultural and Indigenous Affairs v. Kord*, (2002) 125 FCR 68 (Aus. FFC, Mar. 28, 2002). See also *NACM* (Aus. FC, 2003), at 561–62 [52].

<sup>91</sup> *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [168] (emphasis in original). In doing so, the Authority “respectfully, but nevertheless strongly disagree[d] with the contrary view expressed in . . . *Elias-Zacarias*”: at [169]. Indeed, the Authority clearly explained that it may well be that the particular wording of the US statute – which does not precisely mirror the Convention language – explains the intent requirement in US law: see at [169].

<sup>92</sup> Justice Madgwick concluded that an approach that requires intent “appears dissonant with the concerns properly to be imputed, as a matter of interpretation, to the framers of the Convention”: *NACM* (Aus. FC, 2003), at 564 [58].

not dependent on such proof.”<sup>93</sup> To the contrary, as long as “persecution or fear of it may be related to the grounds . . . it is irrelevant whether the [persecutor] intended to persecute. It is the result which matters.”<sup>94</sup>

5 Third and related, the intention requirement cannot be reconciled to the Convention’s fundamental concern with socio-political disfranchisement anchored in non-discrimination norms, since the international understanding of non-discrimination law is that discrimination may be established on the basis of intent *or* effect.<sup>95</sup> As Justice Madgwick of the Australian Federal Court observed, “[d]iscrimination law, both nationally and internationally, treats as uncontroversial the proposition that discrimination may be legally established  
10 where either the intent or effect of conduct is discriminatory.”<sup>96</sup>

In sum, an application of the rules of treaty interpretation leads to the conclusion that intention is not a necessary element in establishing the causal link in refugee law.<sup>97</sup> While evidence of intention is of course a sufficient basis to find a nexus, it is not the only means of satisfying the causal requirement.

<sup>93</sup> As cited in Musalo, Moore, and Boswell, *supra* n. 43, at 324. See *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [171]: “The focus [of the Convention] is on assisting the (potential) victim, not on assigning guilt to the persecutor.” See also *NACM* (Aus. FC, 2003), at 563–64 [57]. The UNHCR endorsed the predicament approach in *amicus* submissions before the US Court of Appeals of the Seventh Circuit in *Bueso-Avila v. Holder*, (2011) 663 F.3d 934 (USCA, 7th Cir., Nov. 29, 2011), where it argued that “[i]n UNHCR’s view, when analysing the causal connection between a Convention ground and the applicant’s well-founded fear, the focus should be on the reasons for the applicant’s predicament”: at 10, citing UNHCR, “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity” (Nov. 21, 2008), at [28].

<sup>94</sup> Anker, *supra* n. 29, at 268 n. 3.

<sup>95</sup> The major international human rights treaties allow for both direct and indirect discrimination, or discrimination in purpose or effect: see e.g. Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 UNTS 195 (“Race Convention”); Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, entered into force Sept. 3, 1981, 1249 UNTS 13; and Article 2 of the Convention on the Rights of Persons with Disabilities, adopted Dec. 13, 2006, entered into force May 3, 2008, 2515 UNTS 3 (“Disability Convention”). See also Human Rights Committee, General Comment No. 18: Non-Discrimination (Oct. 11, 1989), at [7] (“HRC General Comment No. 18”), and CESCR General Comment No. 20, *supra* n. 26, at [10]. For a discussion of the acceptance of indirect discrimination in domestic discrimination law, see S. Fredman, *Discrimination Law* (2nd edn., 2011), at 177–80; see also C. McCrudden, “Equality and Non-Discrimination,” in D. Feldman (ed.), *English Public Law* (2nd edn., 2009) 499, at 547–51. Indeed, Fredman notes that in the UK, “it is now settled law that the motive of the perpetrator is irrelevant,” even in the context of establishing direct discrimination: at 203–4; see also McCrudden, at 547.

<sup>96</sup> *NACM* (Aus. FC, 2003), at 564 [59]–[60]. See also North J.’s observation that: “The notion of indirect discrimination resulting from facially neutral legislation is well known in the area of discrimination law. There is good reason in principle that facially neutral legislation which impacts unequally on certain people for a Convention reason indicates such discrimination as to require the Tribunal to investigate whether persecution exists”: *SZAOG* (Aus. FFC, 2004), at [19] (in dissent).

<sup>97</sup> For other academic opinion to this effect, see Goodwin-Gill and McAdam, *supra* n. 33, at 100–2; Musalo, Moore, and Boswell, *supra* n. 43, at 322–29; Zimmermann and Mahler, *supra* n. 81, at 374. We note that Carlier similarly argues that the reason for the persecution can be found in the mind of the persecutor or the mind of the persecuted: J.-Y. Carlier, *Droit d’asile et des réfugiés: de la protection aux droits* (2008) (“*Droit d’asile*”), at 214–17; see also J.-Y. Carlier, “The Geneva Definition and the ‘Theory of the Three Scales,’” in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999), at 49, where he states that the link can be either “internal” (from the perspective of the victim) or “external” (from the perspective of the persecutor).

While many jurisdictions continue to insist on a showing of intention of either the persecutor or the state, there is also evidence of a more thoughtful approach emerging, particularly where courts have had the opportunity explicitly to consider the competing arguments. In New Zealand, “a claimant must establish not only a well-founded fear of being persecuted, but also that this *predicament* is linked to one of the five Convention grounds,”<sup>98</sup> 5 while in Canada the Federal Court of Appeal has held that the Board was in error when it “wrongly required that a ‘persecutory intent’ be present, whereas a persecutory effect will suffice.”<sup>99</sup> Recent UNHCR Guidelines have similarly explicitly endorsed the position that the “for reasons of” clause focuses “on the reasons for the applicant’s feared predicament within the overall context of the case, and how he or she would experience the harm rather 10 than on the mind-set of the perpetrator.”<sup>100</sup>

Even in states where the requirement to establish intention is still predominant, such as the UK and Australia,<sup>101</sup> some judges have endorsed a test of whether a Convention ground is “the true cause of his or her predicament,”<sup>102</sup> “the true reason for the persecution which is feared,”<sup>103</sup> or the “real cause” of the risk of being persecuted.<sup>104</sup> As Justice Branson of the 15 Australian Federal Court highlighted in *Okere*:

<sup>98</sup> *AC (Russia)*, [2012] NZIPT 800151 (NZ IPT, Jun. 26, 2012) (emphasis added). For earlier authority, see *Refugee Appeal No. 76044*, [2008] NZAR 719 (NZ RSAA, Sept. 11, 2008), at [68] and [73].

<sup>99</sup> *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 FC 314 (Can. FCA, Apr. 1, 1993); applied in *Naseem v. Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 1072 (Can. FC, Jul. 17, 2002), at [7]. However, decisions dealing with military conscription are often unclear on the nexus point. In some instances the Federal Court appears to suggest that intention is required: see e.g. *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540 (Can. FCA, Jun. 15, 1993), and *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 561 (Can. FC, Mar. 31, 2006) (upheld on appeal to the FCA). The nexus issue however is little discussed in these cases, as they tend to turn on other issues such as whether there is an international “right” to conscientious objection and the adequacy of state protection: see e.g. *Hughey v. Canada (Minister of Citizenship and Immigration)*, [2006] FC 421 (Can. FC, Mar. 31, 2006); *Key v. Canada (Minister of Citizenship and Immigration)*, [2009] 2 FCR 625 (Can. FC, Jul. 4, 2008). However, in *Mohilov v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 1292 (Can. FC, Nov. 21, 2008), the court noted that “[e]vasion might lead to Convention refugee status if it reflects an implied political opinion that the military service is fundamentally illegitimate under international law” or where a person expresses “‘principled objections’ to military service, more widely known as ‘conscientious objectors’”: at [18], citing *Lebedev v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 728 (Can. FC, Jul. 9, 2007).

<sup>100</sup> In the *Guidelines on International Protection No. 9*, *supra* n. 19, the UNHCR explicitly states that “[t]he intent or motive of the persecutor can be a relevant factor to establishing the ‘causal link’ but it is not a prerequisite”: at [39].

<sup>101</sup> Indeed, although making a very strong case for the predicament approach, Madgwick J. acknowledged that such an approach was not consistent with other Federal Court authority and that although such authority is “in need of reconsideration” it could not be undertaken by a single judge alone: *NACM* (Aus. FC, 2003), at 561 [50], 567 [66]. This included a decision in which his Honour wrote the lead judgment: *NAEU of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2002] FCAFC 259 (Aus. FFC, Oct. 24, 2002).

<sup>102</sup> *NACM* (Aus. FC, 2003), at 561 [50]. <sup>103</sup> *Okere* (Aus. FC, 1998), at 118.

<sup>104</sup> *Applicant N403 v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1088 (Aus. FC, Aug. 23, 2000), at [23]. The language of “real reasons” was also employed by the Full Federal Court in *SDAQ v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 129 FCR 137 (Aus. FFC, May 30, 2003), at 144–45 [16] (per Cooper J., in dissent); 148 [29] (per Carr J.); and 150 [36] (per Finkelstein J.).

History supports the view that religious persecution often takes “indirect” forms. To take only one well known example, few would question that Sir Thomas More was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.<sup>105</sup>

In a particularly explicit reflection on point, Justice Madgwick acknowledged that although having previously “perpetrated . . . confusion myself”<sup>106</sup> in relation to this issue, “on further reflection it seems to me that neither analysis of the text of the Convention nor a consideration of its relevant context compel that conclusion [that intent is required].”<sup>107</sup>

5 Similarly, in the *Sepet* litigation in the UK concerning compulsory military service, extensive submissions were presented both to the Court of Appeal and to the House of Lords on the question whether intention is a proper requirement in light of the rules of treaty interpretation.<sup>108</sup> The Court of Appeal unanimously rejected the argument of the Home Secretary that the “perspective of the persecutor” is determinative.<sup>109</sup> Lord Justice  
10 Laws succinctly explained that the Home Secretary’s submission “confuses what is *meant* in Art 1A(2) by the words ‘for reasons of race, religion [etc]’ with one of the modes of *proving* that the words apply.”<sup>110</sup> Indeed, he observed that

So far as other common law authorities . . . use the language of motive or motivation, the context can I think be seen to be such that the only potential engine of discrimination on the facts was the persecutor’s motive. But if that were not so, I should with great deference but no hesitation reject out of hand the view that the autonomous, international meaning of the Convention involves the proposition that the whole sense of “*for reasons of . . .*” has a single reference, namely the motive of the putative persecutor. No authority binds this court so to hold, and to do so would confine the scope of Convention protection in a straitjacket so tight as to mock the words in the recital to which I have already referred: “*the widest possible exercise of these fundamental rights and freedoms*” . . . The question is always whether the asylum claimant faces discrimination on a Convention ground.<sup>111</sup>

<sup>105</sup> *Okere* (Aus. FC, 1998), at 118. Indeed, indirect prevention of religious practice, for example by virtue of a law of general application, may be sufficient to establish a claim to refugee status. This analysis in Hathaway, *Refugee Status*, at 148, was cited with approval by the Australian Federal Court in *Okere*, *ibid.* See also *Hellman v. Minister for Immigration and Multicultural Affairs*, (2000) 175 ALR 149 (Aus. FC, May 17, 2000), at [36]–[39]. This notion of indirect persecution might be thought consistent with the more objective approach favored by the High Court (see *Chen Shi Hai* (Aus. HC, 2000), especially at 304–5 [32]–[35] (per Gleeson C.J., Gaudron, Gummow, and Hayne JJ.); *Applicant S* (Aus. HC, 2004), at [42]–[43] (per Gleeson C.J., Gummow and Kirby JJ.) and [83] (per McHugh J.); *Minister for Immigration and Multicultural Affairs v. Ibrahim*, (2000) 204 CLR 1 (Aus. HC, Oct. 26, 2000), at 33 [102] (per McHugh J.)) and with the adoption of the word “reason” rather than “motive” in the Migration Act 1958 (Cth), s. 91R.

<sup>106</sup> *NACM* (Aus. FC, 2003), at 561 [50]. <sup>107</sup> *Ibid.*

<sup>108</sup> See *Sepet*, House of Lords, UNHCR, “Case for the Intervener” (2003), *supra* n. 65.

<sup>109</sup> *Sepet* (Eng. CA, 2001), at [92], [154], and [182], as noted by Lord Bingham in the House of Lords: *Sepet v. Secretary of State for the Home Department*, [2003] 1 WLR 856 (UKHL, Mar. 20, 2003), at [21].

<sup>110</sup> *Sepet* (Eng. CA, 2001), at [89].

<sup>111</sup> *Ibid.*, at [92]–[93], emphasis in original. Lord Justice Jonathan Parker explicitly agreed with Laws L.J. on this point: see at [154]–[155]. For another similar decision of the English Court of Appeal, see *Montoya* (Eng. CA, 2002), at [31]: “We are prepared to accept that there can be circumstances in which a person can be persecuted for Convention reasons notwithstanding that the persecutor’s personal motivation was independent of those reasons. An example might be where a person’s religion forbade the carrying of weapons and that person therefore refused to do military service which in turn exposed him to imprisonment even though his persecutor was unaware of his religious imperative and was only concerned to enforce what he saw as the victim’s civil duty” (per Lord Justice Schiemann, delivering



In sum, while it is still widely and frequently assumed that evidence of intention is the only method of satisfying the “for reasons of” clause in refugee law, there is an emerging “predicament approach” that more closely comports with the text, object, and purpose of the Convention and hence is to be preferred. Accordingly, the more principled approach to interpreting the Refugee Convention’s nexus clause is to acknowledge that the causal element may be satisfied where the intention either of the persecutor or of the state in withholding protection is linked to a Convention ground, or where the Convention ground explains why the applicant is at risk of being persecuted. Against this understanding of the nature of the nexus clause, we now turn to the question of quantum: how strong a connection is required in order to find that an applicant is at risk “for reasons of” a Convention ground?

### 5.3 Quantifying the causal link

The second controversy regarding the basic approach to the nexus clause is whether the strength of the causal connection between the risk of being persecuted and the Convention ground must attain a particular level of significance in order to satisfy the “for reasons of” clause in the refugee definition.

It is well accepted that the Convention ground need not account for the totality of the risk faced by the claimant. Rather, as acknowledged by the House of Lords,

persecutors may act for more than one reason . . . [J]ust because someone had been persecuted for suspected involvement in violent terrorism, it [does] not follow that he had not been persecuted for his political opinion. In other words, he might have been persecuted for both reasons . . . In such a case the appropriate inference may be that, if the applicant returned home, he would be ill-treated for a combination of Convention and non-Convention reasons. If so, the person considering the claim for asylum will properly conclude that the applicant has a well-founded fear of persecution for that combination of reasons.<sup>112</sup>

The principle that the existence of mixed motives does not defeat a valid refugee claim is well accepted in a range of other jurisdictions, including Australia,<sup>113</sup>

the judgment of the court). Neither the House of Lords nor Supreme Court has adjudicated this issue directly. In *Sepet*, relevant comments were *obiter* as it was acknowledged that it was not necessary to decide this point, given that in the view of the court the applicant failed in establishing the persecution point: see *Sepet* (UKHL, 2003), per Lord Bingham at 871 [21], Lord Hoffmann at 879–80 [54]. The language of “real reason” was, however, adopted in *R (Sivakumar) v. Secretary of State for the Home Department*, [2003] 1 WLR 840 (UKHL, Mar. 20, 2003), at 853 [40], per Lord Rodger. Lord Bingham also reiterated the “real reason” test in *Fornah* (UKHL, 2006), at 433 [17]. We note that his Lordship also cited with approval the “Michigan Guidelines on Nexus,” *supra* n. 11: at 434 [18]. In *Sepet*, Lord Bingham adopted the Australian formulation from *Ibrahim* (Aus. HC, 2000), phrasing the relevant question as “Why will the applicant be subjected to the harm?”: at 872 [22], citing *Ibrahim* at [102] (emphasis in original). Lord Bingham acknowledged that, in line with non-discrimination law, it is appropriate to ask whether a Convention ground is “an effective cause of the difference in treatment”: at 872 [22].

<sup>112</sup> *Sivakumar* (UKHL, 2003), at 853–54 [40], per Lord Rodger, with whom Lord Hoffmann explicitly agreed at 849 [22].

<sup>113</sup> In *Applicant in V488 of 2000 v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1815 (Aus. FC, Dec. 19, 2001), the Federal Court of Australia held that “the need for a Convention reason will be satisfied if only one of those motives is referable to, for example, the victim’s race or membership of a social group”: at [36]. See also *Minister for Immigration and Multicultural Affairs v. Sarrazola (No. 2)*, (2001) 107 FCR 184 (Aus. FFC, Mar. 21, 2001), at 186 [2] (per Heerey J.) and 197 [45] (per Merkel J.);

the US,<sup>114</sup> Canada,<sup>115</sup> New Zealand,<sup>116</sup> and Germany,<sup>117</sup> and is also endorsed by the UNHCR.<sup>118</sup> As articulated in an early decision of the Canadian Federal Court, “[p]eople frequently act out of mixed motives, and it is enough for the existence of political motivation that one of the motives was political.”<sup>119</sup>

5 This widespread rejection of a “sole motive” test is consistent with the text, context, object, and purpose of the Convention. The text of Article 1(A)(2) does not require a “sole motive” test, since the pertinent phrase is simply “for reasons of” rather than “solely for reasons of.” As the US Court of Appeals for the Second Circuit observed, the “plain meaning” of the nexus clause “does not mean persecution solely on account of the protected

*Gersten v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 855 (Aus. FFC, Jul. 5, 2000), at [32]; *W375/01A v. Minister for Immigration and Multicultural Affairs*, (2002) 67 ALD 757 (Aus. FFC, Apr. 3, 2002), at 764 [26].

<sup>114</sup> In the US, the mixed motive doctrine was very well established prior to the REAL ID Act (US): see e.g. *Hernandez-Montiel v. Immigration and Naturalization Service*, (2000) 225 F.3d 1084 (USCA, 9th Cir., Aug. 24, 2000), at 1096; *Zhou v. Ashcroft*, (2003) 85 Fed. Appx. 556 (USCA, 9th Cir., Dec. 11, 2003), at 568; *Zhang v. Gonzales*, (2005) 426 F.3d 540 (USCA, 2nd Cir., Oct. 13, 2005), at 548; *Duarte Porras v. Attorney General*, (2005) 159 Fed. Appx. 949 (USCA, 11th Cir., Dec. 19, 2005), at 954; *Mohideen v. Gonzales*, (2005) 416 F.3d 567 (USCA, 7th Cir., Jul. 21, 2005), at 569; *Diaz-Marroquin v. Immigration and Naturalization Service*, (2001) 3 Fed. Appx. 601 (USCA, 9th Cir., Feb. 7, 2001); *Parussimova* (USCA, 9th Cir., 2009), at 739–40, and the amendment has not altered the basic premise that mixed motives may be present: see e.g. *Matter of NM*, (2011) 25 I & N Dec. 526 (USBIA, Jun. 9, 2011), at 530. In *Girma* (USCA, 5th Cir., 2002) the court explained that “the presence of possible mixed motives need not [necessarily] defeat an asylum claim”: at 667, citing *Kozulin v. Immigration and Naturalization Service*, (2000) 218 F.3d 1112 (USCA, 9th Cir., Jul. 14, 2000), at 1117.

<sup>115</sup> See *Zhu v. Canada (Minister of Employment and Immigration)*, [1994] FCJ 80 (Can. FC, Jan. 28, 1994); *Shahiraj v. Canada (Minister of Citizenship and Immigration)*, (2001) 205 FTR 199 (Can. FCTD, May 9, 2001). See also M. Jones and S. Baglay, *Refugee Law* (2007), at 126, citing *Sopiqoti v. Canada (Minister of Citizenship and Immigration)*, (2003) 34 Imm. L. R. (3d) 126 (Can. FC, Jan. 29, 2003), at [14].

<sup>116</sup> *Refugee Appeal No. 72635/01* (NZ RSAA, 2002).

<sup>117</sup> *10 C 24.08* (Ger. BverwG [German Federal Administrative Court], Nov. 24, 2009), at [16]. Interestingly, the focus on establishing the requisite degree of causation appears largely an issue with which common law courts have been engaged: see M. Foster, “Causation in Context: Interpreting the Nexus Clause in the Refugee Convention,” (2002) 23(2) Mich. J. Intl. L. 265, an insight that tends to be corroborated by the lack of reference to this issue in the Qualification Directive. Article 9(3) of the Qualification Directive, *supra* n. 28, simply states that, “[i]n accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.”

<sup>118</sup> UNHCR, *Guidelines on International Protection No. 7*, *supra* n. 16, at [29]; see also UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [29]; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/09/08 (Dec. 22, 2009) (“*Guidelines on International Protection No. 8*”), at [20]; UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [38].

<sup>119</sup> *Zhu* (Can. FC, 1994), at [2]; see also *Veeravagu v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 468 (Can. FCA, May 27, 1992), at [4]. The mixed motives doctrine has been applied to motives or reasons related to both the applicant and the persecutor. In terms of the applicant, it has been accepted that the fact that a claim for refugee status is partly motivated for example by economic considerations is immaterial where a person has a well-founded fear of being persecuted. See e.g. *Melkonian v. Ashcroft*, (2003) 320 F.3d 1061 (USCA, 9th Cir., Mar. 4, 2003), at 1068. The Hiroshima District Court recognized that: “Even if the defendant (applicant) was motivated by the possibility of working in Japan at the same time, it does not preclude acknowledgement of his intention to seek asylum”: *RES v. Japan (Prosecutor)*, (2002) Wa No. 225 (Jap. Hiroshima Dist. Ct., Jun. 20, 2002), at s. 2[4], cited in O. Arakaki, *Refugee Law and Practice in Japan* (2008), at 197.

grounds.”<sup>120</sup> Further, the rationale for the mixed motives doctrine is supported by the object and purpose of the Convention in that courts have recognized that to read a sole cause test into the definition “would be to narrow the scope of the [Convention] protection artificially,”<sup>121</sup> and hence to “render [it] largely ineffectual.”<sup>122</sup>

Despite the widespread rejection of a “sole motive” test in refugee law, there is still on occasion the tendency to apply a binary distinction in categorizing the reasons for being persecuted such that if one non-Convention ground can be identified, it is assumed that all other potential factors are excluded.<sup>123</sup> Yet an acknowledgment that “human conduct is rarely, if ever, uni-dimensional”<sup>124</sup> means that a decision-maker should not “treat[] the presence of a nonpolitical motive as evidence of the absence of a political motive.”<sup>125</sup> In the context of extortion for example, “the activities of extortionists may or may not have underlying Convention nexus, and it is an error of law to overlook the need to examine the underlying reasons for the refugee claimant being targeted for extortion by its principal beneficiary.”<sup>126</sup> Similarly, where “an act of revenge or retribution is derived from or arises

<sup>120</sup> *Osorio v. Immigration and Naturalization Service*, (1994) 18 F.3d 1017 (USCA, 2nd Cir., Mar. 7, 1994), at 1029.

<sup>121</sup> *Jahazi v. Minister for Immigration and Ethnic Affairs*, (1995) 61 FCR 293 (Aus. FC, Nov. 14, 1995), at 299.

<sup>122</sup> *Minister for Immigration and Multicultural Affairs v. Abdi*, (1999) 87 FCR 280 (Aus. FFC, Mar. 26, 1999), at 287. See also *Re SP*, (1996) 21 I & N Dec. 486 (USBIA, Jun. 18, 1996), in which the Board of Immigration Appeals acknowledged that in adjudicating mixed motive cases “it is important to keep in mind the fundamental humanitarian concerns of asylum law”: at 492.

<sup>123</sup> In *Sarrazola (No. 2)* (Aus. FFC, 2001), Merkel J. criticized the Refugee Review Tribunal’s decision on the basis that, “[t]o find, as the RRT did, that she was later pursued and threatened because it was believed she has the means to pay, cannot negative the significance of the fact that she was selected as the target to pay because of her family membership. To elevate having the means to pay to be the *only* reason motivating the respondent’s persecutors is . . . illogical and wrong”: at 199 [52] (emphasis in original). For a particularly worrying example in the context of religion, see *Amanfi v. Ashcroft*, (2003) 328 F.3d 719 (USCA, 3rd Cir., May 16, 2003), in which the Third Circuit characterized the “dispute” between the “macho men” and the applicant and his father as “personal” notwithstanding the clear evidence that it was their religious views that had put them at risk: see at 726. See also *Metko v. Gonzales*, (2005) 159 Fed. Appx. 666 (USCA, 6th Cir., Dec. 14, 2005), where the Sixth Circuit minimized the importance of the fact that “some of the threats referred to Ms Metko’s belief in a democratic system of government,” finding that “these references were incidental to the threats’ purpose of silencing Ms Metko”: at 669. Yet, as the concurring judge found in the case, “it is clear that Metko’s fear stems from her husband’s connections to those in power in Albania”: at 670. See also *Igoshin v. Immigration and Naturalization Service*, (2002) 50 Fed. Appx. 905 (USCA, 10th Cir., Oct. 9, 2002), where the Tenth Circuit took an unnecessarily narrow approach to the context of this case, overlooking grounds of religion and political opinion as clearly available mixed motives. For a recent Canadian decision, see *Rasuli v. Canada (Minister of Citizenship and Immigration)*, [2012] FC 1340 (Can. FC, Oct. 25, 2012).

<sup>124</sup> *Chen Shi Hai* (Aus. HC, 2000), at 338 [69], per Kirby J.

<sup>125</sup> *Menghesha v. Gonzales*, (2006) 450 F.3d 142 (USCA, 4th Cir., Mar. 13, 2006), at 148. See also *Bi Xia Qu v. Holder*, (2010) 618 F.3d 602 (USCA, 6th Cir., Aug. 27, 2010), at 608: “if there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.” For an example of the relegation of a complex political and ethnic context to dismissal as simply a “personal dispute,” see *Adebisi v. Immigration and Naturalization Service*, (1992) 952 F.2d 910 (USCA, 5th Cir., Feb. 7, 1992), at 913.

<sup>126</sup> *MZYRI v. Minister for Immigration*, (2012) 267 FLR 456 (Aus. FMCA, Apr. 30, 2012), at [51]; *Rajaratnam v. Minister for Immigration and Multicultural Affairs*, (2000) 62 ALD 73 (Aus. FFC, Aug. 10, 2000), at [46]–[48]. See also *Minister for Immigration and Multicultural Affairs v. Sarrazola*, (1999) 95 FCR 517 (Aus. FFC, Oct. 6, 1999), at 521–22 [13]–[17]. For another interesting decision, see *Jahed v. Immigration and*

out of a political act or campaign then the act of revenge or retribution may be a political act.”<sup>127</sup> And in the context of trafficking, UNHCR Guidelines explain that the “overriding economic motive” involved does not “exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking.”<sup>128</sup>

5 It is often in claims involving gender that decision-makers focus disproportionately on the assumed “personal” motives of the persecutor and conclude that where a “personal motive” such as desire, revenge, personal gain, or greed is present this necessarily excludes a Convention ground. This binary reasoning – either a dispute is personal *or* it is Convention related – can lead to a simplistic analysis that fails to comprehend the wider societal context  
10 to a woman’s fear of being persecuted. The better approach is to recognize, as did the US Court of Appeals for the Seventh Circuit in an “honor killing” case, that although “[t]he man who does the killing may have a personal motivation in the sense that he is angry that his sister has dishonored the family,”<sup>129</sup> this does not detract from the fact that “he is killing her because society has deemed that this is a permissible – maybe in some eyes  
15 the only correct – course of action”<sup>130</sup> due to her transgression of a gender-based honor code.

Recognition that a person may be at risk of being persecuted even though both Convention and non-Convention grounds are contributing factors in creating the risk does not, however, dispose of the causation issues. Decision-makers have continued to grapple with the *degree* or  
20 *quantum* of causal connection required. Both judicial analysis<sup>131</sup> and legislative amendment have at times sought to introduce further precision to the task of quantifying the causal link. Most obviously, US legislation requires that a Convention ground “was or will be *at least one central reason* for persecuting the applicant,”<sup>132</sup> while Australian law provides that

*Naturalization Service*, (2004) 356 F.3d 991 (USCA, 9th Cir., Jan. 20, 2004). See also *Borja v. Immigration and Naturalization Service*, (1999) 175 F.3d 732 (USCA, 9th Cir., Apr. 30, 1999).

<sup>127</sup> *SHKB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 545 (Aus. FC, May 5, 2004), at [12], per Selway J. (upheld on appeal to the Full Court: see [2005] FCAFC 11 (Aus. FFC, Feb. 18, 2005)). See also *MZYRI* (Aus. FMCA, 2012), at [52]; *Castaneda-Castillo v. Holder*, (2011) 638 F.3d 354 (USCA, 1st Cir., Mar. 24, 2011), at 366; and *Lim v. Immigration and Naturalization Service*, (2000) 224 F.3d 929 (USCA, 9th Cir., Aug. 29, 2000), at 934: “political revenge and political persecution are not mutually exclusive.” In *Zoghbi v. Gonzales*, (2005) 148 Fed. Appx. 596 (USCA, 9th Cir., Aug. 16, 2005), the court held that, “[a]lthough the IJ [immigration judge] found that Zoghbi suffered persecution *primarily* because of the military dispute in that region, he acknowledged petitioner’s religion was another basis for Hezbollah’s actions . . . Petitioner thus has established that he was persecuted, under a mixed motive theory”: at 598. In *Rajanayake v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 143 (Aus. FFC, Feb. 26, 2002), the Full Federal Court of Australia noted that: “If the person against whom the extortion is perceived is particularly vulnerable to extortion by reason of some other characteristic protected by the Convention . . . it may be that he or she is being persecuted for reason of that characteristic”: at [39].

<sup>128</sup> UNHCR, *Guidelines on International Protection No. 7*, *supra* n. 16, at [31]. For a good example of this, see *Bi Xia Qu* (USCA, 6th Cir., 2010), at 608. In a different context, the US Court of Appeals for the Ninth Circuit has acknowledged that the fact that persecution may have been at least in part for reasons of the applicant’s economic status “does not affect our conclusion that the CPM persecuted him and his family at least in part on account of a protected ground”: *Maimi* (USCA, 9th Cir., 2000), at 1176 n. 1.

<sup>129</sup> *Sarhan* (USCA, 7th Cir., 2011), at 655, where the court paraphrased the position of the immigration judge, Board of Immigration Appeals, and Attorney General.

<sup>130</sup> *Ibid.* <sup>131</sup> See the extensive analysis in Foster, *supra* n. 117, at 269–91.

<sup>132</sup> The REAL ID Act has amended the Immigration and Nationality Act 1952 (US) to include 8 USC § 1158(b)(1)(B) (emphasis added).

a Convention reason must be “the *essential and significant* reason” for the risk of being persecuted.<sup>133</sup> Alternative formulations include that the Convention ground need be the principal, predominant, major, essential, significant, or “but for” reason for the applicant’s well-founded fear.<sup>134</sup>

What then, amongst the myriad available tests, is the correct approach to quantifying the causal link in refugee law? Questions of causation are relevant, of course, in other areas of the law, but it is well established that they must be “answered in the legal framework in which they arise.”<sup>135</sup> The legal framework and context in which the question of causation arises in the Refugee Convention is uniquely challenging given that a decision-maker must attempt to prognosticate future risk against the backdrop of a likely paucity of evidence.<sup>136</sup> Given that refugee flows are today more likely than at the Convention’s inception to reflect risks from non-state agents, whose aims and motivations may be diverse and complex, there are especially serious challenges in determining the causal link in the context of refugee law. After all, how does one ascertain the relative significance of the refugee applicant’s race as compared with wealth as contributing factors in placing her at risk of being persecuted? Where the claim rests on the motivation or intention of the past or future persecutor,<sup>137</sup> the task of identifying and separating out the relative weight of various motivating factors in the mind of a person who is not present at the adjudication procedure would appear a very difficult, if not impossible, task.<sup>138</sup> The combination of all of these contextual factors points to the need for a flexible standard that is not only consistent with the protective object and purpose of the Convention, but responsive to the challenging reality of refugee status adjudication.

One approach that has sometimes been suggested is to require the Convention ground to constitute a “but for” reason for the risk of being persecuted. In *Parussimova*, for example,

<sup>133</sup> Migration Act 1958 (Cth), s. 91R(1)(a) (emphasis added). In at least some cases, an attempt to describe the requisite level of causation is a legislative response to a perception that other more lenient standards adopted by the judiciary have led inappropriately to the recognition of refugee status where the link to a Convention ground is too attenuated. For example, in *Matter of NM* (USBIA, 2011), the Board of Immigration Appeals explained that, in passing this amendment, “Congress was concerned that the Ninth Circuit’s decisions in *Borja* . . . ‘undermined a proper analysis of mixed motive cases.’”: at 531. The Board of Immigration Appeals went on to note that the Ninth Circuit “has acknowledged that the REAL ID Act’s ‘one central reason’ standard ‘places a more onerous burden on the asylum applicant than the “at least in part” standard [the Ninth Circuit] previously applied’”: at 531.

<sup>134</sup> Foster, *supra* n. 117, at 274–91.

<sup>135</sup> *Chappel v. Hart*, (1998) 195 CLR 232 (Aus. HC, Sept. 2, 1998), at [7], per Gaudron J.; *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [167]; *Shah* (UKHL, 1999): “Answers to questions about causation will often differ according to the context in which the question is asked”: at 653, per Lord Hoffmann.

<sup>136</sup> Foster, *supra* n. 117, at 296–97. See *supra* Ch. 2.6. See also *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), in which the New Zealand Refugee Status Appeals Authority noted that “[t]he determination of refugee status is a notoriously difficult exercise . . . Both the refugee claimant and the decision-maker are handicapped by evidentiary voids, not the least of which is the inability to cross-examine the agent of persecution”: at [172].

<sup>137</sup> See *supra* Ch. 5.2.1.

<sup>138</sup> See e.g. the eloquent dissent of Circuit Judge Wiener in *Ontunez-Tursios v. Ashcroft*, (2002) 303 F.3d 241 (USCA, 5th Cir., Aug. 13, 2002), in which he noted that in the context of “class struggles cum land use or ownership struggles” which were the subject of that application, “the intertwining of the political, economical, social and property-holding motivations inevitably proves inextricable, rendering fruitless any analytical effort to isolate one causal factor. As such, attempts to parse these elements invariably prove speculative at best”: at 355.

a US court elevated the “one central reason” test into a “but for” test – a test well known to tort law<sup>139</sup> – by concluding that “a motive is a ‘central reason’ if the persecutor would not have harmed the applicant if such motive did not exist.”<sup>140</sup> In that case, while the evidence revealed that the applicant’s ethnicity “played a role in the [past persecution],”<sup>141</sup> it was “simply not clear whether [her] ethnicity, as opposed to one of the other possible motives evinced by the record, caused the assailants to initiate their attack or increase its severity once it had begun.”<sup>142</sup> In our view this approach suffers from the traditional shortcomings of the “but for” analysis in tort law, recognized in that context to “demand[] the impossible,”<sup>143</sup> as it “challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs,”<sup>144</sup> thus opening “the door wide for conjecture.”<sup>145</sup> These considerations apply *a fortiori* in refugee law given the hypothetical nature of an assessment concerning prospective assessment of risk.

More contextually relevant insight might be derived from analysis of causation in non-discrimination law, a body of law that, while concerned with ascertaining liability, shares with refugee law the fundamental aim of protecting and providing relief to victims.<sup>146</sup> Further, the language of causation in non-discrimination law often resembles that of the Refugee Convention (for example, discrimination “on the ground of,” “on the basis of,” “by reason of”).<sup>147</sup> Where issues of multiple causes arise, they tend more closely to resemble the issues in refugee law in that rather than dealing with multiple independent causes (as in tort law) non-discrimination law often requires a decision-maker to ascertain why a single person or organization acted in a particular way – a difficult task because it means dealing with “a tangle of human motivations, which are not truly independent or separable.”<sup>148</sup> It is significant, then, that in non-discrimination law there is considerable authority for the proposition that a “jurisprudence of adjectives”<sup>149</sup> should be rejected in favor of a

<sup>139</sup> See Foster, *supra* n. 117, at 305–10. In some jurisdictions, particularly Australia, it has sometimes been suggested that the “common sense” test from tort law might also be imported into refugee law: discussed in Hathaway and Foster, *supra* n. 16, at 473. For a critique of this approach, see Hathaway and Foster, at 472–73. Legomsky and Rodriguez have argued for the adoption of the “but for” test from tort law into refugee law, but carefully explain that it is offered “as a *sufficient* condition for nexus . . . not as a *necessary* condition”: *supra* n. 8, at 988 (emphasis in original).

<sup>140</sup> *Parussimova* (USCA, 9th Cir., 2009), at 741–43. Interestingly, the Ninth Circuit had earlier explicitly rejected the “but for” test in refugee law: see *Gafoor* (USCA, 9th Cir., 2000).

<sup>141</sup> *Parussimova* (USCA, 9th Cir., 2009), at 742.

<sup>142</sup> *Ibid.*, at 742. For another recent example, see *Shaikh* (USCA, 7th Cir., 2012).

<sup>143</sup> W. S. Malone, “Ruminations on Cause-in-Fact,” (1956) 9 Stan.L. R. 60, at 67. <sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.* In *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), the Refugee Status Appeals Authority stated: “It is wrong in law to uncritically import causation standards from other bodies of law (in particular, the notoriously problematical ‘but for’ test from tort law)”: at [167].

<sup>146</sup> Foster, *supra* n. 117, at 318.

<sup>147</sup> See e.g. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 UNTS 171 (“Civil and Political Covenant”), at Art. 26.

<sup>148</sup> See M. E. Maatman, “Choosing Words and Creating Worlds: The Supreme Court’s Rhetoric and Its Constitutive Effects on Employment Discrimination Law,” (1998) 60 U. Pitt. L. Rev. 1, at 21–22. As Fredman observes, “[d]irect discrimination is particularly difficult to prove, since most relevant evidence is in the hands of the respondent”: Fredman, *supra* n. 95, at 283.

<sup>149</sup> *Starcon, Inc. v. National Labor Relations Board*, (1999) 176 F.3d 948 (USCA, 7th Cir., May 4, 1999), at 951.



more simplified and straightforward “one factor” or “one reason” test of causation,<sup>150</sup> a development relied upon by several courts as a persuasive reason to adopt a “one factor” test in refugee law.<sup>151</sup>

Given the difficulties, perhaps even impossibility, of ascertaining the precise weight of a Convention reason in creating a well-founded fear of being persecuted, it is not surprising that attempts to further refine the level of causation do not appear to have clarified or assisted the causal analysis in refugee law in any meaningful way. In Australia, for example, where legislation requires the Convention reason to constitute the “essential and significant” reason,<sup>152</sup> the Federal Magistrates Court has explained that this does not alter the fact that “a Convention reason may explain actions accompanied by mixed or personal motives,”<sup>153</sup> and that “a Convention nexus can be established if one of the grounds mentioned in the Convention is identified as amongst the motivations for conduct of a persecutory nature.”<sup>154</sup> Accordingly, the legislative amendment simply “provides a gloss requiring disregard of concurrent or contributory Convention causes of persecution if they can be characterized as inessential or insignificant.”<sup>155</sup> Similarly, in the US, where legislative amendment requires the Convention ground to be “a central reason,” the Board of Immigration Appeals has stated that “our standard in mixed motive cases has not been radically altered,”<sup>156</sup> explaining the new test, as in the Australian context, largely in terms of what is *not* a central reason, namely, one that is “incidental, tangential, superficial, or subordinate to another reason for harm.”<sup>157</sup>

<sup>150</sup> For example, in various pieces of Australian legislation implementing the key international human rights treaties it is explicitly recognized that an act may be done for a prohibited reason “whether or not the particular matter is the dominant or substantial reason for the doing of the act”: Sex Discrimination Act 1984 (Cth), s. 8. See also Racial Discrimination Act 1975 (Cth), s. 18(b); Age Discrimination Act 2004 (Cth), s. 16(1)(b) – amendments which resolved early uncertainty surrounding the correct test in favor of a simple “one reason” approach. The Committee on the Elimination of Racial Discrimination has suggested that the Australian example of adopting a “one factor” test might be considered as a model for those state parties that adopt a more stringent test which, in the Committee’s view, is in violation of the object and purpose of the Race Convention, *supra* n. 95: Committee on the Elimination of Racial Discrimination, “Consideration of Ninth and Tenth Periodic Reports of Austria,” UN Doc. CERD/C.SR.947 (Sept. 9, 1992), at 3; Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Austria,” UN Doc. CERD/C/304/Add.64 (Apr. 7, 1999), at [11].

<sup>151</sup> See e.g. *Chokov v. Minister for Immigration and Multicultural Affairs*, [1999] FCA 823 (Aus. FC, Jun. 25, 1999), at [31]; *Okere* (Aus. FC, 1998); *Gafoor* (USCA, 9th Cir., 2000), at 654.

<sup>152</sup> Migration Act 1958 (Cth), s. 91R(1)(a).

<sup>153</sup> *SZFZN v. Minister for Immigration*, [2006] FMCA 1153 (Aus. FMCA, Aug. 31, 2006), at [16]–[17].

<sup>154</sup> *DZACC v. Minister for Immigration*, [2012] FMCA 314 (Aus. FMCA, Apr. 20, 2012), at [16].

<sup>155</sup> *SZFZN* (Aus. FMCA, 2006), at [21].

<sup>156</sup> *Re JBN and SM, Respondents*, (2007) 24 I & N Dec. 208 (USBIA, Jun. 25, 2007), at 214. See also *Stserba* (USCA, 6th Cir., 2011), at 978.

<sup>157</sup> *Re JBN* (USBIA, 2007), at 214. The word “subordinate” has been excised by at least one Circuit Court of Appeal on the basis that “the mixed motive analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate”: *Ndayshimiye v. Attorney General*, (2009) 557 F.3d 124 (USCA, 3rd Cir., Feb. 24, 2009), at 129; see Anker, *supra* n. 29, at 283. The resulting position is that “asylum may not be granted if a protected ground is only an ‘incidental, tangential, or superficial’ reason for persecution”: *Ndayshimiye*, at 130. For subsequent case law applying a similarly liberal test, see *Zorig v. Holder*, (2009) 349 Fed. Appx. 306 (USCA, 10th Cir., Oct. 15, 2009), at 311; *Zhiqiang Hu v. Holder*, 2011 U.S. App. LEXIS 14327 (USCA, 9th Cir., Jul. 14, 2011), at 5. But for a worrying application of this test, see *Shaikh* (USCA, 7th Cir., 2012).

In light of the myriad practical challenges in assigning particular weight to a Convention ground, and the lack of any principled or ethical basis for denying protection so long as a Convention ground is a contributing factor in establishing risk,<sup>158</sup> it is logical that the overwhelming judicial preference is to adopt a straightforward “one factor” test, such that

5 “the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted.”<sup>159</sup> This test has largely been adopted in a range of jurisdictions and endorsed by the UNHCR, which has emphasized that it is sufficient “that the Convention ground be a

10 *relevant factor* contributing to the persecution,”<sup>160</sup> or “the Convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant cause.”<sup>161</sup> The House of Lords has explicitly endorsed the Michigan Guidelines on Nexus,<sup>162</sup> which proposed the “contributing cause” test, although Lord Bingham added the gloss “effective reason” when explaining that the “ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution.”<sup>163</sup>

15 In Germany, the Federal Administrative Court has affirmed that the question is whether the “measures of persecution will affect the individual, *at least in part*, because of characteristics that are relevant for asylum.”<sup>164</sup>

Regardless of the variations in expression, there is now widespread authority for the proposition that

<sup>158</sup> As Legomsky and Rodriguez observe, “[i]f a person or group persecutes someone on precisely that [Convention] basis, the fact that the persecutor is additionally discriminating on some other basis doesn’t *lessen* the harm or diminish the victim’s need for protection”: *supra* n. 8, at 988 (emphasis in original).

<sup>159</sup> “Michigan Guidelines on Nexus,” *supra* n. 11, at [13].

<sup>160</sup> *Guidelines on International Protection No. 7*, *supra* n. 16, at [29] (emphasis added); see also UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [29]; UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [40]; UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [20]; UNHCR, Advisory Opinion to the Tokyo Bar Association, “Causal Linkage between a 1951 Convention Ground and the Risk of Being Persecuted” (Mar. 1, 2006), at [5].

<sup>161</sup> UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [38].

<sup>162</sup> *Fornah* (UKHL, 2006), at 434 [18], per Lord Bingham, providing the lead judgment in that case.

<sup>163</sup> *Ibid.*, at 433 [17]. His Lordship stated: “It is enough that the ground relied on is an effective reason.” In *HJ (Iran)* (UKSC, 2010), the UK Supreme Court invoked the language of “material reason, among a number of complementary reasons”: at 640 [62], per Lord Rodger, in the context of rejecting the argument that a person should be required to act discreetly to avoid being persecuted.

<sup>164</sup> *10 C 24.08* (Ger. BverwG [German Federal Administrative Court], Nov. 24, 2009), at [16] (unofficial translation, emphasis added). The leading case is said to be *9 C 28.99* (Ger. BverwG, Jul. 25, 2000). This was also the test adopted in the US prior to the amendments in the REAL ID Act (US): see e.g. *Tagaga v. Immigration and Naturalization Service*, (2000) 228 F.3d 1030 (USCA, 9th Cir., Sept. 21, 2000), at 1035; *Girma* (USCA, 5th Cir., 2002), at 666; *Lukwago v. Ashcroft*, (2003) 329 F.3d 157 (USCA, 3rd Cir., May 14, 2003), at 170; *Mengheshha* (USCA, 4th Cir., 2006): “Under the INA’s ‘mixed-motive’ standard, an asylum applicant need only show that the alleged persecutor is motivated *in part* to persecute him on account of a protected trait”: at 148 (emphasis in original). Further, the court noted that “the INA requires only that an applicant prove that one of those motives is prohibited under the INA”: at 148. See also *Rivera v. Attorney General*, (2007) 487 F.3d 815 (USCA, 11th Cir., May 23, 2007): “This Court has held that an applicant is entitled to withholding of removal ‘[i]f [he] can show that persecution was, at least in part, motivated by a protected ground’”: at 821. This appears to continue to be the approach in some jurisdictions, notwithstanding the passage of the REAL ID Act: see e.g. *Bi Xia Qu* (USCA, 6th Cir., 2010), at 608: “Qu need only show that Zhang was motivated to abduct her, at least in part, on account of an enumerated ground.”

it is sufficient for the refugee claimant to establish that the Convention ground is a *contributing* cause to the risk of “being persecuted”. It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or “but for” cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted.<sup>165</sup>

There may, of course, be cases where the link is so tenuous as to be truly marginal; hence if “the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.”<sup>166</sup> Where the Convention ground is incidental, coincidental, or otherwise *de minimis* in establishing risk, refugee status is appropriately denied. For example, in *Velasco*, Lord Justice Sedley observed that in that case the applicant’s “membership of the Conservative Party was incidental. It had [merely] furnished the opportunity for him to be in a role in which he was able to discover the fraud and by that means to find himself at risk.”<sup>167</sup> However, beyond this qualification it is difficult to justify a delimitation of refugee law’s beneficiary class on the basis of the relative weight of a Convention ground.

In sum, analysis of the various attempts to quantify the requisite causal connection in refugee law reveals that there is little to be gained, but much to be lost, by grafting unworkable and unclear causation standards onto the “for reasons of” clause. As Lord Rodger observed in justifying the adoption of a contributing cause or “one factor” test in refugee law, “as in the fields of sex and race discrimination, there is little to be gained from dwelling unduly on the precise adjective to use to describe the reason.”<sup>168</sup> Hence, it is sufficient if the Convention reason or ground accounts in part or is a contributing factor in creating the risk of being persecuted. Providing that the Convention reason is not “remote to the point of irrelevance,” any attempt further to prescribe a required level of causation is unlikely to be workable or consistent with the object and purpose of the Convention.

## 5.4 The Convention grounds

Having explored the nature of the causal link in the refugee definition, we now turn to the Convention grounds. Although there are five independent grounds on which a claim for protection may be based, they embody multiple manifestations of a single idea: fundamental

<sup>165</sup> *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [173]; adopted by the New Zealand Immigration and Protection Tribunal in *AC (Russia)* (NZ IPT, 2012), at [77] (emphasis in citation from *AC (Russia)*). See Foster, *supra* n. 18, in which it is stated that “the overwhelming trend in the common law jurisprudence is to eschew [a] strict test such as dominant, predominant, essential or ‘but for’ cause in favour of a more liberal ‘in part’ or ‘a factor’ test”: at 257–58 and authorities cited therein. In the US, see *Mohideen* (USCA, 7th Cir., 2005), at 570; *Bueso-Avila* (USCA, 7th Cir., 2011), at 937; and *He v. Holder*, (2012) 502 Fed. Appx. 430 (USCA, 6th Cir., Oct. 10, 2012), at 435 (“at least in part”). There is also academic support for this position: see Anker, *supra* n. 29, at 282 ff; Legomsky and Rodriguez, *supra* n. 8, at 990. In Canada, see Jones and Baglay, *supra* n. 115, at 126, citing *Cabarcas v. Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 396 (Can. FC, Mar. 19, 2002), at [6].

<sup>166</sup> “Michigan Guidelines on Nexus,” *supra* n. 11, at [13]. Adopted in *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [173]; approved in *AC (Russia)* (NZ IPT, 2012), at [77].

<sup>167</sup> *Velasco v. Secretary of State for the Home Department*, [2000] EWCA Civ J 0405-5 (Eng. CA, Apr. 5, 2000), at [6]. His Lordship further provided similarly remote examples at [7]. For another good example of such a case, see *Pedro-Mateo v. Immigration and Naturalization Service*, (2000) 224 F.3d 1147 (USCA, 9th Cir., Sept. 14, 2000). Legomsky and Rodriguez endorse this position also, although by reference to the tort-based notion of proximate cause: see *supra* n. 8, at 988–90.

<sup>168</sup> *Sivakumar* (UKHL, 2003), at 854 [41]; Lord Hoffmann explicitly agreeing at 849 [22].

socio-political disfranchisement defined by reference to core norms of non-discrimination law.<sup>169</sup> As explained by Lord Bingham in the House of Lords, “the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being.”<sup>170</sup>

It will sometimes be obvious that a person is defined by a protected ground. A person’s affiliation with some Convention grounds may be readily visible and immediately apparent due to immutable features such as physical appearance (in the case of race or nationality, and such social groups as gender); while an affiliation with other grounds is more likely to be revealed – indeed in some cases can *only* be revealed – through activity or behavior (for example political opinion, religion, and particular social groups such as homosexuals).<sup>171</sup> The relevant behavior may be straightforwardly associated with the Convention ground – for example, attending church or publishing a political opinion piece in a newspaper – or less obviously so – for example, residing in a neighborhood whose inhabitants are deemed to be supportive of political opposition. In any case, the relevant question is simply whether a person is at risk for a Convention reason, regardless of whether the stigmatized status or identity is revealed or exposed through behavior, and regardless of whether the applicant actually possesses or has simply had the relevant ground imputed to her.<sup>172</sup>

Since all five grounds are accorded equal weight and importance in the Convention,<sup>173</sup> there is no basis for privileging claims based on overt identity over those where identity is revealed through activity, or for assuming that claims grounded in protected forms of “behavior” or “activity” are any less deserving than those based on facial manifestation of a Convention ground.<sup>174</sup> So long as a Convention ground is a contributing factor to the risk of being persecuted, even where the existence of the Convention ground was or will only be exhibited through activity or behavior, refugee status is appropriately recognized.<sup>175</sup>

<sup>169</sup> This notion, first set out in Hathaway, *Refugee Status*, at 135–41, has been widely adopted: see e.g. Goodwin-Gill and McAdam, *supra* n. 33, at 70.

<sup>170</sup> *Fornah* (UKHL, 2006), at 430 [13]. Both the Civil and Political Covenant, *supra* n. 147, and the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force Jan. 3, 1976, 993 UNTS 3 (“Economic, Social and Cultural Covenant”) prohibit discrimination on the grounds of (*inter alia*): race, color, language, religion, political or other opinion, national or social origin, or other status: see Art. 2. See also Race Convention, *supra* n. 95, at Arts. 1 and 2.

<sup>171</sup> For example, one American judge explained that political opinion is “prototypically” evidenced by “verbal or openly expressive behavior by the applicant in furtherance of a particular cause”: *Saldarriaga v. Gonzales*, (2005) 402 F.3d 461 (USCA, 4th Cir., Mar. 29, 2005), at 466, cited in Anker, *supra* n. 29, at 291. Of course this distinction is fluid. For example, sexual orientation and gender identity may be revealed by external appearance: see UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [12].

<sup>172</sup> As the UNHCR Guidelines note, “an activity associated with sexual orientation may merely reveal or expose the stigmatized identity”: UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [19].

<sup>173</sup> As noted by the UK Supreme Court in *RT (Zimbabwe)* (UKSC, 2012): “It is well established that there are no hierarchies of protection amongst the Convention reasons for persecution”: at 356 [25], per Lord Dyson (with whom Lord Hope, Baroness Hale, Lord Clarke, Lord Wilson, and Lord Reed agreed).

<sup>174</sup> *Ibid.*, at 356 [25]: “the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual.”

<sup>175</sup> We note that there are frequently credibility issues in establishing connection to a Convention ground especially in the context of grounds such as religion, political opinion, and particular social groups such as homosexuality. For consideration of this issue in the context of homosexuality, see J. C. Hathaway and

Yet decision-makers have sometimes fallen into error by imposing on applicants, particularly although not exclusively in the context of claims based on sexuality,<sup>176</sup> a requirement effectively to suppress identity by hiding or exercising restraint or “discretion,”<sup>177</sup> or tolerating “some element of concealment,”<sup>178</sup> in relation to their activity or behavior.<sup>179</sup> Although this remains an ongoing source of confusion and uncertainty in some jurisdictions,<sup>180</sup> this approach has now been emphatically rejected in the major common law jurisdictions.<sup>181</sup> In addition to resting on the questionable premise that it is in fact possible to conceal one’s sexual identity (given that one’s status or identity may be “expressed or revealed in many subtle . . . ways”),<sup>182</sup> the “discretion” approach suffers from a basic shortcoming in principle since, as articulated by the UK Supreme Court, “refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right.”<sup>183</sup> After all, as the Australian High Court explained in its seminal S395 decision,

J. Pobjoy, “Queer Cases Make Bad Law,” (2012) 44 N. Y. U. J. Intl. L. & Pol. 315, at 319 n. 15. In general, see also *supra* Ch. 2.6.1.

<sup>176</sup> For an unusual application of the maligned discretion issue to a claim based on race, see *Hysi v. Secretary of State for the Home Department*, [2005] INLR 602 (Eng. CA, Jun. 15, 2005), in which the English Court of Appeal overturned the decision below on the basis that it effectively required that “the appellant would be prepared to lie and dissemble about his ethnic origins . . . [and] to avoid consorting with members of the Roma community, including presumably his own mother”: at [26].

<sup>177</sup> For a thorough description of this phenomenon, see J. Millbank, “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom,” (2009) 13 Intl. J. H. Rts. 391, at 393–94. See also C. Dauvergne and J. Millbank, “Before the High Court: Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh,” (2003) 25(1) Syd. L. Rev. 97.

<sup>178</sup> *HJ (Iran)* (UKSC, 2010), at 625 [22], per Lord Hope, describing the previous erroneous approach. See also Lord Walker, who noted that “the use of the words ‘discretion’ and ‘discreetly’ tends to obscure the point that what is really involved is concealment of sexual orientation”: at 653 [101].

<sup>179</sup> For example, the cases discussed by R. Haines, J. C. Hathaway, and M. Foster, “Claims to Refugee Status Based on Voluntary but Protected Actions,” (2003) 15 Intl. J. Ref. L. 430, at 435. See also text *supra*, Ch. 2, at nn. 487–98.

<sup>180</sup> See e.g. S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (2011), at 33–39.

<sup>181</sup> In the US, see *Karouni v. Gonzales*, (2005) 399 F.3d 1163 (USCA, 9th Cir., Mar. 7, 2005) (homosexuality) and *Kazemzadeh v. Attorney General*, (2009) 577 F.3d 1341 (USCA, 11th Cir., Aug. 6, 2009) (religion). In New Zealand, see *Refugee Appeal No. 74665/03*, [2005] INLR 68 (NZ RSAA, Jul. 7, 2004), described as “impressive” in *HJ (Iran)* (UKSC, 2010), at 629 [32]; see also *MPR v. Refugee Status Appeals Authority*, [2012] NZHC 567 (NZ HC, Mar. 28, 2012), at [48]–[51]. In Canada, see *Fosu v. Canada (Minister of Citizenship and Immigration)*, (2008) 335 FTR 223 (Can. FC, Oct. 8, 2008).

<sup>182</sup> UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [19]. As Hathaway and Pobjoy note, “the assumption that it is in fact possible for every gay application to be discreet – that there is, in effect, some universal on/off switch – is empirically unsound”: *supra* n. 175, at 326. As Millbank notes, discretion reasoning has led to error in that in some cases “discreet” and “open” homosexuals are treated as if “they are two completely distinct, stable, and mutually exclusive groups”: *supra* n. 177, at 506. Yet “even those assiduously committed to concealment are always at risk of exposure through the disclosures of others, or surveillance, and through their own lack of conformity to heterosexual behavioural norms over time, for example, if they do not marry and raise children by a certain age”: at 506.

<sup>183</sup> *RT (Zimbabwe)* (UKSC, 2012), at 354 [20]. While this issue routinely arises in the context of what might be called “protected but voluntary actions,” it has also been applied in the context of race/ethnicity. For example, in *Hysi* (Eng. CA, 2005), the English Court of Appeal allowed the appeal on the basis that the tribunal’s decision effectively rested on the applicant’s ability to “avoid letting slip any intimation of his true ethnicity”: at [33].

[h]istory has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.<sup>184</sup>

This rejection of a duty of concealment is increasingly reflected in civil law jurisdictions as well. In the context of claims based on limitations of religious practice, the Court of Justice of the European Union has held that where a decision-maker is satisfied that a person is at risk of being persecuted for reasons of religion, the fact that the applicant “could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.”<sup>185</sup>

This does not of course mean that there is no possible limit on behavior, or that refugee status must be recognized, even where a person’s desired activity threatens, for example, public safety or the rights or freedoms of others.<sup>186</sup> Because the scope of the activity protected at international law may not be absolute,<sup>187</sup> the legitimacy of any limitation sought to be imposed on the applicant on return to his or her home country turns on the scope of the right as codified at international law,<sup>188</sup> not on the subjective views of the decision-maker as to whether a purported limitation is “reasonable”<sup>189</sup> or “reasonably tolerable,”<sup>190</sup> or whether a decision-maker regards certain behavior or activity as trivial or insufficiently

<sup>184</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, (2003) 216 CLR 473 (Aus. HC, Dec. 9, 2003), at 489–90 [41], per McHugh and Kirby JJ. See also Gummow and Hayne JJ. at 501 [82]: “to say that an applicant for protection is ‘expected’ to live discreetly is both wrong and irrelevant to the task to be undertaken by the tribunal if it is intended as a statement of what the applicant must do.” This passage was adopted with approval in *HJ (Iran)* (UKSC, 2010) at 628 [29], per Lord Hope, explicitly rejecting the “reasonably tolerable” test. Of course, as noted *supra*, Chs. 3.3.2, 3.5.6, being required to conceal one’s sexual identity can lead to significant psychological harm: see Hathaway and Pobjoy, *supra* n. 175, at 358–71; see also UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [33].

<sup>185</sup> *Bundesrepublik Deutschland v. Y (C-71/11) and Z (C-99/11)* (CJEU, Sept. 5, 2012), at [79]. Further, the same court has recently emphatically held that “an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin to avoid persecution”: *Minister voor Immigratie en Asiel v. X (C-199/12)*, *Y (C-200/12)* and *Z v. Minister voor Immigratie en Asiel (C-201/12)* (Nov. 7, 2013), at [71]. See also UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [30]–[33].

<sup>186</sup> See also *Yameen v. Secretary of State for the Home Department*, [2011] EWHC 2250 (Eng. HC, Aug. 25, 2011), at [68].

<sup>187</sup> See *supra* Ch. 3.5.

<sup>188</sup> As noted by Hathaway and Pobjoy, *supra* n. 175, at 378, international human rights law imposes limitations on many civil and political rights, for example, Art. 18(3) of the Civil and Political Covenant, *supra* n. 147, in the context of freedom of religion.

<sup>189</sup> See *Wang* (Aus. FFC, 2000), at 19 [88]: “the Convention, in seeking to protect fundamental rights and freedoms of individuals[,] does not superimpose upon that protection a requirement that it is only available in respect of those rights and freedoms which are exercised reasonably . . . [A decision-maker] is not entitled to reject the claim because it regards it as unreasonable or unnecessary for the claimant to practice [his or her] beliefs or convictions.” See further, Haines, Hathaway, and Foster, *supra* n. 179, at 435–36.

<sup>190</sup> *RT (Zimbabwe)* (UKSC, 2012), at 354 [19]. This test was explicitly rejected in *HJ (Iran)* (UKSC, 2010), at 628 [29], per Lord Hope. See also at 630–31 [35]: “The question what is reasonably tolerable has no part in this inquiry,” also rejecting any analysis of whether a person’s refusal to conceal is “unreasonable.” As Lord Rodger observed in *HJ (Iran)*, “a tribunal has no legitimate way of deciding whether an applicant could reasonably be expected to tolerate living discreetly and concealing his homosexuality indefinitely for fear of persecution. Where would the tribunal find the yardstick to measure the level of suffering



central to a person's core identity or beliefs.<sup>191</sup> In other words, an applicant's claim may be properly rejected because she should be required to desist from certain conduct only if such a restriction is justified under international human rights law: for example, because it is "prescribed by law and [is] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>192</sup>

In sum, leaving aside those (exceptional) cases where a limitation on behavior is legitimate under the standards set by international human rights law, a person cannot be expected to avoid persecution or be required to hide, suppress, or desist from conduct which would otherwise reveal her identity as a person to whom the Refugee Convention extends protection.

### 5.5 Race

While the drafters of the Convention did not specifically define the term "race," the historical context makes clear that their intent was to include those Jewish victims of Naziism who had been persecuted because of their ethnicity, whether or not they actively practiced their religion.<sup>193</sup> This historical rationale is important, because it legitimizes the attribution of a broad social meaning to the term "race" to include all forms of identifiable ethnicity. As Grahl-Madsen observed, the Convention's notion of race includes not only persons at risk by reason of their membership in a particular racial category, but also other groups such as Jews and Roma defined by physical, linguistic, or cultural distinctiveness.<sup>194</sup> The possibility of overlap between race and other enumerated factors such as religion,

which a gay man – far less, the particular applicant – would find reasonably tolerable?": at 646–47 [80]. See also *S395/2002* (Aus. HC, 2003), per Gummow and Hayne JJ., at 501–2 [83].

<sup>191</sup> UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [19]. See also *Minister voor Immigratie en Asiel v. X* (C-199/12), *Y* (C-200/12) and *Z v. Minister voor Immigratie en Asiel* (C-201/12) (Nov. 7, 2013), at [67]–[68] and [78].

<sup>192</sup> Civil and Political Covenant, *supra* n. 147, at Art. 18(3).

<sup>193</sup> Grahl-Madsen suggests that the reference to "race" is derived from Administrative Memorandum No. 39 of the Supreme Headquarters Allied Expeditionary Force, which was "aimed at helping the Jewish victims of Nazi persecution, of whom some were persecuted because of their Jewish race, some because of their Jewish religion, and some for both reasons": A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), at 217–18.

<sup>194</sup> "The origin of the phrase makes it quite clear that the word 'race' in the present context denotes not only the major ethnic groups . . . but also groups which are less easily differentiated, such as Jews, gypsies, etc. In the present context the word 'race' is therefore referring to social prejudice rather than to a more or less scientific division of mankind. In other words, the term 'race', as used in Article IA(2), is a social more than an ethnographic concept, and is applicable whenever a person is persecuted because of his ethnic origin": Grahl-Madsen, *supra* n. 193, at 218. In *Horvath v. Secretary of State for the Home Department*, [1999] Imm AR 121 (UKIAT, Dec. 4, 1998), involving an application for refugee status by a Slovak national and member of the Roma community, the tribunal noted that: "The Secretary of State concedes that [the applicant] falls within a category, namely race, which is protected by the Convention": at 137–38. The tribunal summarized historical evidence that the Roma people have a unique "life-style, language, culture and art": at 131. This decision was ultimately upheld in the House of Lords, although the Convention ground was not in issue at any level. Similarly in *Calado v. Minister for Immigration and Multicultural Affairs*, (1997) 81 FCR 59 (Aus. FC, Dec. 19, 1997), Tamberlin J. advocated an approach to the Convention ground "race" that takes into account the "popular" understanding of the term, "which accords importance to physical appearance, skin colour, and ethnic origin": at 455 (upheld on appeal to the Full Court although the Full Court did not discuss "race": see *Calado* (Aus. FFC, 1998)). This decision is also interesting for its discussion of the notion that "[t]he native language of individuals . . . is clearly an important part of the cultural heritage and group identification of [a] person": *ibid.*, at 63.

nationality,<sup>195</sup> and membership of a particular social group is clear<sup>196</sup> but unproblematic since, as explained above, claims may be based on one or a combination of forms of civil or political disfranchisement.<sup>197</sup> For example, in *Baballah* the US Court of Appeals for the Ninth Circuit noted that

[t]he strong correlation between ethnicity and religion in the Middle East makes it difficult to determine whether it was one or both of these categories that was responsible for Baballah's persecution. We need not make this determination, since both categories are protected.<sup>198</sup>

5 A broad interpretation of race is not only historically defensible, but moreover consistent with the modern disavowal of race as a biological or scientific category, and the recognition that "race" is a socially constructed notion.<sup>199</sup> It is also consistent with developments in

<sup>195</sup> It is often said that ethnicity is a mix of the race and nationality grounds. For example, in *Baballah* (USCA, 9th Cir., 2003), the court explained that, "[o]ur precedent establishes that 'the term ethnicity describes a category which falls somewhere between and within the protected grounds of race and nationality'" at 991 n. 10, citing *Shoafra v. Immigration and Naturalization Service*, (2000) U.S. App. Lexis 31361 (USCA, 9th Cir., Sept. 7, 2000), at 4 n. 2. See also *Duarte de Guinac v. Immigration and Naturalization Service*, (1999) 179 F.3d 1156 (USCA, 9th Cir., Jun. 8, 1999), at 1160 n. 5.

<sup>196</sup> For example, in *Negeya v. Gonzales*, (2005) 417 F.3d 78 (USCA, 1st Cir., Jul. 27, 2005), the US Court of Appeals found that the applicant, an ethnic Eritrean from Ethiopia, was a member of a particular social group of "ethnic Eritreans" on the basis of the immutability of this group: at 82. The court stated that groups satisfying the social group criterion "typically include racial and ethnic groups": *ibid.* Of course the claim could as easily have been accepted as one involving persecution for reasons of race. Similarly, in *Jorge-Tzoc v. Gonzales*, (2006) 435 F.3d 146 (USCA, 2nd Cir., Jan. 18, 2006), the US Court of Appeals assumed that the claim was properly based on the "particular social group, the Mayans": at 150, yet it could also have been based on race. Another example is a claim based on gender and race, which could arise in the context of civil war where rape can be used as a method of punishment or humiliation against an ethnic group or community. This is recognized in Australian administrative guidelines which note that "the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, whilst the women may be viewed as capable of propagating the ethnic identity and persecuted in a different way, such as through sexual violence": Australian Department of Immigration and Multicultural Affairs, "Guidelines on Gender Issues" (1996), at 4.29, cited in Department of Immigration and Multicultural and Indigenous Affairs (Cth), *Interpreting the Refugees Convention – An Australian Contribution* (2002), at 98. This appears to be based on the UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [24]. It is also recognized in guidelines issued by the UK Border Agency, "Gender Issues in the Asylum Claim" (Sept. 2010), at [2.2].

<sup>197</sup> See text *supra*, at nn. 16–19. In particular, in *Calado* (Aus. FC, 1997), at 454–55, Tamberlin J. of the Australian Federal Court noted that "[i]n some circumstances persons of the same race may also form an independent social community or have the same nationality. A common language may be a feature of such communities or groups." This was affirmed by the Full Federal Court: *Calado* (Aus. FFC, 1998), at 67.

<sup>198</sup> *Baballah* (USCA, 9th Cir., 2003), at 990 n. 9, citing *Gafoor* (USCA, 9th Cir., 2000) (finding that applicant was persecuted on account of race and political opinion). See also UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/04/06 (Apr. 28, 2004) ("Guidelines on International Protection No. 6"), at [10].

<sup>199</sup> This has been recognized in the context of domestic constitutional law. For example, in *Saint Francis College v. Al-Khazraji, aka Allan*, (1987) 481 US 604 (USSC, May 18, 1987), White J. (delivering the opinion for a unanimous court) explained that "[m]any modern biologists and anthropologists, however, criticise racial classifications as arbitrary and of little use in understanding the variability of human beings... some, but not all, scientists [have] conclude[d] that racial classifications are for the most part socio-political, rather than biological, in nature": at 610 n. 4. The court held that it had "little

international human rights law. The widely ratified International Convention on the Elimination of All Forms of Racial Discrimination, for example, defines “racial discrimination” as including differential treatment based on “race, colour, descent, or national or ethnic origin.”<sup>200</sup>

This inclusive approach to defining the Convention ground “race” has been accepted without controversy in a wide range of state parties to the Convention.<sup>201</sup> For example, the European Union’s Qualification Directive recognizes that “the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group.”<sup>202</sup> Accordingly, it is clear that claims based on “ethnicity,”<sup>203</sup> “heritage,”<sup>204</sup> “mixed ethnicity,”<sup>205</sup> “marrying between races, religions, [or] nationalities,”<sup>206</sup> “member[ship] of an indigenous . . . ethnic group,”<sup>207</sup> and “child[ren] of a religious and ethnic intermarriage,”<sup>208</sup> are comfortably accommodated within this ground.

In sum, the contemporary conceptualization of the Convention ground “race” is consistent with the notion that “race” is a socially constructed notion. Hence, “race” for Convention

trouble” in finding that the protection against racial discrimination in US law protects “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics”: at 613. For detailed discussion of this issue in the refugee context, see Musalo, Moore, and Boswell, *supra* n. 43, at 527–29.

<sup>200</sup> Race Convention, *supra* n. 95, at Art. 1(1).

<sup>201</sup> The UNHCR *Handbook* similarly recommends a comprehensive definition of race as “understood in its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage. Frequently, it will entail membership of a specific social group of common descent forming a minority within a larger population”: UNHCR, *Handbook*, *supra* n. 9, at [68]. See also UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [33]. This UNHCR-derived interpretation has been explicitly adopted into Canadian law: *V87-6040X* (Can. IRB, Jul. 7, 1987), at 1–2, per A. Wlodyka, affirmed without comment by *A-569-87* (Can. FCA, Apr. 13, 1988) as well as in immigration policy guidelines. Jones and Baglay note that there “is scant Canadian jurisprudence concerning race as a ground of nexus”: *supra* n. 115, at 128, but explain that decisions of the Board “have considered, inter alia, the following groups as potentially ‘racial’: Jews, Tutsis, Chinese (in Peru), and blacks (in Colombia)”: *ibid.* (footnotes omitted).

<sup>202</sup> Qualification Directive, *supra* n. 28, at Art. 10(1)(a). Hailbronner notes, in relation to the identically worded 2004 version of Art. 10(1)(a), that the commission explained that “the concept of race should be interpreted in the broadest of terms to include all kinds of ethnic groups and the full range of sociological understandings of the term”: Hailbronner, *supra* n. 42, at 1081.

<sup>203</sup> *Baballah* (USCA, 9th Cir., 2003), at 991 n. 10. See also *Shoafera* (USCA, 9th Cir., 2000), at 15: “we conclude that Shoafera was persecuted, in part, because of her Amhara ethnicity”; *Manoharan v. Canada* (Minister of Citizenship and Immigration), (2005) 49 Imm. L. R. (3d) 252, at [13], [29], regarding a Sri Lankan citizen of Tamil ethnicity; *Refugee Appeal No. 73873* (NZ RSAA, Apr. 28, 2006), at [74], recognizing a Convention ground based in part on the applicant’s ethnicity as a Palestinian in Egypt.

<sup>204</sup> *Negeya* (USCA, 1st Cir., 2005).

<sup>205</sup> See e.g. *Hysi* (Eng. CA, 2005), where the court described the applicant as “a citizen of Kosovo, of mixed ethnicity, the only child born to an Albanian father and a Roma-gypsy mother,” at [1], and noted that the Adjudicator had accepted the appellant’s claim that he was “a genuine refugee, who, because of his ‘mixed ethnicity’[,] had suffered persecution”: at [3] and [8].

<sup>206</sup> *Baballah* (USCA, 9th Cir., 2003), at 990, citing *Maini* (USCA, 9th Cir., 2000), at 1175.

<sup>207</sup> *Duarte de Guinac* (USCA, 9th Cir., 1999), at 1158, citing *Singh v. Immigration and Naturalization Service*, (1996) 94 F.3d 1353 (USCA, 9th Cir., Sept. 6, 1996), in which persecution of Indo-Fijians by ethnic Fijians was understood to be on account of race: *Duarte de Guinac* (USCA, 9th Cir., 1999), at 1160. In our view, the *obiter* comments in *Pedro-Mateo* (USCA, 9th Cir., 2000), which cast doubt on whether the “Kanjol Indian[s] from Guatemala” (at 1149) constitute a particular social group, missed the point that if persecution had been established the correct ground would have been race: see at 1150–51.

<sup>208</sup> *Baballah* (USCA, 9th Cir., 2003), at 990, citing *Maini* (USCA, 9th Cir., 2000), at 1176.

purposes may be defined by ethnicity or cultural or linguistic distinctiveness, and frequently overlaps with other Convention grounds.

## 5.6 Nationality

Closely linked to the notion of race is the concept of nationality.<sup>209</sup> As in the case of race, the drafting history of the Convention offers no specific definition of nationality.<sup>210</sup>

5 Early commentators assumed a narrow meaning of the term, roughly equivalent to formal citizenship, leading to the obvious question of why a state would choose to persecute its own citizens merely by reason of their status as citizens.<sup>211</sup> Modern practice, however, suggests a number of bases on which a claim may be founded on the Convention ground “nationality.”

10 First, resident internationally unprotected persons, such as stateless persons, are sometimes the object of human rights abuse by reason of their status as “foreigners” or “non-nationals.” Recognition that non-nationals are protected under the Refugee Convention is consistent with the general proposition that the Convention grounds extend both to persons who do, and those who do not, have the relevant attributes set by the Convention.  
 15 Accordingly, “[p]ersecution for ‘reasons of nationality’ is also understood to include persecution for lack of nationality, that is: persecution of stateless persons.”<sup>212</sup> Of course statelessness does not, per se, give rise to refugee status,<sup>213</sup> but a risk of being persecuted can follow from the fact of being stateless.<sup>214</sup> For example, in recognizing as valid the claim of a stateless Palestinian from Saudi Arabia, the New Zealand tribunal found that  
 20 that

<sup>209</sup> Indeed, as noted above, ethnicity is sometimes said to be based on a mix of the race and nationality grounds: see *Baballah* (USCA, 9th Cir., 2003).

<sup>210</sup> N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), at 53.

<sup>211</sup> “It is rather difficult to understand how a national of a country could be persecuted by his own government because of his nationality”: *ibid.* However, in *Orelien v. Canada (Minister of Employment and Immigration)*, (1992) 15 Imm. L. R. (2d) 1 (Can. FCA, Nov. 22, 1991), the Canadian Federal Court of Appeal set aside the decision below which had held that “it would be absurd to accept the proposition of your counsel that all Haitians are refugees, since this would offer international protection to both the victims and the perpetrators of the crimes”: at 7–8. In disagreeing with this analysis, Mahoney J.A. (with whom Heald and Stone J.J.A. agreed), explained that, “[o]ne has only to recall the recent history of Cambodia to recognize that possibility of widespread persecution by a national regime. With respect, it is not axiomatic that nationals of a country who have escaped that country may not have a well-founded fear of persecution by reason of their nationality should they be returned”: at 8. For a contrary approach, see *Su Wen Jian v. Minister for Immigration and Ethnic Affairs*, [1996] FCA 1422 (Aus. FC, Apr. 24, 1996), where the Federal Court of Australia held that, “[i]n my view, even if the secret departure laws apply only to Chinese nationals, imprisonment or fines for their contravention would not amount to persecution for reasons of nationality within the meaning of that expression in the Convention”: at [52].

<sup>212</sup> *Grahl-Madsen*, *supra* n. 193, at 219. See also *Refugee Appeal No. 71687/99* (NZ RSAA, Sept. 27, 1999), at 20, and *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [162].

<sup>213</sup> See the extensive discussion in *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), which leads to this conclusion at [152].

<sup>214</sup> *Refugee Appeal No. 73861* (NZ RSAA, Jun. 30, 2005), at [58]. In UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, it is recognized that race and nationality “is at the source of child asylum claims in many contexts. Policies that deny children of a particular race or ethnicity the right to a nationality or to be registered at birth . . . would fall into this category”: at [41].

[t]he appellant's Palestinian race/nationality was also a contributing factor to his ill-treatment. Racial discrimination and social prejudice based on ethnic or national origin is reportedly substantial inside Saudi Arabia. Foreigners, who make up the majority of the labour force, are subject to extensive discrimination and, as foreign nationals, are at a disadvantage when they come into contact with the security forces and the criminal justice system.<sup>215</sup>

Second, persons who are denied full citizenship in their own state can be encompassed within the nationality ground insofar as their inferior political status can be shown to put them at risk of being persecuted. For example, states may disfranchise a portion of their population by ascribing a different nationality to them (as in the case of the black 'homelands' in apartheid South Africa), or denationalize disfavored groups (as in the case of Nazi Germany's Nuremberg Laws which denationalized Jewish citizens).<sup>216</sup> More commonly, some states simply refuse to recognize particular groups of resident nationals as citizens. For example, in recognizing that a Bedoon of Kuwait<sup>217</sup> was at risk of a range of "discriminatory measures . . . which effectively rendered him a non-person in his own country,"<sup>218</sup> the New Zealand tribunal appropriately found that the applicant was at risk of being persecuted on the grounds of "race and nationality (tribe/clan/geographical origins/settled/nomadic)."<sup>219</sup>

Third, persecution based on nationality might arise in the context of sovereign territories where measures are directed against those whose nationality is defined or perceived in terms of allegiance to the predecessor state. For example, the US Court of Appeals for the Sixth Circuit considered a claim based on Estonia's post-independence persecution of ethnic Russians, including "even [those ethnic Russians] who were born in Estonia."<sup>220</sup> Because there was an "an irreducible ethnic element"<sup>221</sup> in, for example, the denial to ethnic Russians of employment opportunities, a nexus to the Convention ground of nationality was established.

Fourth, there are cases that adopt a broader, more sociologically defined understanding of nationality, encompassing linguistic groups and other culturally defined collectivities,<sup>222</sup> thus overlapping to a significant extent with the concept of race.<sup>223</sup> Because many such groups share a sense of political community distinct from that of the nation state, their claims to refugee protection may reasonably be determined on the basis of nationality as

<sup>215</sup> *Refugee Appeal No. 73861* (NZ RSAA, 2005), at [118].

<sup>216</sup> See discussion of denationalization as persecution, *supra* Ch. 3.4.3.

<sup>217</sup> See Human Rights Watch, "The Bedoons of Kuwait: 'Citizens without Citizenship'" (1995).

<sup>218</sup> *Refugee Appeal No. 74467* (NZ RSAA, Sept. 1, 2004), at [103]. We note that this (in our view appropriately) departed from an earlier Refugee Status Appeals Authority decision in *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), which had essentially found that any persecution was simply a result of the legitimate application of the *jus sanguinis* laws in Kuwait rather than on Convention grounds.

<sup>219</sup> *Refugee Appeal No. 74467* (NZ RSAA, 2004), at [94].

<sup>220</sup> *Stserba* (USCA, 6th Cir., 2011), at 975. <sup>221</sup> *Ibid.*

<sup>222</sup> "The term 'nationality' in this context is not to be understood only as 'citizenship.' It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race': UNHCR, *Handbook*, *supra* n. 9, at [74]. *Accord* Grahl-Madsen, *supra* n. 193, at 218.

<sup>223</sup> UNHCR, *Handbook*, *supra* n. 9, [18]. See Germov and Motta, *supra* n. 64, for an interesting discussion of a similarly broad construction taken of nationality in discrimination law: at 259–62. See also UNHCR, "Guidance Note on Victims of Organized Gangs," *supra* n. 9, at [33]; UNHCR, *Guidelines on International Protection No. 7*, *supra* n. 16, at [36]; UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [41]; UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [27].

well as on race.<sup>224</sup> Indeed, in light of the tendency of nation states to fracture along linguistic and cultural lines, this broader understanding of nationality has proven to be important in accommodating contemporary refugee claims, especially by persecuted minorities. Thus, as the Qualification Directive recognizes,

the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.<sup>225</sup>

5 In sum, the Convention ground of nationality is appropriately invoked both by reference to legal notions of nationality such as statelessness, as well as when a risk of being persecuted is due to a person's identification as a member of a culturally, ethnically, linguistically, or otherwise distinct "national" group.

### 5.7 Religion

10 Claims involving a risk of being persecuted for reason of religion are common,<sup>226</sup> yet it is a rare case that has found the need to explore in any depth the meaning of "religion" for the purposes of the Convention.<sup>227</sup> Decision-makers generally simply accept that the applicant's belief system constitutes "religion" for the purposes of the Refugee Convention.<sup>228</sup> Indeed,

<sup>224</sup> This analysis in Hathaway, *Refugee Status*, at 144–45, was adopted by the Federal Court of Australia in *Calado* (Aus. FC, 1997), at 455; approved on appeal in *Calado* (Aus. FFC, 1998), at 67.

<sup>225</sup> Qualification Directive, *supra* n. 28, Art. 10(1)(c). For a rare case decided on the ground of "nationality," see *Baffoe v. Canada (Minister of Citizenship and Immigration)*, (1994) 85 FTR 68 (Can. FCTD, Sept. 28, 1994), in which it is explained that the applicant demonstrated that a land dispute originated because he and his family were not regarded as nationals of Ghana. The court hence identified the Convention ground as nationality: E. Carasco, S. Aiken, W. Creates, D. Galloway, and A. Macklin, *Immigration and Refugee Law: Cases, Notes, Materials and Commentary* (2007), at 586. See also Jones and Baglay, *supra* n. 115, at 127–28 nn. 124–27, for discussion of Canadian Immigration and Refugee Board decisions decided on the ground of nationality.

<sup>226</sup> A risk of being persecuted on the ground of religion may assume various forms, including prohibition or disproportionate or unjustified limitation of religious freedom, as well as other forms of harm such as a risk of violence, imprisonment, or deprivation of fundamental human rights. This broad analysis in Hathaway, *Refugee Status*, at 148, was cited with approval by the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v. Darboy*, (1998) 52 ALD 44 (Aus. FC, Aug. 6, 1998), at 50. See also UNHCR, *Guidelines on International Protection No. 6*, *supra* n. 198, at [12].

<sup>227</sup> Most claims in which religion is the relevant Convention reason do not raise an issue concerning the parameters of the ground "religion," but are rather concerned with other issues, such as whether religious conversion post-flight can constitute a *sur place* claim (see *supra* Ch. 1.4), whether the particular form of harm to which the applicant is at risk constitutes serious harm (see *supra* Ch. 3.5.1), or whether an applicant has credibly established membership of a religion or genuine religious belief (see *supra* Ch. 2.6.1). On this last issue, see e.g. *SZJOC v. Minister for Immigration and Citizenship*, [2008] FCA 1342 (Aus. FC, Aug. 14, 2008). For a particularly interesting example of this phenomenon, see *Minister for Immigration and Citizenship v. SZOCT*, (2010) 274 ALR 487 (Aus. FFC, Dec. 23, 2010). The UK Border Agency, "Considering Asylum Claims and Assessing Credibility" (Mar. 2011), importantly points out that "[i]f decision-makers consider they need to test whether the conversion is genuine, they *must* ensure that any questions asked during the asylum interview are carefully prepared, are tailored to the individual case and do not expect an unrealistic level of specialist knowledge": at 29 (emphasis in original). See also UNHCR, *Guidelines on International Protection No. 6*, *supra* n. 198, at [9], [28]–[33].

<sup>228</sup> In one of the rare cases to have considered whether the applicant's asserted Convention ground constituted "religion" for the purposes of refugee law, the Canadian Federal Court concluded that if "Falun



such a generous construction makes sense, as it is consistent with the broad approach adopted in relation to the Civil and Political Covenant's protection of freedom of religion,<sup>229</sup> which the Human Rights Committee explains

includes theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.<sup>230</sup>

The definition of "religion" adopted in the European Union's Qualification Directive echoes the Human Rights Committee's approach in affirming that "the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs."<sup>231</sup> In a similar vein the UNHCR explains that claims based on the ground 'religion' may involve one or more of the elements "religion as belief (including non-belief); religion as identity; religion as a way of life."<sup>232</sup>

The adoption of a broad and inclusive approach to interpreting the ground "religion" does not, however, mean that any assertion that a person's belief, identity, or way of life is religious should be accepted without question. The Human Rights Committee, for example,

Gong is considered by the Government of China to be a religion, then it must be so for the purposes of the instant claim": *Yang v. Canada (Minister of Citizenship and Immigration)*, (2001) 219 FTR 169 (Can. FCTD, Sept. 26, 2001), at [19]. There is very little academic scholarship on this issue; but for one interesting exception, see A. Helton, "Religion and Persecution: Should the United States Provide Refuge to German Scientologists?" (1999) 11 Intl. J. Ref. L. 310; see also K. Musalo, "Claims for Protection Based on Religion or Belief," (2004) 16 Intl. J. Ref. L. 165. In *Yang*, the Canadian Federal Court considered that Falun Gong could have been considered a particular social group for the purposes of refugee law. This latter finding may explain the lack of controversy concerning this issue, in that where a state or non-state entity wishes to harm a person for reason of her membership of a purported non-majoritarian religion, the claim is likely also to be recognized under other Convention grounds. See e.g. *L (China) v. Secretary of State for the Home Department*, [2004] EWCA Civ 1441 (Eng. CA, Nov. 3, 2004), at [30]–[33], reviewing case law from other jurisdictions which has found Falun Gong claims to be based on imputed political opinion. The UK Border Agency, *supra* n. 227, explains that "Falun Gong in China is more a religious movement than a political group, but the authorities consider Falun Gong to be a threat and have imputed a political agenda to it. In 1999, the then President of China, Jiang Zemin[,] announced that the campaign against the Falun Gong was one of the 'three major political struggles' that year": at 34. This is affirmed in Musalo's extensive survey of case law on the ground of religion in which she found very few judicial decisions concerned with the meaning of "religion": see Musalo, at 202–5.

<sup>229</sup> Civil and Political Covenant, *supra* n. 147, Art. 18(1). As noted in UNHCR, *Guidelines on International Protection No. 6*, *supra* n. 198, the "travaux préparatoires of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such": at [4]. The Guidelines also note that no "universally accepted definition of 'religion' exists": at [4]. See also Musalo, *supra* n. 228, at 170 n. 21.

<sup>230</sup> Human Rights Committee, General Comment No. 22: Article 18: Freedom of Thought, Conscience or Religion, UN Doc. CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993) ("HRC General Comment No. 22"). For a similar approach in domestic constitutional law, see *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551 (Can. SC, Jun. 30, 2004), where the Supreme Court of Canada explained that "[i]n essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith": at [39].

<sup>231</sup> Qualification Directive, *supra* n. 28, at Art. 10(1)(b).

<sup>232</sup> UNHCR, *Guidelines on International Protection No. 6*, *supra* n. 198, at [5]. See further *ibid.*, at [6]–[8].

deemed inadmissible a complaint against Canada by members of the “Assembly of the Church of the Universe” on the basis that “a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug [marijuana] cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience).”<sup>233</sup> Similarly, the English Court of Appeal found that a “devil cult” was not to be considered a religion in the context of refugee law on the basis that its “rites and rituals . . . are merely the trappings of what can only realistically be recognized as an intrinsically criminal organization.”<sup>234</sup>

Freedom of religion encompasses both the right to hold or not to hold any form of theistic, non-theistic, or atheistic belief,<sup>235</sup> and to live in accordance with a chosen belief, including participation in, or abstention from, formal worship and other religious acts, expression of views, and the ordering of personal behavior.<sup>236</sup> Accordingly, religion as a ground for refugee status includes both risk engendered by religious identity, as well as risk precipitated by religious expression. We consider these two dimensions in turn.

Turning first to the protection of persons who are in serious jeopardy because they are identified as adherents of a particular religion or religious belief,<sup>237</sup> it is not necessary for a claimant to have taken any kind of active role in the promotion of her beliefs, nor need she be particularly observant of its precepts or rituals. As observed by the Australian Federal Court, the Refugee Convention “aims at the protection of . . . the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one.”<sup>238</sup> The central issue is whether there is a linkage between the threat of being persecuted and the claimant’s self-defined or externally ascribed religious beliefs, in which case refugee protection is warranted.<sup>239</sup> As is the case in respect of other Convention grounds, a person may be at risk of being persecuted even where she does not hold any religious belief but has simply had a religious belief imputed or attributed to her.<sup>240</sup> In applying this

<sup>233</sup> *MAB, WAT and J-AYT v. Canada*, Communication No. 570/1993, UN Doc. CCPR/C/50/D/570/1993 (Apr. 8, 1994), at [4.2].

<sup>234</sup> *Omoruyi v. Secretary of State for the Home Department*, [2001] Imm AR 175 (Eng. CA, Oct. 12, 2000), at [12]. However, the disposition of this claim mainly turned on the question of intention in the “for reasons of” clause. For a discussion of the treatment of the Ogboni (the subject of *Omoruyi*) in Canadian cases, see Jones and Baglay, *supra* n. 115, at 129 nn. 137–40.

<sup>235</sup> Civil and Political Covenant, *supra* n. 147, at Art. 18(1), states that: “This right shall include freedom to have or to adopt a religion or belief of his choice.”

<sup>236</sup> *Ibid.* This analysis in Hathaway, *Refugee Status*, at 145–46, was cited with approval by the Federal Court of Australia in *W244/01A v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 52 (Aus. FC, Feb. 5, 2002), at [37], and by the UK Upper Tribunal in *AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia*, [2011] UKUT 00445 (UKUT, Nov. 25, 2011), at [177].

<sup>237</sup> This analysis in Hathaway, *Refugee Status*, at 146, was cited with approval in *Omoruyi* (Eng. CA, 2000), at 7.

<sup>238</sup> *Win v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 132 (Aus. FC, Feb. 23, 2001), at [20]. *Win* was explicitly approved by McHugh and Kirby JJ. in *S395/2002* (Aus. HC, 2003), at 491–92 [48]. See also *Shan Zhu Qiu v. Holder*, (2010) 611 F.3d 403 (USCA, 7th Cir., Jul. 12, 2010), at 407: “police are interested in any Falun Gong practitioner, not merely the ‘core leaders.’”

<sup>239</sup> This analysis in Hathaway, *Refugee Status*, at 146, was cited with approval by the Federal Court of Australia in *Pei Lan He v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 446 (Aus. FC, Apr. 23, 2001), at [30].

<sup>240</sup> UNHCR, *Guidelines on International Protection No. 6*, *supra* n. 198, at [9]–[10]. See also UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [42]: “It is sufficient that the child simply be perceived as holding a certain religious belief or belonging to a sect or religious group, for example, because of the religious beliefs of his/her parents.”

principle to the context of gender claims for example, the UNHCR explains that “[f]ailure to abide by [religious] codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes.”<sup>241</sup>

A person is also at risk of being persecuted for reasons of religion where the risk follows from what she does not believe. Since religious freedom includes both the right to believe, and the right *not to believe*,<sup>242</sup> “[t]he Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.”<sup>243</sup> Rather, it has been recognized that freedom of religion, in addition to being “one of the most vital elements” in constituting the identity of believers, “is also a precious asset for atheists, agnostics, sceptics and the unconcerned.”<sup>244</sup> Hence, refugee status is appropriately

<sup>241</sup> UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [25]. This is adopted by the UK Border Agency, *supra* n. 196, the US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, at 29, and the Australian Department of Immigration and Multicultural Affairs, *supra* n. 196, at 4.30. The UNHCR also makes a similar point in relation to children: see UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [43]. For successful cases based on compulsion, see *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 FC 42 (Can. FCTD, Nov. 5, 1993), at [19] and [25]; *Fathi-Rad v. Canada (Secretary of State)*, (1994) 77 FTR 41 (Can. FCTD, Apr. 13, 1994), at [10]. While a similar claim was rejected in *Marshall v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 946 (Can. FC, Aug. 14, 2008), this was on the basis of the purported changed circumstances after the fall of the Taliban in 2001: see [10], [37]–[38]. See also *SBBG v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 199 ALR 281 (Aus. FFC, Jun. 6, 2003), at [30]. In *Fatin v. Immigration and Naturalization Service*, 12 F.3d 1233 (USCA, 3rd Cir., Dec. 20, 1993), the court assumed that “requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution, [but] this requirement clearly does not constitute persecution for all women”: at 1242. In this case the court found that the applicant did not establish that it would be “profoundly abhorrent” to her to wear the chador or comply with Iran’s other gender-specific laws: *ibid.* In *Yadegar-Sargis v. Immigration and Naturalization Service*, (2002) 297 F.3d 596 (USCA, 7th Cir., Jul. 22, 2002), the Seventh Circuit affirmed the Board of Immigration Appeals’ decision below which had found that, on the one hand, “[t]o the degree that the respondent and other women in her proposed group oppose the [Iranian] dress code because they feel it is an imposition of the Islamic religion on them, we would find the members of this group should not be required to change their opposition because it is fundamental to their individual identities or consciences”: at 601. However, it rejected the applicant’s claim because she “always complied with the dress code while living in Iran, and she has indicated that, if returned to Iran, she would continue to conform to the dress code”: at 602. This is an indefensible position in light of the clear evidence that the applicant – a seventy-one-year-old woman – complied with this solely to avoid persecution: see at 599. Given that there is no permissible limitation on the “freedom from coercion to have or to adopt a religion or belief,” coercion cases are more straightforward than cases in which a person’s claim is based on limitation of religious freedom. This distinction was made clear in *Kaya v. Canada (Minister of Citizenship and Immigration)*, (2004) 245 FTR 230 (Can. FC, Jan. 13, 2004), in which Harrington J. explained that it “would be simple, but wrong, to say that the right of Iranian women not to wear the Chador anywhere and the right of Turkish women to wear the Hijab everywhere is a manifestation of the same fundamental rights. The Turkish government is not coercing anyone, man or woman, to wear religious dress. In furtherance of its secular policies, religious dress of any sort is not to be worn in government buildings”: at [19]–[20] (approved and followed in *Aykut v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 466 (Can. FC, Mar. 26, 2004), at [40]).

<sup>242</sup> This is well recognized. For example, as noted by the US Department of Homeland Security, *supra* n. 39, at 29: “The notion of freedom of religion encompasses the freedom to hold and express a belief system of one’s choice and the right not to be subjected to coercion that impairs the freedom to have or adopt a religion or belief of one’s choice.”

<sup>243</sup> *Prashar v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 57 (Aus. FC, Feb. 7, 2001), at [19].

<sup>244</sup> *Kokkinakis v. Greece*, (1994) 17 EHRR 397 (ECtHR, May 23, 1993), at [31].

recognized where a woman faces harm for her particular religious beliefs or practices, “including her refusal to hold particular beliefs [or] to practise a prescribed religion.”<sup>245</sup>

Beyond claims grounded in either belief or refusal to believe, the Convention ground “religion” includes also risk due to behavior that flows from belief (or the absence thereof).<sup>246</sup>

5 As the Qualification Directive provides,

the concept of religion shall in particular include . . . the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.<sup>247</sup>

The freedom to manifest religion or belief “encompasses a broad range of acts,”<sup>248</sup> including not only ceremonial acts and the teaching and practice of religion, but also “such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.”<sup>249</sup> Thus, even where a risk of being persecuted is based only on the applicant’s religious activity or behaviour,<sup>250</sup> it may nonetheless fall within “religion” as a protected ground within the Refugee Convention. Most fundamentally this means that a person cannot be expected to desist from public expression or manifestation of her religious belief in order to avoid a risk of being persecuted since, as observed by the  
10  
15 US Court of Appeals for the Seventh Circuit, the Convention “exists to protect people from having to return to a country and conceal their beliefs.”<sup>251</sup>

<sup>245</sup> UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [25]. In *SBBG* (Aus. FFC, 2003), the Refugee Review Tribunal had rejected that part of the applicant’s claim related to the “legal obligation on women to wear the chador” on the basis that it was “a general obligation of Iranian law and thus could not constitute persecution”: as paraphrased by the Full Federal Court at 288 [30]. However, the Full Federal Court rejected this on the basis that “when an apparently general obligation in fact imposes a requirement reflecting discrimination for a Convention reason it is not a ‘general requirement’”: at 288 [30], per Gray, von Doussa, and Selway JJ. See also *Namitabar* (Can. FCTD, 1993), where the Canadian Federal Court overturned the Board’s decision that the female applicant’s claim relating to the requirement to wear the chador was “a generally applicable law”: at [15]. The court noted that this was incorrect because the “provision on the wearing of veils applies only to women”: at [15]. Further, Tremblay-Lamer J. noted that “it is too easy to cover persecution with an appearance of legitimacy”: at [19].

<sup>246</sup> This analysis in Hathaway, *Refugee Status*, at 148, was adopted with approval by the Federal Court of Canada in *Reul v. Canada (Minister of Citizenship and Immigration)*, (2000) 195 FTR 65 (Can. FCTD, Oct. 2, 2000), at [12]–[16]; *Yang* (Can. FCTD, 2001), at [10]–[11]; and the English Court of Appeal in *Omoruyi* (Eng. CA, 2000), at 7. See also *Liang v. Canada (Minister of Citizenship and Immigration)*, [2011] FC 65 (Can. FC, Jan. 19, 2011), at [17]. In *Wang* (Aus. FFC, 2000), Merkel J. criticized the Refugee Review Tribunal for failing properly to assess the “second element” of the claim based on religion, namely, “the manifestation or practice of that faith or doctrine in community with others”: at 21 [101].

<sup>247</sup> Qualification Directive, *supra* n. 28, at Art. 10(1)(b). For a recent decision reiterating the public nature of religious freedom, see *Bundesrepublik Deutschland v. Y* (CJEU, 2012), at [67].

<sup>248</sup> See HRC General Comment No. 22, *supra* n. 230, at [4].

<sup>249</sup> *Ibid.* Freedom of religious expression is also encompassed within the Civil and Political Covenant, *supra* n. 147, at Art. 19: see Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), at [11].

<sup>250</sup> See *supra* Ch. 3.5.1 for discussion of whether an applicant need establish that an activity is “central” to his or her religion.

<sup>251</sup> *Shan Zhu Qiu* (USCA, 7th Cir., 2010), at 408.

There is, however, an important proviso in relation to claims enlivened by religious activity or behavior, namely, that while freedom of religious belief is absolute,<sup>252</sup> the freedom to manifest religion is subject to limitations so long as they are “prescribed by law” and “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”<sup>253</sup> This means that in some cases a refugee decision-maker may legitimately conclude that a claim is not within the protected ground “religion” because although a risk of being persecuted arises by virtue of the pursuit of a purportedly religious activity, such activity is subject to legitimate restriction in the applicant’s home state.<sup>254</sup> It is important however to analyze such claims against this principled formulation, rather than by reference to whether the decision-maker views the intended activity as “reasonable,”<sup>255</sup> or whether a particular activity or behavior is or is considered in some purportedly objective sense central, integral to, or important to the relevant religion or religious belief.<sup>256</sup> As the Canadian Federal Court has noted, “[i]t is not open to the Board to opine on whether the manner in which a claimant engages in a spiritual practice is right or wrong according to its foundational texts.”<sup>257</sup> Rather, any potential limitation is to be assessed according to whether it meets the criteria set out in Art. 18(3) of the Civil and Political Covenant. In undertaking this assessment, it must be kept in mind that the limitations clause is to be “strictly interpreted,”<sup>258</sup> and cannot be relied upon where a restriction is imposed “for discriminatory purposes or applied in a discriminatory manner.”<sup>259</sup>

The need to assess whether restrictions on religious activity are legitimate has sometimes arisen in the context of cases involving proselytizing by a religious minority.<sup>260</sup> While earlier decisions were prone to engage in a subjective assessment of “reasonableness,”<sup>261</sup> a more principled approach, consistent with international human rights principles, is well exemplified in the UK tribunal’s recent analysis of whether anti-Ahmedi legislation in Pakistan, which “prohibits preaching and other forms of proselytizing,”<sup>262</sup> could be considered a legitimate restriction on religious activity or behavior on the basis that “there were rational administrative and constitutional reasons for [the Pakistani] parliament to legislate in this way.”<sup>263</sup> In a clear and logically structured analysis, the tribunal found both that the purported objective of the laws – the appeasement of the majority of the population who

<sup>252</sup> HRC General Comment No. 22, *supra* n. 230, at [3].

<sup>253</sup> Civil and Political Covenant, *supra* n. 147, at Art. 18(3).

<sup>254</sup> For further analysis, see *supra* Ch. 3.5.1. <sup>255</sup> See text *supra*, at nn. 173–92.

<sup>256</sup> Further, the Court of Justice of the European Union has rejected the former German position of distinguishing between “forum internum” and “forum externum” in *Bundesrepublik Deutschland v. Y* (CJEU, 2012), at [62]–[63]; see *supra* Ch. 3.5.1.

<sup>257</sup> *Wang v. Canada (Minister of Citizenship and Immigration)*, (2012) 9 Imm. L. R. (4th) 78 (Can. FC, Mar. 22, 2012), at [8]. See also *MN and Others (Ahmadis – Country conditions – Risk) Pakistan CG*, [2012] UKUT 00389 (UKUT, Jun. 20, 2012), at [100].

<sup>258</sup> HRC General Comment No. 22, *supra* n. 230, at [8]. For two recent cases in the context of the right to manifest religion by wearing distinctive clothing or head coverings, see *Singh v. France, Communication No. 1876/2009*, UN Doc. CCPR/C/102/D/1876/2009 (HRC, Sept. 27, 2011), and *Singh v. France, Communication No. 1852/2008*, UN Doc. CCPR/C/106/D/1852/2008 (HRC, Dec. 4, 2012).

<sup>259</sup> HRC General Comment No. 22, *supra* n. 230, at [8]. <sup>260</sup> See also *supra* Ch. 3.5.1.

<sup>261</sup> See cases discussed by Haines, Hathaway, and Foster, *supra* n. 179, at 431–36. For a recent example, see *Yameen* (Eng. HC, 2011), at [64]–[87], quashing the decision below, which effectively engaged such reasoning.

<sup>262</sup> *MN* (UKUT, 2012), at [2]. <sup>263</sup> *Ibid.*, at [113]. See also *Yameen* (Eng. HC, 2011), at [68].

disagree with the Ahmadi faith – is not legitimate,<sup>264</sup> and that the measures chosen are disproportionate because the law undermines the Ahmadi’s “fundamental right to religious expression.”<sup>265</sup>

5 In sum, an inclusive approach to interpreting the Convention ground “religion” is consistent with the broad scope of freedom of religion at international law, which includes both belief and expression. Where a claim is grounded in risk engendered by religious behavior or activity, it ought to be recognized as a claim based on “religion,” subject only to the narrow restrictions provided for by international human rights law.

### 5.8 Political opinion

10 The Convention ground “political opinion” was conceived in liberal terms. The Convention’s drafters noted that in addition to “diplomats thrown out of office” and persons “whose political party had been outlawed,” even “individuals who fled from revolutions” ought to be encompassed by the political opinion category.<sup>266</sup> That is, protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations, formal party memberships, or prominent political roles, but also to other persons at risk  
15 from political forces within their home community.<sup>267</sup>

Contemporary international jurisprudence mirrors the drafters’ notion that “political opinion” can be relevant to a broad range of people in recognizing that “the fact of non-membership in a political party” is in and of itself “irrelevant,”<sup>268</sup> that political opinion “encompasses more than electoral politics or formal political ideology or action,”<sup>269</sup> that  
20 where a person is affiliated with an organization, group, or entity, it need not be characterized

<sup>264</sup> *MN* (UKUT, 2012), at [113]. This is consistent with the Human Rights Committee’s view that: “The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as . . . imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26”: HRC General Comment No. 22, *supra* n. 230, at [9].

<sup>265</sup> *MN* (UKUT, 2012), at [113].

<sup>266</sup> UN Doc. E/AC.7/SR.172 (Aug. 12, 1950), at 18–23, and UN Doc. E/AC.7/SR.173 (Aug. 12, 1950), at 5.

<sup>267</sup> This analysis in Hathaway, *Refugee Status*, at 149, was cited with approval by the Federal Court of Australia in *Applicant in V488* (Aus. FC, 2001), at [17]. It was also affirmed by the Belgian Permanent Refugee Appeals Commission in *04-2399/R12893* (Bel. CPRR, Sept. 22, 2005). For further Canadian authority, see cases discussed in Immigration and Refugee Board of Canada, “Interpretation of the Convention Definition in the Case Law” (Dec. 2005), at 4-11–4-12 [4.6].

<sup>268</sup> *Armson v. Canada (Minister of Employment and Immigration)*, (1989) 101 NR 372 (Can. FCA, Sept. 5, 1989), at [6]. See also *Hilo v. Canada (Minister of Employment and Immigration)*, (1991) 130 NR 236 (Can. FCA, Mar. 15, 1991), where the Federal Court of Appeal of Canada deemed it “irrelevant” that the applicant “had no specific role or responsibility within the group”: at [10]. Similarly, in *Butucariu v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 115 (Can. FCA, Feb. 5, 1992), the Federal Court of Appeal queried whether the fact that the applicant was “not an organizer or a leader in the political movements to which he belonged” was “of any real relevance”: at [2].

<sup>269</sup> *Ahmed v. Keisler*, (2007) 504 F.3d 1183 (USCA, 9th Cir., Oct. 16, 2007), at 1192. For a similar analysis, see *Voitenko v. Minister for Immigration and Multicultural Affairs*, (1999) 55 ALD 629 (Aus. FFC, Apr. 14, 1999), at 641 [33], noting that political opinion is clearly “not limited to party politics in the sense that expression is understood in a parliamentary democracy.”



or understood as a traditionally political one,<sup>270</sup> and that it is irrelevant that any such group is “loosely knit” and has “no official title, office or status” in the home country.<sup>271</sup> As neatly articulated by the US Court of Appeals for the Second Circuit, “[r]efugee law does not require that [the applicant] be a politician, only that he is persecuted in his home country for his political beliefs.”<sup>272</sup> Thus, for example, an individual at risk due to an actual or perceived opinion antithetical to the state, including instrumentalities of government such as the armed forces, security institutions, and the police,<sup>273</sup> or due to a belief or opinion in relation to the policies, actions, or ideology of a non-state actor,<sup>274</sup> is at risk due to political opinion.<sup>275</sup>

An understanding that the political opinion ground is not limited to accommodating the quintessential image of a political opponent fleeing a totalitarian government nonetheless leaves open the question of whether a general definition can be formulated. There is considerable authority for the view that political opinion encompasses “any opinion on any matter in which the machinery of state, government, and policy may be engaged.”<sup>276</sup> While some

<sup>270</sup> See e.g. *Ansong v. Canada (Minister of Employment and Immigration)*, (1989) 9 Imm. L. R. (2d) 94 (Can. FCA, Aug. 25, 1989), at [1]–[4], overturning the decision below that the YMCA was unlikely to be involved in political action.

<sup>271</sup> *Hilo* (Can. FCA, 1991), at [10]. See further *Wong v. Canada (Minister of Employment and Immigration)*, (1992) 141 NR 236 (Can. FCA, Apr. 8, 1992), recognizing participation in a student movement as giving rise to a risk on the basis of political opinion.

<sup>272</sup> *Osorio* (USCA, 2nd Cir., 1994), at 1030. See also *Volaj v. Holder*, (2010) 383 Fed. Appx. 52 (USCA, 2nd Cir., Jul. 1, 2010), where the Court of Appeals for the Second Circuit quashed the decision below because it had mistakenly rejected the political opinion claim on the basis that the political communication at issue “did not mention political parties”: at 54. As the court noted, “failure to mention political parties is not dispositive”: at 54. See also *SN (Belarus) v. Ministry of Interior*, 6 Azs 235/2004-57 (Cz. Sup. Admin. Ct., Dec. 21, 2005), in which the Supreme Administrative Court disagreed with the Ministry of the Interior’s submission that the applicant should fail because he was not formally a member of the opposition party in Belarus and did not maintain an important position within the opposition movement. Instead the court confirmed that formal membership of the opposition party is not a necessary prerequisite for persecution on the grounds of political opinion.

<sup>273</sup> See *Voitenko* (Aus. FFC, 1999), at 640–41 [33]. The analysis in Hathaway, *Refugee Status*, that political opinion includes “any action which is perceived to be a challenge to governmental authority,” at 154, was cited with approval by the Federal Court of Australia in *Applicant in V488* (Aus. FC, 2001), at [17], and *C v. Minister for Immigration*, (1999) 94 FCR 366 (Aus. FC, Oct. 20, 1999), at 373 [21]. See also *Guo v. Minister for Immigration and Ethnic Affairs*, (1996) 64 FCR 151 (Aus. FFC, Feb. 26, 1996), at 158–65 (overturned on appeal but not relevantly) and *Voitenko* (Aus. FFC, 1999), at 636 [14]. In *Applicant in V488*, the court characterized the position as being that “actual or imputed political opinion . . . may extend to an opinion expressly or impliedly inconsistent with that held by the government of a country”: at [37], citing a range of authority. See also *Rajanayake* (Aus. FFC, 2002); also approved by the English Court of Appeal in *Sepet* (Eng. CA, 2001), at [159].

<sup>274</sup> See e.g. UK Border Agency, *supra* n. 227, at 34: “Persecution from non-state actors can also involve an imputed political opinion.” See also *Ward* (Can. SC, 1993): “international refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real”: at 744.

<sup>275</sup> As the Australian Full Federal Court explained in *Voitenko* (Aus. FFC, 1999), the “higher the person’s political profile” the easier it will be for that person to establish his or her claim, but “that is a matter going to proof of the facts, not a matter of law”: at 637 [16].

<sup>276</sup> Goodwin-Gill and McAdam, *supra* n. 33, at 87. This phrase, first set out in G. S. Goodwin-Gill, *The Refugee in International Law* (1983), at 31, was adopted by the Canadian Supreme Court in *Ward* (Can. SC, 1993), at 744; see also *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327

courts have shied away from attempting “a comprehensive definition of what constitutes ‘political opinion,’”<sup>277</sup> in one case deeming a purported definition “an unhelpful distraction . . . best avoided,”<sup>278</sup> in general the dominant judicial preference is to adopt a broad rather than narrow approach to defining political opinion for Convention purposes.<sup>279</sup> In our view, such a broad characterization of political opinion is an important means of maintaining the Convention’s vitality.<sup>280</sup> In the remainder of this sub-chapter we analyze the two contemporary contexts in which the Convention ground “political opinion” is most often adjudicated.

### 5.8.1 Unexpressed political opinion

Because the Convention definition refers to “political opinion” rather than to the arguably more constrained notion of “political activity,” there is no requirement that a claimant must have acted upon her beliefs prior to departure from her country in order to qualify for refugee status. In some circumstances, the expression of a non-conforming political belief while

(Can. FCA, Feb. 22, 2000), at [22]; *RT (Zimbabwe)* (UKSC, 2012), at 362 [46]; UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [16]. However, in *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 FC 675 (Can. FCA, Jul. 21, 1993), Heald J.A. (for the majority of the Federal Court of Appeal) thought that this definition was too broad as it would “obviate[] all of the enumerated grounds”: at [26]. In his view, “some limits on the definition of ‘political opinion’ are required”: *ibid*. It is accepted that some limits must be identified. For example, in *Voitenko* (Aus. FFC, 1999), Hill J. explained that the phrase “political opinion” “is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society”: at 641 [33]. See also *Refugee Appeal No. 76339* (NZ RSAA, Apr. 23, 2010), at [86]. On the other hand, in *Gomez v. Secretary of State for the Home Department*, [2000] INLR 549 (UKIAT, Nov. 24, 2000), the tribunal doubted whether this definition was wide enough: see I. A. Macdonald and R. Toal, *Immigration Law and Practice in the United Kingdom* (8th edn., 2010), at [12.74].

<sup>277</sup> *Voitenko* (Aus. FFC, 1999), per Hill J.; cited with approval in *VNAY v. Minister for Immigration and Multicultural Affairs*, [2005] FCAFC 96 (Aus. FFC, May 13, 2005), at [20]–[22]. For an attempt to give the phrase “political opinion” its “ordinary dictionary meaning,” see *Guo* (Aus. FFC, 1996), at 165, per Beaumont J.

<sup>278</sup> *Refugee Appeal No. 76339* (NZ RSAA, 2010), at [87]. This decision was upheld on appeal: *M v. Refugee Status Appeals Authority*, [2010] NZHC 1885 (NZHC, Sept. 17, 2010).

<sup>279</sup> As the Qualification Directive, *supra* n. 28, recognizes, “the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution . . . and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant”: at Art. 10(1)(e). For a discussion of the drafting history of this provision (in the 2004 version), see Hailbronner, *supra* n. 42, at 1091–92. Similarly, the UNHCR has said that, “[a] claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods”: UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [45]. In one of the few appellate courts in the US to offer a general definition of “political opinion,” the US Court of Appeals for the Third Circuit adopted a broad approach in explaining that a “political opinion” was found to be a view “[p]ertaining or relating to the policy or the administration of government, state or national; pertaining to or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy”: *Chang v. Immigration and Naturalization Service*, (1997) 119 F.3d 1055 (USCA, 3rd Cir., Jul. 22, 1997), at 1063 n. 5. The Full Federal Court of Australia takes the view that the words “political opinion” are “capable of a wide meaning”: *VNAY* (Aus. FFC, 2005), at [18].

<sup>280</sup> This analysis in Hathaway, *Refugee Status*, at 157 was adopted in *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [82].

in the home state may simply have been a practical impossibility due to a risk of being persecuted, while in other cases the applicant may not have held or felt as strongly about the particular belief at the time of departure.<sup>281</sup> Since the refugee definition requires a forward-looking assessment of risk, the issue to be addressed is whether there is reason to believe that the claimant's decision to exercise her right to form an opinion would place her in jeopardy upon return to her home state. Assessment of such cases turns on whether there is evidence that potential persecutors in the home state either are aware, or could reasonably become aware, of the claimant's views. 5

Freedom of expression is a core human right.<sup>282</sup> It is therefore inappropriate to reject a claim for refugee status on the ground that the claimant could avoid detection by keeping silent – in other words to require the applicant's opinion to remain unexpressed.<sup>283</sup> In line with the general principles set out above,<sup>284</sup> refugee status cannot be denied on the basis that an applicant could simply suppress or conceal a protected interest on return.<sup>285</sup> Hence, the Australian Full Federal Court appropriately overturned the rejection of the claim of a Somali poet who would continue to write poetry "highly critical of the Somali clan system and the internecine fighting which it engendered,"<sup>286</sup> observing that there is 10 15

nothing fanciful about the idea of people with strong religious or political convictions having a present fear of persecution founded upon apprehensions of what they may do and what may happen to them if they come face to face with repression . . . The history of political persecution . . . provides examples in abundance of people who have felt compelled to speak out in the direct face of oppression.<sup>287</sup>

Indeed, the court concluded that to require a person with strongly held views to act "reasonably" and compromise that belief in order to avoid persecution "would be quite contrary to the humanitarian objects of the Convention."<sup>288</sup>

<sup>281</sup> This is well accepted: see e.g. UK Border Agency, *supra* n. 227, at 36. With respect to the issue of post-departure statements of political opinion designed to secure access to asylum abroad, see *supra* Ch. 1.4.

<sup>282</sup> See Civil and Political Covenant, *supra* n. 147, at Art. 19.

<sup>283</sup> "In view of the fact that the first paragraph of the Preamble to the Refugee Convention contains a direct reference to the Universal Declaration and the principle which thereby has been affirmed, 'that human beings shall enjoy fundamental rights and freedoms without discrimination', it seems reasonable to infer that a person may justly fear persecution 'for reason of political opinion' in the sense of the Refugee Convention if he is threatened with measures of a persecutory nature because of his exercise of or his insistence on certain of the 'rights' laid down in the Universal Declaration": Grahl-Madsen, *supra* n. 193, at 227.

<sup>284</sup> See text *supra*, at nn. 173–92.

<sup>285</sup> Any limitation on behavior must be assessed according to available limitations at international law and specifically Art. 19(3) of the Covenant on Civil and Political Rights, *supra* n. 147.

<sup>286</sup> *Omar v. Minister for Immigration and Multicultural Affairs*, (2000) 179 ALR 525 (Aus. FFC, Oct. 16, 2000), at 527 [4].

<sup>287</sup> *Ibid.*, at [39]–[40]. As long recognized by the UNHCR, although home authorities may presently have no knowledge of a claimant's convictions, "[d]ue to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion": UNHCR, *Handbook*, *supra* n. 9, at 20.

<sup>288</sup> *Omar* (Aus. FFC, 2000), at 537 [42], cited with approval in *Wang* (Aus. FFC, 2000).

A modern variant of this category is embodied in recent cases that have raised the question whether refusal to feign allegiance to a totalitarian regime constitutes a form of unexpressed political opinion. For example, in *RT (Zimbabwe)* country information suggested that the applicants, who had neutral political views, were at risk of being persecuted unless they could demonstrate “positive support” for or loyalty to the ruling regime on return.<sup>289</sup> The question for the UK Supreme Court was whether a person with no political beliefs is “obliged to pretend to support a political regime in order to avoid the persecution that he would suffer if his political neutrality were disclosed,”<sup>290</sup> or whether, as was contended by the applicants, they were entitled to refrain from expressing any political views and ought to be protected as refugees. In assessing such claims, it had been suggested in earlier decisions that it was appropriate to examine whether a “neutral” view is merely “at the margin, rather than the core, of the protected right,”<sup>291</sup> such that a person could be required to “lie and feign loyalty”<sup>292</sup> to avoid persecution in her home country. But as the UK Supreme Court affirmed in *RT (Zimbabwe)*, this dichotomy between “core” and “marginal” political beliefs is false:<sup>293</sup>

Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom *not* to hold and *not* to have to express opinions.<sup>293</sup>

Accordingly, refugee status ought not to be refused merely on the basis that a person could be required to “dissemble on pain of persecution.”<sup>294</sup>

### 5.8.2 Political opinion implicit in conduct

There is no requirement that an applicant actually possess a political opinion; rather it is sufficient if she is at risk of being persecuted because of a political opinion attributed to her.<sup>295</sup>

<sup>289</sup> *Omar* (Aus. FFC, 2000), at [2] and [15].      <sup>290</sup> *Ibid.*, at [22].

<sup>291</sup> *RT (Zimbabwe)* (UKSC, 2012), at 360–61 [41], describing the argument of the Secretary of State.

<sup>292</sup> *Ibid.*, at [1].

<sup>293</sup> *Ibid.*, at [32]. Further the court noted that “[t]here is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer”: at [45]. This is also reflected in the US Court of Appeals for the Ninth Circuit’s doctrine of “hazardous neutrality” in which “a lack of political opinion may constitute a political opinion for purposes of the INA”: *Rivera-Moreno* (USCA, 9th Cir., 2000), at 483. The court explained that “[w]e define hazardous neutrality as ‘showing political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces’”: at 483, citing *Sangha* (USCA, 9th Cir., 1997). We note that the court explicitly considers that this position is valid notwithstanding *Elias-Zacarias* (USSC, 1992). For further discussion, see Anker, *supra* n. 29, at 302–4.

<sup>294</sup> *RT (Zimbabwe)* (UKSC, 2012), at 361 [42].

<sup>295</sup> This is recognized in the Qualification Directive, *supra* n. 28, which states, “whether or not that opinion, thought or belief has been acted upon by the applicant”: at Art. 10(1)(e). This is consistent with previous German practice: see *2 BvR 472/91* (Ger. BverfG [German Federal Constitutional Court], Jan. 14, 1992), reported at (1993) 5 Intl. J. Ref. L. 474. In *RT (Zimbabwe)* (UKSC, 2012), the UK Supreme Court noted: “The principle is not in doubt that an individual may be at risk of persecution on the grounds of imputed opinion and that it is nothing to the point that he does not in fact hold that opinion”: at 363 [53]. In the US, Legomsky and Rodriguez note that following *Elias-Zacarias* (USSC, 1992), the decision left some uncertainty about “the continued viability of imputed political opinion”: *supra* n. 8, at 923. However, they note that “[t]he doctrine now appears settled,” as it has been “accepted by the General Counsel for

In other words, it is clear that “persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.”<sup>296</sup> Even where the applicant “has not formulated a specific political opinion in their own mind,”<sup>297</sup> or explicitly disavows the views ascribed to her by the persecutor, refugee status may appropriately be recognized.<sup>298</sup> Such attribution may be based, for example, on a person’s membership of a political party, organization, or entity perceived to hold or express political views,<sup>299</sup> or simply on the basis of a person’s family connections,<sup>300</sup> race, or ethnicity.

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the former Immigration and Naturalization Service, the BIA, the courts, and the proposed, still pending Justice Department regulations”: *ibid.* See also their discussion regarding “cynically imputed political opinion”: at 924. For a recent affirmation in the Sixth Circuit, see *Mushayahama v. Holder*, (2012) 469 Fed. Appx. 443 (USCA, 6th Cir., Apr. 24, 2012), at 45.

<sup>296</sup> *Chan v. Minister for Immigration and Ethnic Affairs*, (1989) 169 CLR 379 (Aus. HC, Dec. 9, 1989), at 416, cited in *Applicant in V488* (Aus. FC, 2001) at [17], and adopted in *Minister for Immigration and Ethnic Affairs v. Guo*, (1997) 191 CLR 559 (Aus. HC, Jun. 13, 1997), at 571. In *Ward*, the Canadian Supreme Court explained that “the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant’s true beliefs . . . The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant”: *Ward* (Can. SC, 1993), at 746. See also *Sangha* (USCA, 9th Cir., 1997); *Ahmed* (USCA, 9th Cir., 2007), at 1192–93; *Koudriachova v. Gonzales*, (2007) 490 F.3d 255 (USCA, 2nd Cir., Jun. 26, 2007), at 264; *Canas-Segovia* (USCA, 9th Cir., 1992), at 601; and *Espinosa-Cortez* (USCA, 3rd Cir., 2010), at 109.

<sup>297</sup> UK Border Agency, *supra* n. 227, at 35.

<sup>298</sup> “[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the government believes he does”: *Hernandez-Ortiz v. Immigration and Naturalization Service*, (1985) 777 F.2d 509 (USCA, 9th Cir., Dec. 2, 1985). There is ample authority for this proposition: see e.g. *Hilo* (Can. FCA, 1991), at [10]. The analysis of political opinion implicit in conduct in Hathaway, *Refugee Status*, at 152–56 was approved by the English Court of Appeal in *Krotov* (Eng. CA, 2004), at 1842 [46].

<sup>299</sup> See e.g. *Hilo* (Can. FCA, 1991), where the court found that the Syrian authorities “sought to persecute the appellant because of his perceived political opinion” on the basis of his membership of a charitable organization: at [10].

<sup>300</sup> See e.g. *Chan* (Aus. HC, 1989): “it stands to reason that the authorities would be inclined to regard with suspicion and distrust a member of an anti-revolutionary family who was associated with a faction opposed to the government, even if his political opinions were not clearly defined or so clearly defined as to throw up an identifiable conflict with the political philosophy of the government”: at 390 (per Mason C.J.), see also at 416 (per Gaudron J.) and 433 (per McHugh J.). This is particularly the case in respect of children: see e.g. the US Department of Justice, *Guidelines for Children*, *supra* n. 48, at 22; UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [46]. In *Belayneh v. Immigration and Naturalization Service*, (2000) 213 F.3d 488 (USCA, 9th Cir., May 23, 2000) the court explained that “[w]ell-founded fear of persecution may be established by the persecution of an estranged spouse whose views are imputed to the petitioner”: at 491, citing *Meza-Manay v. Immigration and Naturalization Service*, (1998) 139 F.3d 759 (USCA, 9th Cir., Mar. 24, 1998), at 764. See also *Hassan v. Holder*, (2009) 571 F.3d 631 (USCA, 7th Cir., Jul. 2, 2009), at 642; *Lin v. Ashcroft*, (2003) 377 F.3d 1014 (USCA, 9th Cir., Jan. 26, 2003), at 1030; *Navas* (USCA, 9th Cir., 2000), at 660; *Rios v. Ashcroft*, (2002) 287 F.3d 895 (USCA, 9th Cir., May 1, 2002), at 899–900; and *Chen v. Holder*, (2010) 604 F.3d 324 (USCA, 7th Cir., Apr. 28, 2010), at 332–34.

<sup>301</sup> In *Paramananthan v. Minister for Immigration and Multicultural Affairs*, (1998) 94 FCR 28 (Aus. FFC, Dec. 21, 1998), at 47, the imputation was made on the basis that the applicants were “young Tamil males from the Jaffna peninsula”: at 47. See also *Sivakumar* (UKHL, 2003), where Lord Steyn noted that “[o]n a realistic view of the facts there was a reasonable likelihood of persecution on the ground of race (since he was a Tamil), a member of a particular social group (he was a Tamil from Jaffna) or political opinion (the separatist views predominant among Tamils from the North)”: at 847 [18]. It was clear that such views were not actually held by the applicant but rather imputed to him on the basis of his race: see at 846 [16]. See also *Chanchavac v. Immigration and Naturalization Service*, 2000 U.S. App. LEXIS 5066 (USCA, 9th Cir., Mar. 27, 2000).

Importantly, attribution of a political opinion may follow not only from membership of an entity, organization, or other group, but also from engagement in activities which imply an adverse political opinion, and which would elicit a negative response tantamount to persecution.<sup>302</sup> The relevant behavior or action need not resemble traditional forms of political protest or activity.<sup>303</sup> For example, the Full Federal Court of Australia recognized that “[a]t some times, and in some places, music has been part of the language of political dissent.”<sup>304</sup> In some societies the only political roles that women and children are permitted to undertake are less overt, such as preparing or distributing pamphlets,<sup>305</sup> acting as couriers,<sup>306</sup> “nursing sick rebel soldiers,”<sup>307</sup> cooking and providing food,<sup>308</sup> or harboring political opponents,<sup>309</sup> actions which may nonetheless evince – explicitly or implicitly – a political opinion.<sup>310</sup> In determining whether an imputation of political opinion is likely to be made on return, the crucial issue is whether “certain behavior or actions on the part of the applicant are or have been perceived by the authorities as political opposition.”<sup>311</sup>

<sup>302</sup> Grahl-Madsen, *supra* n. 193, at 129. This analysis in Hathaway, *Refugee Status*, at 152, was cited with approval by the Federal Court of Australia in *Guo* (Aus. FFC, 1996), at 158–65; *Voitenko* (Aus. FFC, 1999), at 636 [14]; and *Saliba v. Minister for Immigration and Ethnic Affairs*, (1998) 89 FCR 38 (Aus. FC, Nov. 5, 1998), at 47. While the original formulation in *Refugee Status* mentioned “negative governmental response,” we agree with Sackville J. in *Saliba* that this reference to “governmental response” “needs to be qualified” by the recognition that persecution may flow from state or non-state actors: see *ibid.*, at 47.

<sup>303</sup> Rather it may, as eloquently explained by Kirby J. of the Australian High Court, “be shown by repeated conduct which is never (or rarely) converted into articulate political protest of the kind familiar to Australian society”: *Guo* (Aus. HC, 1997), at 598.

<sup>304</sup> *WAFZ of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2002] FCAFC 292 (Aus. FFC, Sept. 16, 2002), at [18].

<sup>305</sup> UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [45] and also UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [33].

<sup>306</sup> UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [45].

<sup>307</sup> UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [33].

<sup>308</sup> See US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, at 23, noting that “women may also engage in more non-traditional political expression than men, because of their situation in society.” See also UK Border Agency, *supra* n. 196: “The gender roles in many countries mean that women will more often be involved in so-called ‘low level’ political activities, for instance hiding people, passing messages or providing community services, food, clothing, or medical care . . . Non-conformist opinions or behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her”: at 12.

<sup>309</sup> See e.g. *Aristil v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 884 (Can. FCA, Sept. 28, 1992), at [2]–[4].

<sup>310</sup> Historically there has been a tendency to “relegate women’s activities . . . to a separate women’s sphere” and to label them as non-political: see T. Spijkerboer, *Gender and Refugee Status* (2000), at 94; but see discussion of positive case law at 116–17. See also H. Crawley, *Refugees and Gender: Law and Process* (2001), at 79–90. As Crawley notes, while women are frequently engaged in “so-called ‘low level’ political activity, they may actually be at greater risk of persecution” because they are at risk of being punished not only for their political work but “because they challenge dominant gender ideologies by being politically active at all”: at 82.

<sup>311</sup> Hathaway, *Refugee Status*, at 153, quoting from *Raul Rodolfo Lira Pastene, M79-1132* (Can. IRB, Mar. 28, 1980), at [4], cited with approval by the Federal Court of Australia in *Emiantor v. Minister for Immigration and Multicultural Affairs*, (1997) 48 ALD 635 (Aus. FC, Dec. 3, 1997), at 641; *Paramanathan* (Aus. FFC, 1998), at 47; *Voitenko* (Aus. FFC, 1999), at 636 [14]; and *Rajanayake* (Aus. FFC, 2002), at [39]. In the US, the Immigration and Nationality Act (US) provides that, for the purposes of refugee status determination, “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or



When is imputation appropriately found to exist? Given the inherent challenges in ascertaining what a person, government, or organization – not present at the refugee hearing – has implied or is likely to imply from the applicant’s behavior,<sup>312</sup> it is vital that the inquiry be undertaken with sensitivity to the broader societal context pertaining in the applicant’s home state,<sup>313</sup> including the “specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.”<sup>314</sup> In particular, decision-makers should be attentive to the “subtle underlying message” that might be conveyed in behavior or action in the applicant’s home country, and be careful to guard against “a substitution or importation of Western or North-American interpretation and values for those of an often much more subtle culture.”<sup>315</sup> As Justice Kirby of the High Court of Australia opined, “[i]ntolerance and autocracy can be irrational,”<sup>316</sup> hence there is a need “to avoid ‘excessive formalism’ in the assessment of actions which, in intolerant environments, may be interpreted as implying an adverse political opinion.”<sup>317</sup> Further, conduct that may appear relatively trivial or unimportant by a decision-maker in a democratic country may in fact assume enormous political significance in the home country, for example wearing color in a totalitarian state or revealing a flash of nail polish beneath a burqa.<sup>318</sup>

Hence, rather than viewing an act as “merely an isolated incident devoid of greater implications,”<sup>319</sup> it is important to scrutinize whether an act is in fact “politically significant.”<sup>320</sup> For example, in *Ward*, the Canadian Supreme Court of Canada recognized

subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion”: 8 USC § 1101(a)(42). This was introduced by the Illegal Immigration Reform and Immigrant Responsibility Act 1996 (US), at s. 601(a), “for the express purpose of overturning the BIA’s decision in *Matter of Chang*” which had denied that political opinion could be made out in the context of China’s one-child policy: see *Lin-Zheng v. Attorney General*, (2009) 557 F.3d 147 (USCA, 3rd Cir., Feb. 19, 2009), at 151. See also *Fei Mei Cheng A/K/A Pei Kwan Lee* (USCA, 3rd Cir., 2010), at 184; *Wang v. Attorney General*, (2007) 222 Fed. Appx. 176 (USCA, 3rd Cir., Mar. 14, 2007); and *Jiang v. Holder*, (2010) 606 F.3d 1099 (USCA, 9th Cir., May 24, 2010). The political opinion ground has been rejected in this context in Canada: see e.g. *Chan* (Can. FCA, 1993), and in New Zealand: see *Re ZWD, Refugee Appeal No. 3/91* (NZ RSAA, Oct. 20, 1992). Legislative declarations of this kind are (appropriately) rare however, and in most jurisdictions ascertaining whether political opinion can be imputed from action is undertaken on a case-by-case basis.

<sup>312</sup> In these cases, the focus is usually on the intention/approach of the persecutor. But see *supra* Ch. 5.2.1, cautioning against over-reliance on establishing intention.

<sup>313</sup> In *Chan* (Can. FCA, 1993), Heald J.A. (for the majority) stated that “[d]etermination of whether the acts or views will be perceived as a challenge to a persecutor’s authority is, necessarily, contextual”: at 695. Macdonald and Toal similarly state that “[w]hat makes an opinion political is the social structure and social context of the asylum seeker’s country of origin”: Macdonald and Toal, *supra* n. 276, at 842.

<sup>314</sup> UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [46], endorsing *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [84]. See also *Refugee Appeal No. 76339* (NZ RSAA, 2010), at [88].

<sup>315</sup> In this case, China: see *Chen v. Canada (Minister of Employment and Immigration)*, (1993) 70 FTR 241 (Can. FC, Nov. 10, 1993), at [9]. See also *Aranguiz v. Canada (Minister of Employment and Immigration)*, (1991) 139 NR 79 (Can. FCA, Oct. 4, 1991), at 80.

<sup>316</sup> *Guo* (Aus. HC, 1997), at 596. <sup>317</sup> *Ibid.*

<sup>318</sup> We are grateful to Sienna Merope for suggesting these examples.

<sup>319</sup> *Ward* (Can. SC, 1993), at 748.

<sup>320</sup> *Ibid.* In *Castro and Carranza-Fuentes v. Holder*, (2010) 597 F.3d 93 (USCA, 2nd Cir., Mar. 2, 2010), the court criticized the decision below for failing to evaluate the claim “against the backdrop of Guatemala’s volatile political history”: at 102. In *Immigration and Naturalization Service v. Aguirre-Aguirre*, (1999) 526 US 415 (USSC, May 3, 1999), the US Supreme Court observed: “For purposes of our review, we assume that the amount of bus fares is an important political and social issue in Guatemala. We are advised that bus fare represents a significant portion of many Guatemalans’ annual living expenses, and a rise in fares may impose substantial economic hardship”: at 421.

that setting his organization's hostages free "made Ward a political traitor in the eyes of a militant para-military organization, such as the INLA, which supports the use of terrorist tactics to achieve its ends."<sup>321</sup> Similarly, an overly narrow focus on the "economic" nature of a labor dispute between a Guatemalan union leader and the government was criticized on appeal on the basis that it "ignored the political context of the dispute,"<sup>322</sup> and specifically the fact that the applicant "and his union posed a political threat to [the government's] authority via their organized opposition activities."<sup>323</sup>

This notion of "political opinion" as a relative concept has been frequently applied. Among those acts that have been construed as expressions of political opinion are public statements regarding the unfair distribution of food in Iraq,<sup>324</sup> a public accusation of judicial ineptness where such conduct was considered "anti-Islamic,"<sup>325</sup> attempts by a Guatemalan literacy teacher to educate the population,<sup>326</sup> the preparedness of a Sinhalese travel agent to engage in business with Tamil clients,<sup>327</sup> the supply of business services to governmental and military institutions,<sup>328</sup> employment by political figures including the government,<sup>329</sup>

<sup>321</sup> *Ward* (Can. SC, 1993), at 748. See also *Ahmed v. Canada (Minister of Employment and Immigration)*, (1993) 68 FTR 221 (Can. FCTD, Oct. 8, 1993) and *Sopiqoti* (Can. FC, 2003), where the court criticized the decision below for failing to consider whether the applicant's actions, such as refusing to fire on pro-democracy demonstrators, were considered to be political activities.

<sup>322</sup> *Osorio* (USCA, 2nd Cir., 1994), at 1029.

<sup>323</sup> *Ibid.*; see also at 1030: "We believe that [the applicant's] activities clearly evince the political opinion that strikes by municipal workers should be legal and that workers should be given more rights." This can be contrasted with the decision of the Court of Appeals for the Fifth Circuit in *Ontunez-Tursios* (USCA, 5th Cir., 2002); see in particular the disagreement between the majority (at 351–52) and dissent (at 355–62). See also *Mejilla-Romero v. Holder*, (2010) 600 F.3d 63 (USCA, 1st Cir., Apr. 6, 2010), where Circuit Judge Stahl issued a strong dissenting judgment in which he disagreed with the majority's rejection of the imputed political opinion claim on the basis that the applicant's family's engagement in "advocating for land reform for several decades in their community" meant that the applicant had "suffered the same persecution that his many family members had, merely because of a political opinion imputed to him": at 77 (cf. majority opinion at 21).

<sup>324</sup> *Al-Safer v. Immigration and Naturalization Service*, (2001) 268 F.3d 1143 (USCA, 9th Cir., Oct. 23, 2001), at 1146.

<sup>325</sup> *SB (Risk on Return – Illegal Exit) Iran CG*, [2009] UKAIT 00053 (UKAIT, May 6, 2009), at [66].

<sup>326</sup> *Cordon-Garcia* (USCA, 9th Cir., 2000), at 992. <sup>327</sup> *Rajanayake* (Aus. FFC, 2002).

<sup>328</sup> In *Espinosa-Cortez* (USCA, 3rd Cir., 2010), the court noted that the applicant "owned a catering business that supplied food to governmental and military institutions" (at 5) and that this was significant in that he "made his living by supporting the Colombian government, military, and military academy through the provision of food and other services": at 24. As such it was likely that FARC had imputed a political opinion to him: at 27.

<sup>329</sup> See *Navas* (USCA, 9th Cir., 2000), at 659 n. 19; *Sagaydak v. Gonzales*, (2005) 405 F.3d 1035 (USCA, 9th Cir., May 4, 2005), at 1042; *Rios v. Ashcroft*, (2002) 287 F.3d 895 (USCA, 9th Cir., May 1, 2002), at 899–900; *Konan v. Attorney General*, (2005) 432 F.3d 497 (USCA, 3rd Cir., Dec. 30, 2005), at 503; *Ramos-Calmo v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 15099 (USCA, 9th Cir., Jul. 2, 1999); and *Castro and Carranza-Fuentes* (USCA, 2nd Cir., 2010), at 104–5. In *Agbuya v. Immigration and Naturalization Service*, (2001) 241 F.3d 1224 (USCA, 9th Cir., Mar. 12, 2001), the court recognized refugee status in relation to an employee of a mine in the Philippines because the unpopular personnel actions she was required to undertake in her job were perceived by the communist group, NPA, as "an affront to their cause: Agbuya was viewed as politically aligned with the mining company and the government, and against the NPA": at 1229. See also UK Border Agency, *supra* n. 227, at 32. For an interesting discussion of this issue, see *Noune v. Secretary of State for the Home Department*, [2000] EWCA Civ 306 (Eng. CA, Dec. 6, 2000), at [26]. But in some cases US decision-makers have not recognized that employment is associated with political opinion, particularly in the context of military or police officers: see e.g. *Matter of Fuentes*, (1988) 19 I & N Dec. 658 (USBIA, Apr. 18, 1988), at 659; *Estrada-Escobar v. Ashcroft*, (2004) 376 F.3d 1042 (USCA, 10th Cir., Jul. 20, 2004), at 1045–47; and *Cruz-Navarro v. Immigration*

actual, imputed, or implied advocacy of human rights,<sup>330</sup> including labor rights,<sup>331</sup> undertaking humanitarian work,<sup>332</sup> defection from the KGB,<sup>333</sup> illegal departure or stay abroad,<sup>334</sup> the lodgment of a (failed) claim for refugee status abroad,<sup>335</sup> and violation of a politically motivated criminal law.<sup>336</sup> Even the refusal to declare a political opinion – in other words

*and Naturalization Service*, (2000) 232 F.3d 1024 (USCA, 9th Cir., Nov. 15, 2000). However, the Ninth Circuit has rejected the position represented in *Matter of Fuentes*, namely that currently serving military officers cannot fall within the political opinion ground: see *Abaya v. Immigration and Naturalization Service*, (2001) 2 Fed. Appx. 850 (USCA, 9th Cir., Jan. 25, 2001), at 851–52.

<sup>330</sup> Grahl-Madsen, *supra* n. 193, at 227; *Ward* (Can. SC, 1993), at 746. An example of implied advocacy or support for human rights is the decision in *Kwong v. Canada (Minister of Citizenship and Immigration)*, (1995) 96 FTR 302 (Can. FCTD, May 1, 1995), in which a hospital security guard was found to be at risk for reasons of political opinion because he had released several women who were scheduled to undergo abortion and sterilization by the Chinese government: see at [4], [14]–[15].

<sup>331</sup> See *Zhiqiang Hu* (USCA, 9th Cir., 2011): “We have repeatedly recognized that labor speech in many instances can be political”: at 5, citing previous authority. See also *Perez v. Immigration and Naturalization Service*, (1990) 902 F.2d 760 (USCA, 9th Cir., May 7, 1990), at 761–63.

<sup>332</sup> In *Martinez-Buendia* (USCA, 7th Cir., 2010), the court noted that there was uncontested evidence that the FARC perceives “individuals who do humanitarian work” to be a political threat: see at 15. In that case the applicant’s work with the Health Brigade meant that she was at risk of being persecuted on account of her political opinion: at 15–16. See also *Long v. Holder*, (2010) 620 F.3d 162 (USCA, 2nd Cir., Sept. 16, 2010), at 166; *Xun Li v. Holder*, (2009) 559 F.3d 1096 (USCA, 9th Cir., Mar. 23, 2009), at 1113; and *Jin v. Holder*, (2012) 454 Fed. Appx. 9 (USCA, 2nd Cir., Jan. 3, 2012).

<sup>333</sup> *Koudriachova* (USCA, 2nd Cir., 2007), at 264.

<sup>334</sup> In some cases the evidence available to the court supports the finding that a particular regime “regarded those who had applied for refugee status in another country to be political traitors,” or that “illegal departure and prolonged absence raises the prospect that a particular person has dissident views in the eyes of the . . . authorities”: *Minister for Immigration and Multicultural Affairs v. Applicant Z*, [2001] FCA 1447 (Aus. FC, Oct. 16, 2001), at [6], [7], concerning Iraq. In another decision involving an Iraqi national who had been evacuated from Iraq by the US government, the US Court of Appeals for the Ninth Circuit found that “[d]ocumentary evidence in the record demonstrates that Iraqi law permits the death penalty in cases of espionage, which is defined broadly to include ‘unauthorized contact with foreigners’ . . . [T]here is direct confirmation in the record that Iraq may well regard all the evacuees as traitors, and persecute them”: *Al-Harbi v. Immigration and Naturalization Service*, (2001) 242 F.3d 882 (USCA, 9th Cir., Mar. 9, 2001), at 893. As noted by Grahl-Madsen, “[s]ome States have made it a crime to withdraw from society without permission (‘Republikflucht’), and anyone who manages to escape may face stiff penalties if he ever returns”: A. Grahl-Madsen, “International Refugee Law Today and Tomorrow,” (1982) *Archiv des Völkerrechts* 411, at 421. In other cases, the mere fact that sanctions imposed for violations of passport and emigration regulations are disproportional has appropriately been considered sufficient to imply that “they are in general aimed at an imputed oppositional opinion”: *A v. Independent Federal Asylum Board (UBAS)* (Au. VwGH [Austrian Administrative Court], Nov. 21, 2002). But see *Clara v. Attorney General*, (2001) 275 F.3d 1334 (USCA, 11th Cir., Dec. 19, 2001) and *Xin Kong Ni v. Immigration and Naturalization Service*, (2002) 54 Fed. Appx. 212 (USCA, 6th Cir., Dec. 27, 2002).

<sup>335</sup> See *AA v. Secretary of State for the Home Department*, [2007] 1 WLR 3134 (Eng. CA, Apr. 12, 2006), at 3154 [75]; *Al-Harbi* (USCA, 9th Cir., 2001), at 890; and *FV v. Refugee Appeals Tribunal*, [2009] IEHC 268 (Ir. HC, May 28, 2009), at [33]–[37]. See also 22144 (Bel. CCE [Belgian Council for Alien Law Litigation], Jan. 28, 2009), at 4.10, in which it was accepted that the applicant’s violation of the Uzbek penal code (in having left illegally) could amount to persecution and that the relevant Convention reason was political opinion, “presumed from the act of claiming asylum in Belgium” (unofficial translation).

<sup>336</sup> In *Long* (USCA, 2nd Cir., 2010), the US Court of Appeals for the Second Circuit explained that the enforcement of a law of general applicability can constitute persecution on account of political opinion – in that case the prohibition of assistance to North Korean refugees. It gave as examples where prosecution is a pretext for political persecution (at 165); or where someone “has been singled out for enforcement or harsh punishment because of his political opinion”: at 165–66. See also *Xun Li* (USCA, 9th Cir., 2009),

a position of neutrality – might lead to an imputation of a political opinion.<sup>337</sup> The focus is always on the existence of a *de facto* political attribution, notwithstanding the objective unimportance of the claimant's political acts, her own inability to characterize her actions as flowing from a particular political ideology,<sup>338</sup> or the simultaneous existence of non-Convention motivations such as “personal greed.”<sup>339</sup>

The ability to recognize refugee status based on imputed political opinion has particular salience and has engendered significant controversy in three contemporary contexts: opposition to corruption, resistance to crime, and assertions of gender equality.

The first category of claim relates to persons who act as whistleblowers, informants, or witnesses against those, often powerful or prominent, persons involved in corruption, or other illegal behavior, in their home state. The difficulty with these claims is that a risk of being persecuted is not for reasons of political opinion simply because it arises in a politicized context.<sup>340</sup> Unless the reason for the applicant's predicament is his or her political opinion – whether it is an opinion genuinely held, or an opinion imputed or implied – the causal nexus requirement is not met.<sup>341</sup> This distinction however can be

at 108–9. Although contrast *Li v. Attorney General*, (2011) 633 F.3d 136 (USCA, 3rd Cir., Feb. 1, 2011). See also *supra* Ch. 3.4.2.

<sup>337</sup> In *RT (Zimbabwe)* (UKSC, 2012), the UK Supreme Court explained that “[t]he idea ‘if you are not with us, you are against us’ pervades the thinking of dictators. From their perspective, there is no real difference between neutrality and opposition”: at 361 [44]. The court quoted from a decision of the Immigration Appeals Tribunal in *Gomez* (UKIAT, 2000), at [46]: “In certain circumstances, for example where both sides operate simplistic ideas of political loyalty and political treachery, fence-sitting can be considered a highly political act”: at [44]. See also UK Border Agency, *supra* n. 227, at 34. In *Rivera-Moreno* (USCA, 9th Cir., 2000), the Court of Appeals for the Ninth Circuit explained, in relation to the “hazardous neutrality” doctrine (see *supra* n. 293): “An applicant can establish his political neutrality by pronouncement or by his actions”: at 483, citing *Ramos-Vasquez v. Immigration and Naturalization Service*, (1995) 57 F.3d 857 (USCA, 9th Cir., Jun. 16, 1995), at 863 (applicant deserts rather than illegally shooting deserters).

<sup>338</sup> This analysis in Hathaway, *Refugee Status*, at 155–56, was cited with approval by the UK Supreme Court in *RT (Zimbabwe)* (UKSC, 2012), at 363 [53]. This is particularly important in the context of claims by children: see e.g. UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [46].

<sup>339</sup> In line with the mixed motives doctrine discussed above, *supra* Ch. 5.3, courts have noted that “it is well established that mixed motives do not negate a legitimate nexus to political opinion”: *Baghdasaryan v. Holder*, (2010) 592 F.3d 1018 (USCA, 9th Cir., Jan. 13, 2010), at 1023. See also *Castro and Carranza-Fuentes* (USCA, 2nd Cir., 2010), at 103–4, and *Diaz-Marroquin* (USCA, 9th Cir., 2001), where the court held, in recognizing the political opinion ground, that “[i]t is not dispositive that the guerrillas may also have been motivated by personal revenge against Diaz for informing the police against them”: at 605.

<sup>340</sup> As the Court of Appeals for the First Circuit noted, “[b]ecause people report criminal conduct to law enforcement for various reasons, the mere act of giving a statement to the police or testifying before a grand jury does not compel a conclusion that it is an expression of political opinion”: *Amilcar-Orellana v. Mukasey*, (2008) 551 F.3d 86 (USCA, 1st Cir., Dec. 24, 2008), at 91. See also *Vasquez v. Immigration and Naturalization Service*, (1999) 177 F.3d 62 (USCA, 1st Cir., May 24, 1999) and *Re JEAH, 2507/95* (NZ RSAA, Apr. 22, 1996), at 14.

<sup>341</sup> In Canada, the Federal Court has “held on numerous occasions that victims of criminal activity, even victims of organized crime, do not meet the definition of Convention refugees”: *Suvorova* (Can. FC, 2009), at [59], citing previous authority. In *Yoli v. Canada (Minister of Citizenship and Immigration)*, (2002) 226 FTR 48 (Can. FC, Dec. 30, 2002), at [27]: “Refusing to participate in criminal activity, witnessing and/or reporting a crime have generally been found by this Court not to be in and of themselves expressions of political opinion attracting Convention refugee protection”: for examples, see *Marvin v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ 38 (Can. FCTD, Jan. 10, 1995); *Serrano v. Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 570 (Can. FCTD, Apr. 27, 1999); *Bencic v. Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 623 (Can. FCTD, Apr. 26, 2002).

difficult to draw in the context of criminal activity undertaken in a politicized context where corruption and criminal behavior are endemic and integral to the political structure. For this reason there is no simplistic dichotomy between opposition to criminal activity and the expression of a political opinion.<sup>342</sup> Rather “the critical importance of the specific facts of the particular case”<sup>343</sup> and the historical and socio-political context of the society in question are determinative.<sup>344</sup> 5

The strongest type of case is one in which the applicant has “stood up for law and order” in the context of a corrupt system: that is, one where law enforcement officials do not regularly enforce the law and hence can be antagonistic towards citizens who insist on it being enforced.<sup>345</sup> In assessing such cases, the US Court of Appeals for the Second Circuit has rejected “an impoverished view of what political opinions are,” and eschewed a “categorical distinction between opposition to extortion and corruption, and other disputes with government policy and practice.”<sup>346</sup> Where corruption is “inextricably intertwined with government operation,” the “exposure and prosecution of such an abuse of public trust” has been characterized by the US Court of Appeals for the Ninth Circuit as “necessarily political.”<sup>347</sup> Indeed, in some contexts, to “decry corruption . . . is to strike at the core of . . . government.”<sup>348</sup> 10 15

It has been held that there is no nexus to the Convention definition where the fear of persecution is unrelated to a political opinion and arises from being suspected of involvement in criminal activity, or subject to reprisals as a result of having knowledge that certain individuals committed crimes: *Mehrabani v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 427 (Can. FCTD, Apr. 3, 1998); *Bencic* (Can. FCTD, 2002). Similarly, in *Suarez v. Secretary of State for the Home Department*, [2002] 1 WLR 2663 (Eng. CA, May 22, 2002), the English Court of Appeal cautioned that it would be “wrong to assume that all actions aimed at preventing the exposure of criminal activities . . . can be characterized as imputing a political opinion”: at [46], per Keene L.J.; adopted in *Refugee Appeal No. 76339* (NZ RSAA, 2010), at [103].

<sup>342</sup> *Voitenko* (Aus. FFC, 1999), at [17].

<sup>343</sup> *Refugee Appeal No. 76339* (NZ RSAA, 2010), at [90] and [96]–[97]. <sup>344</sup> *Ibid.*, at [88] and [99].

<sup>345</sup> As the English Court of Appeal acknowledged in *A v. Secretary of State for the Home Department*, [2003] EWCA Civ 175 (Eng. CA, Jan. 21, 2002), an imputed political opinion may be found “where an individual is perceived to be on the side of law and order in a country where that has broken down”: at [23], citing previous authorities in support of his proposition, although ultimately finding that the case under review was not so described. See also *Minister for Immigration and Multicultural Affairs v. Y*, [1998] FCA 515 (Aus. FC, May 18, 1998) and *C* (Aus. FC, 1999), at 375 [25]: “resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending upon the circumstances.”

<sup>346</sup> *Zhang* (USCA, 2nd Cir., 2005); see also *Volaj* (USCA, 2nd Cir., 2010) and *Yu v. Holder*, (2012) 693 F.3d 294 (USCA, 2nd Cir., Sept. 7, 2012).

<sup>347</sup> *Grava v. Immigration and Naturalization Service*, (2000) 205 F.3d 1177 (USCA, 9th Cir., Mar. 7, 2000), at 1180, citing *Reyes-Guerrero v. Immigration and Naturalization Service*, (1999) 192 F.3d 1241 (USCA, 9th Cir., Sept. 16, 1999), at 1245. See also *Hasan v. Ashcroft*, (2004) 380 F.3d 1114 (USCA, 9th Cir., Aug. 18, 2004), at 1121, and *Voitenko* (Aus. FFC, 1999), at 640 [32]. In the US it appears that the weight of authority is on the side of viewing “fighting government corruption” as an implied political opinion in line with the view taken in *Zhang* (USCA, 2nd Cir., 2005): see e.g. *Musabelliu v. Gonzales*, (2006) 442 F.3d 991 (USCA, 7th Cir., Mar. 27, 2006), at 995, and *Castro and Carranza-Fuentes* (USCA, 2nd Cir., 2010), at 100. This is particularly so in the Ninth Circuit: see e.g. *Fedunyak v. Gonzales*, (2007) 477 F.3d 1126 (USCA, 9th Cir., Mar. 2, 2007), at 1129–30; *Mamouzian v. Ashcroft*, (2004) 390 F.3d 1129 (USCA, 9th Cir., Sept. 2, 2004), at 1134–35; *Sagaydak* (USCA, 9th Cir., 2005); and *Baghdasaryan* (USCA, 9th Cir., 2010), at 1024–25. However, we note that it has been suggested that the “one central reason” standard may result in a more restrictive approach in such cases: see *Matter of NM* (USBIA, 2011), at 532.

<sup>348</sup> *Berrueta v. Canada (Minister of Citizenship and Immigration)*, (1996) 109 FTR 159 (Can. FCTD, Mar. 21, 1996), at 2. See also *Suarez* (Eng. CA, 2002), at [29]–[30].



This recognition of the endemic nature of corruption in many countries resonates with the Canadian Federal Court of Appeal's observation that, "[w]here, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of 'political opinion'."<sup>349</sup> Conversely, the Federal Court of Australia has observed that,

[i]t needs to be emphasized that where individual, rather than systemic, corruption is exposed it is less likely that the act of exposure will be one in which a political opinion will be seen to have been manifested. This is because the exposure in that instance is more likely to be seen as the reporting of criminal conduct rather than any form of opposition to, or defiance of, state authority or governance.<sup>350</sup>

In line with this approach, cases which have recognized opposition to corruption as encompassed by the political opinion ground include a Chinese businessman who protested against official corruption and was labeled "unpatriotic;"<sup>351</sup> the elected chairman of a labor union who protested against corruption on the part of factory officials;<sup>352</sup> a Philippine customs inspector who exposed the smuggling activities of his superiors;<sup>353</sup> a Russian citizen engaged in efforts to expose patterns of corruption involving members of the Russian mafia and officials of the government;<sup>354</sup> a Ukrainian businessman at risk after filing a complaint alleging corruption among government officials;<sup>355</sup> a Colombian prosecutor whose determination to pursue corruption charges against members of the government meant that he was labeled "a stooge for the conservative party,"<sup>356</sup> and a Guatemalan police officer who reported government corruption to a United Nations human rights organization.<sup>357</sup>

Notwithstanding such developments, there is sometimes unwarranted skepticism regarding the extent to which opposition to corruption can exemplify imputed political opinion. For example, in *Storozhenko* a Ukrainian man had witnessed an ordinary crime committed by an intoxicated police officer and had immediately accosted the officer to complain and criticize his actions.<sup>358</sup> He was assaulted by the officer, and subsequently lodged a complaint at the local police station about this and the original crime committed by the police officer. Despite receiving threats and demands to withdraw the complaints, the applicant persisted in seeking justice through the central police station and later via a special police unit

<sup>349</sup> *Klinko* (Can. FCA, 2000), at [35].

<sup>350</sup> *Zheng v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 670 (Aus. FC, Aug. 23, 2000), at [33].

<sup>351</sup> *Zhang* (USCA, 2nd Cir., 2005).

<sup>352</sup> *Bu v. Gonzales*, (2007) 490 F.3d 424 (USCA, 6th Cir., Jun. 15, 2007), at 429–30, and see authorities cited therein. See also *Yu* (USCA, 2nd Cir., 2012).

<sup>353</sup> *Grava* (USCA, 9th Cir., Mar. 7, 2000); see also *Briones v. Immigration and Naturalization Service*, (1999) 175 F.3d 727 (USCA, 9th Cir., Apr. 30, 1999), in which the court held that the petitioner's "activity as a confidential informer who sided with the Philippine military in a conflict that was political at its core certainly would be perceived as a political act by the group informed upon": at 729, as cited in *Soriano v. Holder*, (2009) 569 F.3d 1162 (USCA, 9th Cir., Jun. 26, 2009), at 1165.

<sup>354</sup> *Voitenko* (Aus. FFC, 1999).

<sup>355</sup> *Klinko* (Can. FCA, 2000). See also *04-2399/R12893* (Bel. CPRR [Belgian Permanent Refugee Appeals Commission], Sept. 22, 2005).

<sup>356</sup> *Reyes-Guerrero* (USCA, 9th Cir., 1999), at 1244–45.

<sup>357</sup> *Castro and Carranza-Fuentes* (USCA, 2nd Cir., 2010), at 100–6.

<sup>358</sup> *Storozhenko v. Secretary of State for the Home Department*, [2001] Imm AR 329 (Eng. CA, Jun. 15, 2001), at [3].



established to combat organized crime.<sup>359</sup> In rejecting the refugee claim, the tribunal held that it was “manifestly artificial to talk in terms of imputed political opinion,”<sup>360</sup> a decision upheld by the Court of Appeal.<sup>361</sup> The Court of Appeal’s reasoning, however, suggests an overly simplistic view of political opinion, in placing significance on the fact that the applicant “did not involve himself in any public activities”<sup>362</sup> and “did not write to the newspapers or allow himself to be interviewed by the media or become involved in a public campaign of any kind.”<sup>363</sup> Yet, in the context of a country in which “police corruption . . . remained a serious problem,”<sup>364</sup> a person’s persistent and dogged attempts to hold police officers to account for conduct that affected himself and other innocent victims is in our view accurately understood as implied political opinion, notwithstanding that a “layman” may not view such a case as a classic example of one warranting refugee status.<sup>365</sup>

An alternative approach that seems to be gaining traction holds that in assessing such claims it is possible and appropriate to identify whether the applicant’s motives in resisting or reporting corruption are predominantly personal (in which case refugee status is denied) or predominantly political (in which case refugee status is accorded). This approach may be of assistance in the rare straightforward case involving nothing but personal motives and interests.<sup>366</sup> For example, in a decision concerning a Romanian citizen sentenced to imprisonment for his role in a fraudulent tax transaction, the New Zealand Refugee Status Appeals Authority accepted that “corruption is pervasive in Romania.”<sup>367</sup> Yet a close examination of the facts revealed that the applicant was involved in “a very personal fight” involving “a falling out between accomplices,”<sup>368</sup> and “[n]othing he has done can sensibly be described [or perceived] as a political act or expression of a political opinion.”<sup>369</sup> Similarly, the US Court of Appeals for the Ninth Circuit held that since “[p]ersonal animosity is not political opinion,”<sup>370</sup> where criminals were merely taking revenge against their co-accused informant, the political opinion ground was not satisfied.<sup>371</sup> In other words, where the applicant’s conduct was in truth solely a manifestation of self-protection or self-interest rather than reflecting or evincing a political opinion, refugee status is appropriately denied.<sup>372</sup> But there are many other cases where the existence of personal self-interest in no sense eclipses the fundamentally political character of the applicant’s actions.<sup>373</sup> For this reason an attempt to categorize the motives and context as either “personal” or “political” in such a case is

<sup>359</sup> *Ibid.*, at [27]. <sup>360</sup> *Ibid.*, at [12]. <sup>361</sup> *Ibid.* <sup>362</sup> *Ibid.*, at [27]. <sup>363</sup> *Ibid.* <sup>364</sup> *Ibid.*, at [29].

<sup>365</sup> Brooke L.J. (Mance and Simon Brown L.J. agreeing) stated that “[a] layman would be very surprised to be told that the way in which Mr Storozhenko was treated when he sought to bring this police officer to justice qualified him for refugee status on the grounds that he had a well-founded fear of persecution for a political opinion”: at [51].

<sup>366</sup> For example, see *Salvador-Martinez v. Immigration and Naturalization Service*, 2000 U.S. App. LEXIS 860 (USCA, 9th Cir., Jan. 7, 2000).

<sup>367</sup> *Refugee Appeal No. 76339* (NZ RSAA, 2010), at [4]. <sup>368</sup> *Ibid.*, at [107].

<sup>369</sup> *Ibid.* For another good example of a case that was appropriately found to be outside the Refugee Convention, see *AC (Russia)* (NZ IPT, 2012), where the Russian businessman’s claim was based on his decision not to transfer his business activities to an organized crime group. The tribunal found that the “appellant’s predicament arises not out of any actual or imputed political opinion”: at [78].

<sup>370</sup> *Soriano* (USCA, 9th Cir., 2009), at 1164–65.

<sup>371</sup> *Ibid.*, at 1165. As the court noted, “[p]etitioner’s only act in opposition to organized crime was informing the police after his arrest about two individuals who had engaged in criminal activities”: at 1165.

<sup>372</sup> *Zhang* (USCA, 2nd Cir., 2005); see also *Castro and Carranza-Fuentes* (USCA, 2nd Cir., 2010), at 101, and *El Hejjar v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 263 (Aus. FFC, Mar. 13, 2000).

<sup>373</sup> See e.g. *Hayrapetyan v. Mukasey*, (2008) 534 F.3d 1330 (USCA, 10th Cir., Jul. 28, 2008), at 1337–38.

manifestly artificial. As such, cases involving criminal conduct or prosecution should not be subjected to *a priori* assumptions set apart from the context in which they arise, but rather analyzed with sensitivity to the context and against an understanding that such claims may well fit within the ambit of the political opinion ground.

5 The second category of case involving “political opinion implicit in conduct” that has proven challenging in recent years is where a person is at risk of being persecuted for resisting extortionist or other demands, or forcible recruitment into, for example, an insurgency group or gang. Such cases are often assessed by reference to a dichotomous inquiry into whether the harm flows from motives such as pure criminality, revenge, or retribution, or whether  
 10 the act of resistance reflects or is properly perceived as reflecting a political opinion.<sup>374</sup> Of course, where a person is merely at risk of “common crime,” or where extortion or forced recruitment is properly understood as random, or motivated exclusively by greed or purely criminal motives, a refugee claim is appropriately denied on nexus grounds.<sup>375</sup> Yet  
 15 decision-makers should not too readily dismiss such claims without considering whether Convention motives or reasons – most relevantly implied political opinion – may co-exist with non-Convention-related reasons.<sup>376</sup> As explained above, the mere fact that motives such as revenge, greed, or retribution play a part in the applicant’s risk does not preclude a finding that her real or perceived political opinion is also a contributing factor,<sup>377</sup> and hence

<sup>374</sup> We note that such claims can also be considered within the “member of a particular social group” category on grounds such as age and gender: see *infra* Chs. 5.9.1, 5.9.4.

<sup>375</sup> There is considerable authority in the US for the proposition that “[m]ere refusal to join a gang does not constitute political opinion”: *Mejilla-Romero* (USCA, 1st Cir., 2010), at 24, citing *Matter of EAG*, (2008) 24 I & N Dec. 591 (USBIA, Jul. 30, 2008), at 596. In the US, the Supreme Court’s decision in *Elias-Zacarias* (USSC, 1992) is often cited as authority for the proposition that a claim will fail unless the applicant is able to show “either a political motive in resisting recruitment by guerrillas or a well-founded fear of persecuting him because of that political opinion”: as paraphrased in *Re SEG*, (2008) 24 I & N Dec. 579 (USBIA, Jul. 30, 2008), at 589. See also *Berganza-Sagastume v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 20370 (USCA, 9th Cir., Aug. 25, 1999); *Robles-Diaz v. Immigration and Naturalization Service*, 2000 U.S. App. LEXIS 862 (USCA, 9th Cir., Jan. 20, 2000), at 4–6; *Sene v. Ashcroft*, (2002) 54 Fed. Appx. 753 (USCA, 3rd Cir., Dec. 11, 2002), at 757–58; *Hernandez-Baena and Carrera-Garcia v. Gonzales*, (2005) 417 F.3d 720 (USCA, 7th Cir., Aug. 4, 2005), at 723; *Pascual v. Mukasey*, (2007) 514 F.3d 483 (USCA, 6th Cir., Dec. 19, 2007). See also in the context of extortion, *Mebrak v. Ashcroft*, 2003 U.S. App. LEXIS 14464 (USCA, 7th Cir., Jul. 17, 2003). However, the courts have also emphasized that “*Elias-Zacarias* does not stand for the proposition that attempted recruitment by a guerrilla group will never constitute persecution on account of the asylum seekers’ political beliefs. Rather, *Elias-Zacarias* instructs courts to carefully consider the factual record of each case when determining whether the petitioner’s fear of future persecution due to his refusing recruitment attempts constitutes persecution on account of political beliefs”: *Martinez-Buendia* (USCA, 7th Cir., 2010), at 13. In Canada, the Federal Court has dismissed claims where “the documentary evidence does not suggest that this opposition [resistance to recruitment], in the eyes of the Mara-18 [gang], is perceived to be a political stand against them. It appears that the applicants’ refusal to comply with escalating extortion demands, and Luis’ resistance to recruitment, were acts of economic and personal preservation, not a political stance”: *Tobias Gomez v. Canada (Minister of Citizenship and Immigration)*, (2011) 397 FTR 170 (Can. FC, Sept. 23, 2011), at [26]; see also *Martinez Menendez v. Canada (Minister of Citizenship and Immigration)*, [2010] FC 221 (Can. FC, Feb. 25, 2010).

<sup>376</sup> For an example of a case in which the clear political context was inappropriately minimized, see *Silva v. Attorney General*, (2005) 138 Fed. Appx. 279 (USCA, 11th Cir., Jun. 29, 2005).

<sup>377</sup> See *supra* Ch. 5.3. The UK Border Agency, *supra* n. 227, notes that: “A rebel group’s motives for targeting certain individuals might be political, but there might be other non-political motives as well . . . Just because motives are mixed, this does not mean the Convention cannot be engaged”: at 35. For good examples of correct application of the mixed motives doctrine in this context, see *Desir* (USCA, 9th Cir.,

a basis for recognition of refugee status. Indeed, it is well accepted that “[p]olitical revenge and political persecution are not mutually exclusive.”<sup>378</sup>

Here too, the fundamental question is whether imputation is likely given the societal context and particular facts of the individual case. Where the applicant provides evidence that she explicitly stated her reason for refusal in political terms, decision-makers are far more likely to view the claimant at risk for reason of her political opinion.<sup>379</sup> However, it is important to be cognizant of the fact that “[i]n certain circumstances, for example where both sides operate simplistic ideas of political loyalty and political treachery, fence-sitting can be considered a highly political act.”<sup>380</sup> In other words, a refusal to comply with a demand to join a gang or guerrilla group may in itself convey an oppositional sentiment “as clearly as an opinion expressed in a more traditional political manner.”<sup>381</sup> Hence, where the evidence permits the inference that refusal to join, cooperate with, or carry out a task on behalf of a gang, guerrilla, or insurgent group, or even a government, is perceived or understood as the expression of a political opinion, nexus to a Convention ground is appropriately recognized.<sup>382</sup>

1988) and *Jahed* (USCA, 9th Cir., 2004). By contrast, for an overly simplistic and dichotomous approach in this context, see *Duarte Porras* (USCA, 11th Cir., 2005), at 16–17.

<sup>378</sup> *Abaya* (USCA, 9th Cir., 2001), at 850–51, citing *Lim v. Immigration and Naturalization Service*, (2000) 224 F.3d 929 (USCA, 9th Cir., Aug. 29, 2000), at 934. See also *Singh v. Minister for Immigration and Multicultural Affairs*, (2002) 209 CLR 533 (Aus. HC, Mar. 7, 2002).

<sup>379</sup> See e.g. *Borja* (USCA, 9th Cir., 1999), refusing the extortion demands of a guerrilla group. See also *Del Aguila v. Immigration and Naturalization Service*, 2000 U.S. App. LEXIS 6174 (USCA, 9th Cir., Mar. 31, 2000), at 4–6; and *Gonzales-Neyra v. Immigration and Naturalization Service*, (1997) 133 F.3d 726 (USCA, 9th Cir., Sept. 15, 1997), where the court overruled a finding that nexus to political opinion had not been established, finding that the tribunal below had “overlooked the uncontradicted evidence that petitioner’s life and business had been threatened only after he expressed his political disagreement with the guerrilla organization, and only after he made clear that his refusal to make further payments was on account of that disagreement.” In *Diaz-Marroquin* (USCA, 9th Cir., 2001), the court recognized the political opinion claim on the basis that “[a]ccording to Diaz, when the guerrillas confronted him, he told them directly that he would not join their forces because of his anti-communist politics”: at 605. In some cases where past persecution is relevant, the persecutors may have accused the applicant of holding certain opinions, hence satisfying the nexus clause: see e.g. *Chanchavac* (USCA, 9th Cir., 2000). But see the discussion of this issue in *Re JEAH* (NZ RSAA, 1999), at 14–18.

<sup>380</sup> *RT (Zimbabwe)* (UKSC, 2012), at 361 [44]. See also UK Border Agency, *supra* n. 227: “In some circumstances a person’s neutrality might even lead to them having a political opinion imputed to them. For example, the rebel group might perceive anyone who does not support them to be against them”: at 34–35.

<sup>381</sup> UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [50]. See further discussion at [45]–[51].

<sup>382</sup> In *Mayorga-Esquerria v. Holder*, (2010) 409 Fed. Appx. 81 (USCA, 9th Cir., Nov. 8, 2010), the Ninth Circuit observed that, “[w]hile the mere rejection of membership in a guerrilla organization does not constitute a political opinion. . . when such rejection is understood by guerrillas to be motivated by political objection to the rebels’ cause, we have held many times that the persecution that results is ‘on account of political opinion[.]’”: at 83 (emphasis in original). See also *Castellanos-Castillo v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 22490 (USCA, 9th Cir., Sept. 10, 1999), at 9–12. In *Lukwago* (USCA, 3rd Cir., 2003), the Court of Appeals remanded the case to the Board of Immigration Appeals in part on the basis that it had failed properly to consider whether the applicant’s escape from a rebel group – which he had been forced to join – would be perceived as expression of a political opinion: see at 12–13. Of course it may also be that a person’s refusal *is* due to his or her political opinion, in which case, if one adopts the predicament approach, nexus is also established regardless of what the persecutor intends or perceives.

In line with this approach, refugee status has been recognized in cases involving conscientious desertion from military service;<sup>383</sup> where a doctor refused to kill a member of an opposition party;<sup>384</sup> where an ethnic Fijian Major refused to “participate in the persecution of Indo-Fijians”;<sup>385</sup> and where forced recruitment by guerrilla groups was resisted by an elite military officer<sup>386</sup> and by members of a military family.<sup>387</sup>

The third category of implicit political opinion that remains challenging involves the question whether political opinion can be revealed in resistance to male hegemony, domination, or oppression, or express or implied assertions of gender equality. There is considerable support for the insight that

opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.<sup>388</sup>

<sup>383</sup> See *BE (Iran) v. Secretary of State for the Home Department*, [2009] INLR 1 (Eng. CA, May 20, 2008), finding that the applicant had established that his risk was for reasons of political opinion because he “was seeking to avoid by deserting . . . the commission of what this country and civilised opinion worldwide recognise as an atrocity and a gross violation of human rights – the unmarked planting of anti-personnel mines in roads used by innocent civilians”: at [41]. In *SZAOG* (Aus. FFC, 2004), the Full Federal Court of Australia accepted that refugee status may be appropriate where “a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion . . . or the conscientious objection is itself political opinion”: at 27–28 [46]. But contrast *Velasquez-Velasquez v. Immigration and Naturalization Service*, (2002) 53 Fed. Appx. 359 (USCA, 6th Cir., Dec. 20, 2002) and *Mwesige v. Ashcroft*, (2003) 59 Fed. Appx. 888 (USCA, 7th Cir., Mar. 11, 2003).

<sup>384</sup> *Hakobyan v. Ashcroft*, (2004) 86 Fed. Appx. 353 (USCA, 9th Cir., Jan. 27, 2004), where the court noted that “[h]er refusal could have been seen by the government as subversive and political”: at 356. See also *Cabello v. Canada (Minister of Citizenship and Immigration)*, (1995) 93 FTR 156 (Can. FCTD, Jan. 30, 1995), where a Cuban doctor’s refusal to continue work as a microbiologist due to her disagreement with the Cuban government policy “of isolating for life in a prison-like setting those who test HIV positive” was accepted as a claim grounded in imputed political opinion: at [2]–[7]. See also *Aranguiz* (Can. FCA, 1991), at 2.

<sup>385</sup> *Tagaga* (USCA, 9th Cir., 2000), at 1034.

<sup>386</sup> *Mayorga-Esquerro* (USCA, 9th Cir., 2010), at 9–10, citing *Artiga Turcios v. Immigration and Naturalization Service*, (1987) 829 F.2d 720 (USCA, 9th Cir., Mar. 27, 1987), at 723, and *Velarde v. Immigration and Naturalization Service*, (1998) 140 F.3d 1305 (USCA, 9th Cir., Apr. 10, 1998).

<sup>387</sup> *Del Carmen Molina v. Immigration and Naturalization Service*, (1999) 170 F.3d 1247 (USCA, 9th Cir., Mar. 26, 1999) and *Ventura v. Immigration and Naturalization Service*, (2001) 264 F.3d 1150 (USCA, 9th Cir., Sept. 10, 2001), at 1155, reversed on other grounds *sub nom. Immigration and Naturalization Service v. Ventura*, (2002) 537 US 12 (USSC, Nov. 4, 2002).

<sup>388</sup> US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, at 23; see further at 24–25. In *Fatin* (USCA, 3rd Cir., 1993), the court stated that “there is little doubt that feminism qualifies as a political opinion.” For further discussion of US case law and policy, see Anker, *supra* n. 29, at 328–32. See also UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, which state that political opinion can include “an opinion as to gender roles” and “would include ‘non-conformist behaviour which leads the persecutor to impute a political opinion to him or her’”: at [32]. See also UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, stating that political opinion “may include an opinion as to gender roles expected in the family or as regards education, work or other aspects of life”: at [50]. In addition, gender guidelines in Canada and the US expressly recognize the political dimension to non-conformist behavior: see Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Nov. 13, 1996) (“*Guideline 4*”), at A.II: “A woman who

Accordingly, claims on the political opinion ground have been recognized based on political opinion implicit in the unwillingness of an Iranian woman to wear the chador and attend Islamic functions;<sup>389</sup> the refusal of an Iranian female schoolteacher to enforce Islamic dress codes in the kindergarten in which she worked;<sup>390</sup> and the “attributed oppositional opinion . . . as a woman of ‘western’ upbringing.”<sup>391</sup>

Yet there is still a lack of confidence in viewing the personal as political, particularly in claims involving domestic violence, forced marriage, resistance to female genital mutilation, and sexual violence.<sup>392</sup> On the one hand, in *Lazo-Majano*, the US Court of Appeals for the Ninth Circuit straightforwardly observed that if the sexual abuse perpetrated by a Salvadoran sergeant against the applicant is

seen in its social context, [the perpetrator] is asserting the political opinion that a man has a right to dominate . . . His [action] reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it . . . When, by flight, [the applicant] asserted [a political opinion to the contrary], she became exposed to persecution for her assertion.<sup>393</sup>

Yet in the groundbreaking decision in *Shah and Islam*,<sup>394</sup> the House of Lords felt the need to rely on “membership of a particular social group” analysis to afford refugee status even though the risk faced by both applicants resulted from their determination to liberate themselves from effective bondage as married women, and to assert their independence in a country where women “are unprotected by the state . . . [m]arried women are subordinate to the will of their husbands.”<sup>395</sup> As the House of Lords itself noted, “[e]ven Pakistan statute law

opposes institutionalized discrimination against women, or expresses views of independence from male social, cultural dominance in her society, may be found to fear persecution by reason of her actual political opinion or a political opinion imputed to her.” See also US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, at 28–29; and UK Border Agency, *supra* n. 196: “Non-conformist opinions or behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her whether she holds one or not. For instance opposition to institutionalised discrimination against women in society or expressing views in opposition to the predominant social or cultural norms can be seen to constitute a political opinion. Non-conformist behaviour in certain cultures such as refusing to wear a veil, pursuing an education or choosing a partner could also lead to a woman having a political opinion attributed to her”: at 12–13.

<sup>389</sup> “[W]hile her family did not engage in overtly political acts, her actions and those of her relatives and friends would be construed by the authorities as anti-government”: *Modjgan Shahabaldin*, V85-6161 (Can. IRB, Mar. 2, 1987), at 6. While this is a very early decision, it is cited in Immigration and Refugee Board of Canada, *Guideline 4*, *supra* n. 388, at n. 5, thereby ensuring its ongoing relevance. See also *Namitabar* (Can. FCTD, 1993), at [20]: “I consider that in the case at bar the female applicant has demonstrated that her fear of persecution is connected to her political opinion. In a country where the oppression of women is institutionalized any independent point of view or act opposed to the imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime.”

<sup>390</sup> *AN 5 K 87.38024* (Ger. VG Ansbach [German Administrative Court, Ansbach], Dec. 14, 1989), reported at (1993) 5 Intl. J. Ref. L. 611.

<sup>391</sup> *DA v. Federal Asylum Authority* (Au. VwGH [Austrian Administrative Court], Nov. 10, 1999) (unofficial translation).

<sup>392</sup> This is eloquently set out in *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [72]. See also H. Crawley and T. Lester, “Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe,” UNHCR (May 2004).

<sup>393</sup> *Lazo-Majano v. Immigration and Naturalization Service*, (1987) 813 F.2d 1432 (USCA, 9th Cir., Apr. 2, 1987), at 1435.

<sup>394</sup> *Shah* (UKHL, 1999). <sup>395</sup> *Ibid.*, at 635.

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discriminates against such women.”<sup>396</sup> Submissions based on the political opinion ground were nonetheless rejected by both the tribunal and Court of Appeal, and in the House of Lords an appeal against this aspect of the claim was held to be “unsustainable.”<sup>397</sup>

5 In our view, refugee law ought more clearly to mirror the sophisticated evolution in understanding gender issues that has occurred in international human rights law in recent decades, with a “gendered interpretation” given to all Convention grounds, including political opinion.<sup>398</sup> This involves taking account “of how power is distributed and exercised in the particular society”<sup>399</sup> and understanding that, depending on the particular context of the society in question, “a woman’s actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality,”<sup>400</sup> in other words a political opinion for Refugee Convention purposes.

10 An eloquent modern application of such reasoning is embodied in the decision of Deputy Chairman Haines of the New Zealand tribunal, finding that a claim by a Turkish woman who was at risk of being killed in a so-called “honor killing” was within the ambit of the “political opinion” ground on the basis that

[t]he appellant’s severance of her relationship with her husband was an unambiguous act of self-emancipation from an abusive relationship and the structures of power and inequality which had sanctioned that relationship from the moment the appellant had been forced into it. Her unilateral action in ending the marriage can only be seen by the respective families as a direct challenge to her duties, to their power over her and to their own obligation under custom or law (*töre*) to police the collective code of honour by removing from the collectivity the stain of dishonour. . . . In the specific context we are satisfied that the appellant’s assertion of her right to life and of her right to control her life was a challenge to the collective morality, values, behaviours and codes of the two families and beyond them, of the greater “community” of which they are a part. This challenge to inequality and the structures of power which support it is plainly “political” as that term is used in the Refugee Convention.<sup>401</sup>

15 In sum, a broad and inclusive approach to interpreting “political opinion” is vital to ensuring the ability of the refugee definition to evolve and accommodate modern refugees in need of protection due to the holding of beliefs or engagement in conduct which implicitly or explicitly challenges or threatens those in positions of power.

### 5.9 Membership of a particular social group

The final enumerated ground, membership of a particular social group (“social group”), was introduced with little explanation by the Swedish delegate as a last-minute amendment to the Refugee Convention: “[E]xperience had shown that certain refugees had been persecuted because they belonged to particular social groups. . . . Such cases existed, and it would be as

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*, at 647, per Lord Steyn (Lord Hope agreeing), who noted that he was in agreement with all members of the Court of Appeal on this point. See also *Re RA* (USBIA, 1999), at 906.

<sup>398</sup> See *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [85]; see further Crawley, *supra* n. 310, at 80–81.

<sup>399</sup> *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [84].

<sup>400</sup> *Ibid.*, at [85]. See also *Sarhan* (USCA, 7th Cir., 2011).

<sup>401</sup> *Refugee Appeal No. 76044* (NZ RSAA, 2008), at [89]–[90]. See also Mathew, *supra* n. 79, at 677.



well to mention them explicitly.”<sup>402</sup> There is little doubt that of the five Convention grounds, social group is the “Convention ground with the least clarity.”<sup>403</sup> Perhaps due to its nebulous nature and concomitant malleability, it is also the ground that has been subject to the most rigorous examination by courts. While some early judicial forays into its interpretation were inclined to adopt an “I know it when I see it” approach,<sup>404</sup> senior appellate courts now recognize that a commitment to the rule of law requires the articulation of guiding principles, particularly in the context of decisions that “may determine the fate of individuals.”<sup>405</sup>

How do we identify the “true autonomous and international meaning”<sup>406</sup> of the social group ground?

On the one hand, it is well established that fidelity to the text, object, and purpose of the nexus clause requires that its interpretation result in some limit on the beneficiary class.<sup>407</sup> An attempt to transform this ground into a “catch all” category is seductive from a humanitarian perspective, but would effectively render the nexus clause superfluous and hence cannot stand as a matter of treaty interpretation.<sup>408</sup> For this reason it is also well

<sup>402</sup> Statements of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.3 (Nov. 19, 1951), at 14; and UN Doc. A/CONF.2/SR.19 (Nov. 26, 1951), at 14. The Swedish amendment (incorporated in UN Doc. A/CONF.2/9) was adopted without discussion by a vote of 14–0–8.

<sup>403</sup> UNHCR, Global Consultations on International Protection, “Summary Conclusions, Membership of a Particular Social Group” (2001), at [1]. The analysis in this sub-chapter draws in part on M. Foster, “The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group,’” UNHCR (Apr. 2012).

<sup>404</sup> *Applicant A* (Aus. HC, 1997), at 307–8, per Kirby J.

<sup>405</sup> This was the retort by Gummow J. to Kirby J.’s suggestion in *Applicant A* (Aus. HC, 1997), at 277.

<sup>406</sup> *R v. Secretary of State for the Home Department; Ex parte Adan*, [2001] 2 AC 477 (UKHL, Dec. 19, 2000), at 517.

<sup>407</sup> See in particular *Applicant A* (Aus. HC, 1997), per Dawson J., who noted, in explaining that the ambit of the ground of particular social group is limited: “No doubt many of those limits in the present context sprang from the well-accepted fact that international refugee law was meant to serve as a ‘substitute’ for national protection where the latter was not provided due to discrimination against persons on grounds of their civil and political status. It would therefore 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”: at 248 (footnote omitted). The contrary position was most forcefully put by A. C. Helton, “Persecution on Account of Membership in a Social Group as a Basis for Refugee Status,” (1983) 15 Colum. Hum. Rts. L. Rev. 39, who argued: “The ‘social group’ category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up”: at 41–42, see also 45. Yet this has not been adopted in practice and, in addition to being contrary to the explicit text, is also contrary to the framers’ intentions: “The different categories of refugees to which the proposed convention should apply must be clearly indicated; it would be difficult for the Governments to ratify a convention which otherwise would amount to a kind of document signed in blank to which could be subsequently added new categories of beneficiaries without number”: Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.5 (Jan. 30, 1950), at 2 [4]. Accord e.g. Mr. Henkin of the United States: “[T]he obligations of signatory States must be accurately defined and that could not be done unless the categories to benefit were fixed as at a given date. The States concerned could subsequently extend the scope of their obligations, but they could not undertake unlimited obligations in advance”: UN Doc. E/AC.32/SR.3 (Jan. 26, 1950), at 13 [54].

<sup>408</sup> This analysis in Hathaway, *Refugee Status*, at 159, was cited with approval in *Applicant A* (Aus. HC, 1997), at 260, per McHugh J., and at 295, per Kirby J., where his Honour noted that “[h]ad it been intended that persecution for any reason would satisfy the definition of ‘persecution’ in the definition of a ‘refugee’, it would have been simple for the drafters of the Convention to have deleted altogether the particular categories of persecution. They would have been superfluous” (emphasis in original). See also *Adan* (Eng. CA, 1997), at 1128, and *Shah* (UKHL, 1999), at 643, per Lord Steyn.

accepted that the group cannot be defined solely by reference to the well-founded fear of being persecuted; to hold otherwise would result in tautologous reasoning.<sup>409</sup>

Conversely, it is now widely recognized that the ground should not be artificially limited. Hence, it is well accepted that the size of the group should be irrelevant: a social group may be constituted by a very small group (family) or a very large group (women).<sup>410</sup> As a matter of principle this must be correct, given that the other Convention grounds – race, religion, nationality, and political opinion – “are also characteristics that are shared by large numbers of people,”<sup>411</sup> suggesting that size “of itself can be no objection to the definition of such a class.”<sup>412</sup> The word “particular” in the phrase means that a group should be identifiable, not that it should be of any particular size.<sup>413</sup> As explained by Justice Kirby of the Australian High Court,

[t]he Minister conceded in argument that the number of persons potentially involved in a “particular social group” would not of itself put an applicant otherwise within that group outside the Convention definition. This must be correct. After all, there were six million Jews who were incontestably persecuted in countries under Nazi rule.<sup>414</sup>

Nor does there need to be any “voluntary, associational relationship” between group members, or cohesion or homogeneity.<sup>415</sup> As Lord Steyn emphasized in *Shah*, while “there is limitation involved in the words ‘particular social group,’ what is not justified is to introduce into that formulation an additional restriction of cohesiveness.”<sup>416</sup> Because the

<sup>409</sup> This was originally explained clearly in *Applicant A* (Aus. HC, 1997): “There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution”: at 242. As the House of Lords noted in *Shah* (UKHL, 1999), “The only clear rule which can be said to have been generally recognised is that the persecution must exist independently of, and not be used to define, the social group”: at 656, per Lord Hope.

<sup>410</sup> As Dawson J. noted in *Applicant A* (Aus. HC, 1997): “I can see no reason to confine a particular social group to small groups or to large ones, a family or a group of many millions may each be a particular social group”: at 241. For recent acknowledgment of this principle in a civil law case, see the decision in *STS 6862/2011* (Sp. TS [Spanish Supreme Court], Oct. 24, 2011), at 7: “In fact, the group size is not an important criterion” (unofficial translation). See also UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, at [18]–[19].

<sup>411</sup> Immigration and Refugee Board of Canada, *Guideline 4*, *supra* n. 388, at A.III.

<sup>412</sup> *Khawar* (Aus. HC, 2002), at 28, per McHugh and Gummow JJ.

<sup>413</sup> However, we note that the recent trend in the US to import the newly formulated “social visibility” test, discussed below, has also in some cases been accompanied by a “particularity” requirement which appears to mean that a large group may not meet the test. In some cases the “particularity” requirement has been linked to “numerosity” concerns: see *Portillo v. US Attorney General*, (2011) 435 Fed. Appx. 844 (USCA, 11th Cir., Jul. 22, 2011), citing *Castillo-Arias v. US Attorney General*, (2006) 446 F.3d 1190 (USCA, 11th Cir., Apr. 20, 2006), at 1194–97. However, the US government rejects this understanding of “particularity”: see *Valdiviezo-Galdamez v. Attorney General*, (2011) 663 F.3d 582 (USCA, 3rd Cir., Nov. 8, 2011), at 607 ff.

<sup>414</sup> *Khawar* (Aus. HC, 2002), at 43, per Kirby J.

<sup>415</sup> In relation to the need for a voluntary associational relationship, UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, note that “it is widely accepted in state practice that an applicant need not show that the members of a particular group know one another or associate with each other as a group”: at [15]. Even the US Court of Appeals for the Ninth Circuit, which originally took this approach, has moved away from this requirement: see *Hernandez-Montiel* (USCA, 9th Cir., 2000), at 1093; see also *Thomas v. Gonzales*, (2005) 409 F.3d 1177 (USCA, 9th Cir., Jun. 3, 2005), at 1187.

<sup>416</sup> *Shah* (UKHL, 1999), at 643; see also at 651, per Lord Hoffmann.

social group ground is “obviously not intended to [be] confine[d] . . . to bridge clubs and the like,”<sup>417</sup> decision-makers have recognized that in practice some particular social groups “are notoriously lacking in cohesiveness.”<sup>418</sup>

Notwithstanding consensus on these important interpretive principles, the more general question of the fundamental nature of a “particular social group” has been the subject of much judicial and academic engagement. Specifically, there remains ongoing controversy as to which of the two dominant approaches – *eiusdem generis* or “social perception” – is correct. 5

The *eiusdem generis* approach originated in the decision of the US Board of Immigration Appeals in *Acosta*, but its influence has transcended the US context such that it now represents the dominant approach among common law countries.<sup>419</sup> This approach drew inspiration from a principle of statutory construction – *eiusdem generis* – which is designed to resolve ambiguity or uncertainty<sup>420</sup> by interpreting a general word or phrase by reference to the genus or class revealed in the more specific words that accompany it. In short it is “another way of saying that the words derive meaning from the context in which they appear.”<sup>421</sup> Applying this principle of construction to the refugee definition, the Board of Immigration Appeals observed that each of the other grounds “describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>422</sup> Accordingly, the Board of Immigration Appeals determined that the social group category should be understood 20

to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.<sup>423</sup>

<sup>417</sup> *Sepulveda v. Gonzales*, (2006) 464 F.3d 770 (USCA, 7th Cir., Oct. 2, 2006), at 771. In *Applicant A* (Aus. HC, 1997), McHugh J. made a similar point to that in *Sepulveda* regarding clubs or associations.

<sup>418</sup> *Khawar* (Aus. HC, 2002), at 14 [33], per Gleeson C.J.

<sup>419</sup> The analysis of *eiusdem generis* in Hathaway, *Refugee Status*, at 161 was adopted by the Canadian Supreme Court in *Ward* (Can. SC, 1993), at 737–38, and now represents the position in Canada: see e.g. *Panayotov v. Canada (Minister of Citizenship and Immigration)*, (1995) 102 FTR 56 (Can. FC, Oct. 5, 1995), at [12]; *Asghar v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 768 (Can. FC, May 31, 2005). It is also well entrenched in New Zealand (see *Refugee Appeal No. 71427/99* (NZ RSAA, 2000), [93]–[102]; *AC (Syria)*, [2011] NZIPT 800035 (NZ IPT, May 27, 2011), at [97]), and has been accepted in South Africa (*Fang v. Refugee Appeal Board*, 40771/05, [2006] ZAGPHC 101 (SA HC, Nov. 15, 2006), at 16. In the UK, see *Shah* (UKHL, 1999), at 643 (per Lord Steyn, adopting the “seminal reasoning” in *Re Acosta*, (1985) 19 I & N Dec. 211 (USBIA, Mar. 1, 1985)), 651 (per Lord Hoffmann), and 656 (per Lord Hope). Although we note that some decisions suggest some role for assessing societal discrimination in the analysis: see *Fornah* (UKHL, 2006), at 450 (per Lord Hope) and 455 (per Lord Rodger).

<sup>420</sup> F. A. R. Bennion, *Bennion on Statutory Interpretation* (5th edn., 2008), at 1233.

<sup>421</sup> D. C. Pearce and R. S. Geddes, *Statutory Interpretation in Australia* (7th edn., 2011), at 135. A similar approach appears to be adopted in interpreting the “other status” ground in international human rights law. For example, the Committee on Economic, Social and Cultural Rights has explained that “[a] flexible approach to the ground of ‘other status’ is thus needed in order to capture other forms of differential treatment that . . . are of a comparable nature to the expressly recognised grounds”: CESCR General Comment No. 20, *supra* n. 26, at [27] (emphasis added).

<sup>422</sup> *Acosta* (USBIA, 1985), at 233. <sup>423</sup> *Ibid.*

This approach was adopted by the Supreme Court of Canada in *Ward*,<sup>424</sup> although importantly its distillation of the social group ground was based more explicitly on finding “inspiration in discrimination concepts.”<sup>425</sup> The Canadian Supreme Court favored the *Acosta* approach on the basis that it is consistent with the object and purpose of the Convention as it takes into account the “general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”<sup>426</sup> As Lord Hope subsequently observed in *Shah*:

If one is looking for a genus in order to apply the *ejusdem generis* rule of construction to the phrase “particular social group”, it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society.<sup>427</sup>

Explicit in this articulation is the notion that the ambit of protection is not finite or static, but should evolve in line with principles of non-discrimination law.<sup>428</sup> As the English Court of Appeal observed, “the inclusion of particular social group recognized that there might be different criteria for discrimination, in *pari materiae* with discrimination on other grounds, which would be equally offensive to principles of human rights.”<sup>429</sup>

The *ejusdem generis* approach does not, however, encompass every conceivable group within the social group ground. Rather, it excludes groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights or entitlements.<sup>430</sup> Thus, membership in a voluntary association defined by a non-fundamental purpose, such as recreation or personal convenience, would normally be seen to be outside the scope of the notion of a particular social group.<sup>431</sup>

By grounding interpretation of the social group ground in the underlying non-discrimination purposes of the Refugee Convention, the *ejusdem generis* test offers refugee decision-makers a standard that is capable of principled evolution but not so vague as to admit persons without a serious basis for claim to international protection. Further, because it is grounded in a principled framework, namely, non-discrimination norms of universal applicability, it promotes consistency and objectivity in refugee status decision-making.<sup>432</sup>

<sup>424</sup> *Ward* (Can. SC, 1993), at 736–38, citing Hathaway, *Refugee Status*, at 161.

<sup>425</sup> *Ibid.*, at 734, citing Hathaway, *Refugee Status*, at 135–36. <sup>426</sup> *Ibid.*, at 739.

<sup>427</sup> *Shah* (UKHL, 1999), at 656. <sup>428</sup> Hathaway and Foster, *supra* n. 16, at 481.

<sup>429</sup> *Montoya* (Eng. CA, 2002). This echoed the House of Lords’ approach in *Shah* (UKHL, 1999).

<sup>430</sup> This analysis in Hathaway, *Refugee Status*, at 161, was adopted by the Canadian Supreme Court in *Ward* (Can. SC, 1993), at 737–38, and now represents the position in Canada: see e.g. *Panayotov* (Can. FC, 1995), at [12]. See also *Sepulveda* (USCA, 7th Cir., 2006), at 771.

<sup>431</sup> This analysis from Hathaway, *Refugee Status*, at 168, was cited with approval in *Applicant A* (Aus. HC, 1997), at 305, per Kirby J. But see Grahl-Madsen, who argues for the inclusion within the concept of particular social group of “certain associations, clubs or societies”: Grahl-Madsen, *supra* n. 193, at 219.

<sup>432</sup> The major human rights treaties list specific enumerated grounds on which discrimination is prohibited. Given their wide ratification – particularly in relation to the Civil and Political Covenant, *supra* n. 147, and the Economic, Social and Cultural Covenant, *supra* n. 170 – the specifically listed grounds can provide important guidance in the refugee context. Further, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights provide guidance on the enumerated grounds of discrimination in the Civil and Political Covenant and the Economic, Social and Cultural Covenant respectively, especially the “other status” ground. As the Committee on Economic, Social and Cultural Rights has observed, “[t]he nature of discrimination varies according to context and evolves over time” and hence a “flexible approach to the ground of ‘other status’ is thus needed”: CESCR General Comment No. 20, *supra* n. 26, at [27].

In practice, the *ejusdem generis* approach has been instrumental in ensuring protection of groups such as women, homosexuals, family, children, and persons with disabilities under the rubric of refugee law.<sup>433</sup>

The main challenge to this well-accepted approach came from the Australian High Court which, in *Applicant A*, eschewed the *ejusdem generis* approach in favor of the “ordinary meaning” of the text approach: 5

A “group” is a collection of persons . . . the word “social” is of wide import and may be defined to mean “pertaining, relating, or due to . . . society as a natural or ordinary condition of human life.” “Social” may also be defined as “capable of being associated or united to others” or “associated, allied, combined.” The adjoining of “social” to “group” suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word “particular” in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large.<sup>434</sup>

The social perception test has been described as requiring the satisfaction of three factors:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.<sup>435</sup>

The difficulty with this formulation is that the first criterion is arguably unnecessary since unless the group is identifiable, the potential for there to be a risk of being persecuted *for reasons of membership* in that group is non-existent, while the second criterion merely affirms what the group is not. Hence, the only meaningful criterion is the third: the notion that the group must be distinguished from “society at large.” 10

But how does a decision-maker determine whether the relevant group is distinguished from society at large? It was initially assumed that the social perception test requires that the home society *perceive* the relevant group as a particular social group.<sup>436</sup> However in *Applicant S*, the Australian High Court was careful to emphasize that while “perceptions held by the community may amount to evidence that a social group is a cognizable group within the community”<sup>437</sup> – indeed, such evidence is “usually compelling” in this inquiry<sup>438</sup> – the “general principle is not that the group must be recognized or perceived within the society, but rather that the group must be distinguished from the rest of society.”<sup>439</sup> The court did not provide clear guidance as to precisely how it is that a decision-maker assesses whether the relevant group is so distinguished, and in practice there is a lingering suggestion that a group must be subjectively perceived as a group, rather than merely objectively cognizable or set apart, in order to constitute a particular social group for Convention purposes.<sup>440</sup> 20

<sup>433</sup> See *infra* Chs. 5.9.1, 5.9.2, 5.9.3, 5.9.4, and 5.9.5.

<sup>434</sup> *Applicant A* (Aus. HC, 1997), at 241. Kirby J. explicitly considered and rejected *ejusdem generis* at 294–95.

<sup>435</sup> *Applicant S* (Aus. HC, 2004), at 400 [36], per Gleeson C.J., Gummow and Kirby JJ.

<sup>436</sup> *Ibid.*, at 394 [18]. <sup>437</sup> *Ibid.*, at 397–98 [27].

<sup>438</sup> *Ibid.*, at 410 [67], per McHugh J. <sup>439</sup> *Ibid.*, at 398 [27].

<sup>440</sup> See, e.g., 1011325, [2011] RRTA 227 (Aus. RRT, Mar. 10, 2011), where the tribunal found that homosexual and bisexual men in Kenya were a particular social group, reasoning that this was because “they are

The social perception test adopted in French jurisprudence differs from the Australian approach in that it positively requires the identification of a characteristic common to all members of the group “which define[s] the group in the eyes of the authorities in the country and of society in general.”<sup>441</sup> This “exterior requirement”<sup>442</sup> means that without  
 5 “an affirmative stance of protest and social transgression on the part of the claimant,” she “will not be perceived as a member of a social group by society.”<sup>443</sup>

Confronted by these two contrary approaches, the UNHCR concluded in 2002 that rather than endorsing one of the dominant tests as the correct interpretation at international law, the two distinct methods of interpretation “ought to be reconciled.”<sup>444</sup> As such, the agency  
 10 recommended that the best approach is to require recognition of a social group if *either* of the two tests has been met:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>445</sup>

While clearly well intentioned as it was designed to provide two *alternative* paths by which applicants could satisfy the social group criterion, it is difficult to discern a principled basis to require a single concept to be defined by reference to two such dissonant approaches.  
 15 Of even greater concern, however, the UNHCR’s alternative approach has now been widely misapplied as setting a *cumulative* test, such that an applicant cannot claim protection on social group grounds unless both the *ejusdem generis* and social perception tests are satisfied.

The first such misapplication occurred in 2004 when the European Union moved in its Qualification Directive to mandate for all relevant member states an interpretation that  
 20 explicitly converts the alternative nature of the approach endorsed by the UNHCR into a two-step requirement, stating that a group shall be considered to form a social group where:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic of belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.<sup>446</sup>

perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole”: at [122]. This is also apparent at the judicial level. For example, in *SZJDW v. Minister for Immigration and Citizenship*, [2007] FCA 1121 (Aus. FC, Aug. 1, 2007), the Federal Court of Australia criticized the Refugee Review Tribunal decision in that case on the basis that, *inter alia*, “[n]o consideration appears to have been given either to societal perceptions in India or to ‘legal, social, cultural and religious norms prevalent in [Indian] society’”: at [9], per Finn J.

<sup>441</sup> *Ourbih*, 171858 (Fr. CE [French Council of State], Jun. 23, 1997), as cited in J. Freedman, “Female Asylum-Seekers and Refugees in France,” UNHCR (Jun. 2009), at 30. This approach developed independently of the Australian jurisprudence, and does not appear to have been articulated in opposition to the *ejusdem generis* approach.

<sup>442</sup> D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile* (2002), 427–28.

<sup>443</sup> Carlier, “*Droit d’asile*,” *supra* n. 97.

<sup>444</sup> UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, at [10].

<sup>445</sup> *Ibid.*, at [11]. See further discussion at Foster, *supra* n. 403, at 14.

<sup>446</sup> Qualification Directive, *supra* n. 28, at Art. 10(1)(d) (emphasis added). Although the use of the phrase “in particular” suggests that what follows is not exhaustive, it has been effectively interpreted as such.



In transposing this test into domestic legislation and practice, a number of European jurisdictions now clearly require the satisfaction of *both* tests in order to establish that a person is at risk for reasons of their membership in a particular social group, a position recently affirmed by the Court of Justice of the European Union.<sup>447</sup> For example, in Germany, courts apply a cumulative approach in requiring satisfaction of both a shared fundamental characteristic and that the applicant is part of a group with “a distinct identity within the society of the country of origin.”<sup>448</sup> As a result, claims based on particular social groups defined by gender, sexuality, and family have been rejected in Germany where, respectively, there was insufficient evidence that a gender-based group had a distinct identity in society,<sup>449</sup> where “homosexuality here is not identity defining enough,”<sup>450</sup> and on the basis that although family is assumed to be an immutable characteristic, “a family is not as clearly distinguishable from the rest of society with their own group perceived identity.”<sup>451</sup>

The cumulative approach is not, however, confined to state parties governed by the EU’s Qualification Directive. Although the UNHCR’s 2002 guidelines were clearly intended to provide for two alternative paths to social group recognition,<sup>452</sup> the US Board of Immigration Appeals explicitly relied on these guidelines in 2006 to introduce a new compulsory element into social group analysis, namely, “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”<sup>453</sup> Notwithstanding that the *Acosta* immutability approach had been well entrenched in US jurisprudence for over two decades,<sup>454</sup> it is now accepted in almost every Circuit Court of Appeals that social group

<sup>447</sup> *Minister voor Immigratie en Asiel v. X* (C-199/12), *Y* (C-200/12) and *Z v. Minister voor Immigratie en Asiel* (C-201/12) (Nov. 7, 2013), at [45]. For a thorough discussion of the domestic implementation of these requirements in various European jurisdictions, see Foster, *supra* n. 403, at 15–20.

<sup>448</sup> The application instructions, published by the German Federal Ministry of the Interior, require a cumulative approach, expressly demanding that apart from the definition contained in the 2004 Qualification Directive, *supra* n. 77, at Art. 10(1)(d), there is a need to establish “always a distinct identity within the society of the country of origin. This is for example the case where a group gets discriminated by the surrounding society”: *Hinweise des Bundesinnenministeriums zur Anwendung der Richtlinie 2004/83/EG des Rates über Mindestnormen für die Anerkennung von Flüchtlingen und den Inhalt des zu gewährenden Schutzes* (Oct. 13, 2006) (unofficial translation). For some examples in the case law, see e.g. *3UE 455/06.A* (Ger. VGH [German Higher Administrative Court, Hesse], Apr. 10, 2008); *M 24 K 07.50603* (German VG München [German Administrative Court, Munich], Nov. 6, 2007); *4 A 244/05* (Ger. VG Schleswig-Holstein [German Administrative Court, Schleswig-Holstein], Nov. 20, 2006).

<sup>449</sup> *5244504-346* (Ger. BAMF [German Federal Office for Migration and Refugees], Sept. 21, 2007), finding that “women in Haiti” did not have sufficiently distinct identity in society (unofficial translation).

<sup>450</sup> *AN 18 K 08.30201* (Ger. VG Ansbach [German Administrative Court, Ansbach], Aug. 21, 2008).

<sup>451</sup> *1 LB 22/05* (Ger. OVG Schleswig-Holstein [German Higher Administrative Court, Schleswig-Holstein], Jan. 27, 2006) (unofficial translation).

<sup>452</sup> In addition to UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, at [13], this has been reiterated in other UNHCR guidelines: see e.g. UNHCR, *Guidelines on International Protection No. 1*, *supra* n. 26, at [28]–[31], and UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [45]. Indeed, in *Rivera-Barrientos v. Holder*, (2011) 658 F.3d 1222 (USCA, 10th Cir., Sept. 7, 2011), the UNHCR intervened to argue that this approach was incorrect because it is inconsistent with UNHCR Guidelines: see at 1233. Although acknowledging that “[n]o doubt the BIA’s interpretation of the ‘particular social group’ language diverges from that of the Guidelines,” this was irrelevant because the Guidelines were not binding on a US court: at 1234. See also *Lopez v. Holder*, (2012) 468 Fed. Appx. 57 (USCA, 2nd Cir., Mar. 22, 2012).

<sup>453</sup> *Re CA*, (2006) 23 I & N Dec. 951 (USBIA, Jun. 15, 2006), at 956–57. For a helpful overview of these developments, see *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011), at 594 ff.

<sup>454</sup> This was made clear in UNHCR submissions as *amicus* in *Rivera-Barrientos* (USCA, 10th Cir., 2011), where it stated that the *Acosta* standard “served to guide decisions by Immigration Judges, the Board,

analysis involves this additional hurdle, formulated as “social visibility or, most recently, “social distinction.”<sup>455</sup> Two Circuit Courts of Appeal have categorically rejected the “social visibility” test on the basis that it “makes no sense,”<sup>456</sup> and is “unreasonable”<sup>457</sup> and “unprincipled.”<sup>458</sup> However, it remains the case that in most US jurisdictions where an applicant meets the immutability test but is unable to establish that she is part of a group “perceived as a group by society,”<sup>459</sup> the claim will almost certainly fail.<sup>460</sup> For example, despite both “sex” and “kinship ties” being listed as clear examples of immutable characteristics in *Acosta*,<sup>461</sup> the Board of Immigration Appeals has more recently rejected a gender claim where the relevant social group lacked the requisite “social visibility,”<sup>462</sup> and in another case observed that “not every family will have the distinct, recognizable identity in society that is necessary to be a particular social group” under the social visibility test.<sup>463</sup>

the Circuit Courts and many international courts for over 20 years”: *Rivera-Barrientos v. Holder*, Brief of the UNHCR as *Amicus Curiae* in Support of Petitioner (Aug. 18, 2010), at 19. In *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011), Hardiman J. stated in his concurring judgment that the *Acosta* test “for over twenty years – from 1985 until 2006 – provided the most widely-adopted definition of ‘particular social group’”: at 613.

<sup>455</sup> The social visibility and particularity tests have now been adopted as essential elements in establishing membership of a particular social group in most Circuit Courts of Appeal: including the First (*Scatambuli v. Holder*, (2009) 558 F.3d 53 (USCA, 1st Cir., Feb. 25, 2009), at 59–60; *Diaz Ruano v. Holder*, (2011) 420 Fed. Appx. 19 (USCA, 1st Cir., Apr. 28, 2011), at 21); Second (*Ucelo-Gomez v. Mukasey*, (2007) 509 F.3d 70 (USCA, 2nd Cir., Nov. 21, 2007), at 74); Fourth (*Lizama v. Holder*, (2011) 629 F.3d 440 (USCA, 4th Cir., Jan. 19, 2011)); Fifth (*Orellana-Monson v. Holder*, (2012) 685 F.3d 511 (USCA, 5th Cir., Jun. 25, 2012)); Sixth (*Al-Ghorbani and Alghurbani v. Holder*, (2009) 585 F.3d 980 (USCA, 6th Cir., Nov. 9, 2009), at 994; *Kante v. Holder*, 2011 U.S. App. LEXIS 743 (USCA, 6th Cir., Jan. 7, 2011)); Eighth (*Davila-Mejia v. Mukasey*, (2008) 531 F.3d 624 (USCA, 8th Cir., Jul. 7, 2008), at 629; *Malonga v. Mukasey*, (2008) 546 F.3d 546 (USCA, 8th Cir., Nov. 3, 2008), at 553–54); Ninth (*Arteaga v. Mukasey*, (2007) 511 F.3d 940 (USCA, 9th Cir., Dec. 27, 2007), at 945; *Santos-Lemus v. Mukasey*, (2008) 542 F.3d 738 (USCA, 9th Cir., Sept. 8, 2008), at 746; although see more recent case law in which the court has described “social visibility” and “particularity” as “factor[s] to consider”: *Perdomo v. Holder*, (2010) 611 F.3d 662 (USCA, 9th Cir., Jul. 12, 2010)); Tenth (*Rivera-Barrientos* (USCA, 10th Cir., 2011)); and Eleventh Circuits (*Castillo-Arias* (USCA, 11th Cir., 2006), at 1197). In *Matter of W-G-R*, 26 I & N Dec. 208 (USBIA, Feb. 7, 2014), the BIA renamed the test “social distinction” and emphasized that the test does not require “literal or ‘ocular’ visibility”: at 208.

<sup>456</sup> *Gatimi v. Holder*, (2009) 578 F.3d 611 (USCA, 7th Cir., Aug. 20, 2009), at 3.

<sup>457</sup> *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011). See also *Garcia v. Attorney General*, (2011) 665 F.3d 496 (USCA, 3rd Cir., Nov. 28, 2011), at 504 n. 5.

<sup>458</sup> *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011), at 609. In addition, we note that the First Circuit has recently recognized “the cogency and persuasiveness of both the reasoning and outcomes” of *Gatimi* (USCA, 7th Cir., 2009) and *Valdiviezo-Galdamez*, yet concluded that it “is bound by its own precedent regarding the reasonableness of the Board of Immigration Appeals’ social visibility requirement”: *Rojas-Perez v. Holder*, (2013) 699 F.3d 74 (USCA, 1st Cir., Nov. 5, 2012), at 80.

<sup>459</sup> *Re AME and JGU*, (2007) 24 I & N Dec. 69 (USBIA, Jan. 31, 2007).

<sup>460</sup> The only exception is in the Seventh Circuit, which has emphatically rejected this new requirement: see *Gatimi* (USCA, 7th Cir., 2009), at 615–17.

<sup>461</sup> *Acosta* (USBIA, 1985), at 233.

<sup>462</sup> *Re AT*, (2007) 24 I & N Dec. 296 (USBIA, Sept. 27, 2007), at 303, vacated and remanded on other grounds: *Matter of AT*, (2008) 24 I & N Dec. 617 (USAG, Sept. 22, 2008).

<sup>463</sup> *Thomas*, No. A75-597-0331-034/035/-036 (USBIA, Dec. 27, 2007), cited in F. E. Marouf, “The Emerging Importance of ‘Social Visibility’ in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender,” (2008) 27 *Yale L. & Pol’y Rev.* 47, at 93. In that case, the family did have the requisite visibility, but in others the Board of Immigration Appeals has found that it does not: see e.g. *Crespin-Valladares v. Holder*, (2011) 632 F.3d 117 (USCA, 4th Cir., Feb. 16, 2011), remanding the Board of Immigration Appeals’ decision. See also *Perkeci v. US Attorney General*,

In truth, just as there is no basis on which to allow applicants to rely on *either* of two dissonant approaches to secure protection, nor is there a principled basis on which to require satisfaction of *both* tests. The notion that both tests must be met is impossible to justify by reference to the rules of treaty interpretation;<sup>464</sup> indeed there has been no attempt to explain the principled basis on which such an approach could be supported.<sup>465</sup> 5  
 Rather, the Qualification Directive's approach has been widely criticized as a distortion of the Convention's meaning which is likely to lead to protection gaps.<sup>466</sup> Lord Bingham of the House of Lords has opined that the Qualification Directive's approach in this regard "propounds a test more stringent than is warranted by international authority."<sup>467</sup>

A rejection of both the alternative and cumulative approaches still, however, leaves open 10  
 the question as to which of the two dominant approaches, *ejusdem generis* or social perception, is correct as a matter of international law. In our view, only the *ejusdem generis* test can be justified by reference to the primary rule of construction, that is, that the text should be read in light of the context, object, and purpose of the Convention.

Although the social perception approach purports to be grounded in the "ordinary 15  
 meaning" of the text, there really is no ordinary meaning of the phrase "membership of a particular social group."<sup>468</sup> Hence one must resort, as did the Australian High Court in *Applicant A*, to an interpretation of each individual word within the phrase, resulting in an artificial and meaningless definition divorced from the context, object, and purpose of the Convention. While the concomitant lack of structure and greater fluidity in this method of 20  
 interpretation may embrace some groups not captured by the *ejusdem generis* principle,<sup>469</sup> in our view it is an unprincipled approach to interpreting the social group ground and should be rejected. We have three key concerns.

First, the social perception approach is overly broad and need not effect any meaningful 25  
 delimitation of the beneficiary class.<sup>470</sup> To the extent that the beneficiary class is delimited,

(2011) 446 Fed. Appx. 236 (USCA, 11th Cir., Nov. 8, 2011), in which the Eleventh Circuit upheld the Board of Immigration Appeals' decision that "the Perkeci family did not constitute a particular social group because no evidence indicated that any segment of Albanian society other than the Ndrecca family viewed the Perkeci family as visible or cohesive or sought to harm its members": at 237.

<sup>464</sup> The UNHCR emphatically maintains the position that the cumulative approach adopted in the US is a misunderstanding of its Guidelines: see e.g. *Rivera-Barrientos v. Holder*, Brief of the UNHCR as *Amicus Curiae* in Support of Petitioner (Aug. 18, 2010), at 9–16.

<sup>465</sup> In the US, the Board of Immigration Appeals has relied entirely on the UNHCR Guidelines rather than attempting to justify its approach as a matter of treaty interpretation. By contrast, in the Third Circuit, the court has described it as "unreasonable" and "unprincipled": *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011), at 609; see also Foster, *supra* n. 403, at 30.

<sup>466</sup> Foster, *supra* n. 403, at 19. The European Commission tried to secure an amendment to this provision in the 2011 recast, but was unsuccessful.

<sup>467</sup> *Fornah* (UKHL, 2006), at 433.

<sup>468</sup> In this regard we respectfully disagree with Aleinikoff who argues that there is a "common sense meaning of the term social group": T. A. Aleinikoff, "Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group,'" in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 294.

<sup>469</sup> See Aleinikoff, *supra* n. 468, at 289–91; Goodwin-Gill and McAdam, *supra* n. 33, at 85.

<sup>470</sup> Hathaway and Foster, *supra* n. 16, at 484. See *Re GJ* (NZ RSAA, 1995). In *AC (Russia)* (NZ IPT, 2012), the New Zealand Immigration and Protection Tribunal explained that to apply the "social perception approach" in that case would "potentially enlarge[] both the group and the Convention ground to a meaningless degree": at [79]. Legomsky and Rodriguez observe that if the UNHCR approach is

it is on a fundamentally unprincipled basis, namely that group-based risk is more worthy of protection than is individual risk. Indeed, proponents of this approach acknowledge that it could include any group, including “[p]hilatelists or roller-bladers.”<sup>471</sup> This in our view risks trivializing refugee law and cannot be sustained as a matter of principle.

5 Second, notwithstanding its theoretically broad ambit, the lack of clarity inherent in the social perception test has often paradoxically produced a narrowing – not widening – in the range and types of claim that can fall within the social group ground. While gender, homosexuality, family, and age satisfy the immutability test and hence are clearly within the ambit of social group on the *ejusdem generis* approach,<sup>472</sup> claims on these grounds  
10 have been rejected where such groups do not have “the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them,”<sup>473</sup> thus presenting an “unsurmountable obstacle to refugee status” for members of such groups.<sup>474</sup> For example, in assessing the group “young males” – clearly a group defined by immutable characteristics – a US court applying the social visibility test rejected the claim on the  
15 reasoning that “[o]ne who is ‘young’ in the eyes of one observer may not be ‘young’ in the eyes of another observer.”<sup>475</sup> Similarly, the Australian tribunal rejected a claim based on “eldest male children” – again an immutable characteristic – since it concluded that it was not “an identifiable group with a social presence in India, set apart from other members of the society.”<sup>476</sup> In France, in what has been described as the “discretion requirement  
20 in reverse,”<sup>477</sup> claims based on sexual orientation are rejected where the applicant did not seek to “express openly her homosexuality through her behaviour” such that she “does not belong to a group of persons sufficiently circumscribed and identifiable to constitute a social group.”<sup>478</sup>

“interpreted literally” is there “any group that would not satisfy the UNHCR definition?”: *supra* n. 8, at 938.

<sup>471</sup> See Aleinikoff, *supra* n. 468, at 299. <sup>472</sup> See *infra* Chs. 5.9.1, 5.9.2, 5.9.3, 5.9.4.

<sup>473</sup> *Re AT* (USBIA, 2007), in the context of gender. For a more recent example, see *Da Silva* (USCA, 11th Cir., 2012), in which the court found that the rejection below of the particular social group “women in Guinea-Bissau” was supported by application of the *Acosta* and social visibility requirements: see at 839–41. A recent application of this problem in the context of a particular social group based on age is displayed in *Gomez-Guzman v. Holder*, (2012) 485 Fed. Appx. 64 (USCA, 6th Cir., Jun. 15, 2012), where the Sixth Circuit affirmed the rejection of the claim based on “Guatemalan children under the age of fourteen” on the basis that “Gomez fails to demonstrate his proposed group is sufficiently particularized”: at 6. Indeed, in the context of age-based social groups, in the US, it is almost impossible for youth-based groups to succeed. For example, the courts have been far less willing to consider the relevance of age to risk of gang recruitment, based mostly on the new “social visibility” test: see e.g. *Lopez* (USCA, 2nd Cir., 2012). For discussion of this problem in relation to a range of particular social groups, including in the US and other jurisdictions, see Foster, *supra* n. 403, at 46–48, 52–53, 55, and 59–61.

<sup>474</sup> *Valdiviezo-Galdamez* (USCA, 3rd Cir., 2011), at 604.

<sup>475</sup> *Diaz Ruano* (USCA, 1st Cir., 2011), at 21. This has been a particularly troubling issue in the context of claims based on a fear of forcible recruitment into gangs where, even if the evidence is clear that the gang members target young males (for example), the claim will be rejected in the US based on the social visibility test: see e.g. *Re SEG* (USBIA, 2008), at 587.

<sup>476</sup> 1005461, [2010] RRTA 1103 (Aus RRT, Dec. 8, 2010), at [145].

<sup>477</sup> Jansen and Spijkerboer, *supra* n. 180, at 36. They note that so long as “a person hides her or his sexual orientation or gender identity from others no one can perceive it.”

<sup>478</sup> Foster, *supra* n. 403, at 52 nn. 304–8.

Third, there is fundamental uncertainty surrounding precisely what the test entails,<sup>479</sup> how such a test can be satisfied on an evidentiary basis, and whether, given its apparent subjectivity, its application can appropriately be subject to appellate review.<sup>480</sup> Most importantly, it is often unclear whether the social perception test requires an applicant to establish that subjectively the relevant group is perceived as a separate group within the applicant's country of origin, or whether it entails the more objective requirement to establish that the group is "set apart" within the relevant society.<sup>481</sup> Indeed, in a recent concurring opinion in the US Court of Appeals for the Ninth Circuit, the judges opined that while the court requires that the "shared characteristic of the group should generally be recognizable by others in the community,"

we have not specified the relevant community for this analysis (Petitioner's social circle? Petitioner's native country as a whole? The United States? The global community?). Nor have we specified whether "social visibility" requires that the immutable characteristic particular to the group be readily identifiable to a stranger on the street, or must simply be "recognizable" in some more general sense to the community-at-large.<sup>482</sup>

Moreover, there is uncertainty as to the method by which an applicant could establish the requisite social perception or social visibility. The Australian High Court has reassured decision-makers (and applicants) that "[t]here is no reason in principle" why the social perception test "cannot be ascertained objectively from a third-party perspective,"<sup>483</sup> and that a decision-maker may "draw conclusions as to whether the group is cognizable within the community from 'country information' gathered by international bodies and nations other than the applicant's nation of origin,"<sup>484</sup> in other words, the usual source of fact-finding in a refugee hearing.<sup>485</sup> Yet in practice, especially in its US incarnation, the social perception/visibility/distinction requirement is frequently rejected based on conclusory reasoning that

<sup>479</sup> For example, the UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, give conflicting indications on this issue: see Foster, *supra* n. 403, at 15.

<sup>480</sup> Foster, *supra* n. 403, at 75.

<sup>481</sup> Even in Australia, where the High Court has rejected the need to show that society perceives the group as a group, there is some suggestion that indeed social visibility, similar to the US test, is required. Further, this need for societal perception appears in some cases to resemble the problematic social visibility test recently introduced in US jurisprudence. For example, in one decision the Refugee Review Tribunal refused to recognize Ethiopian failed asylum seekers as a particular social group partly on the basis that "their history as failed asylum seekers is not evident to society at large": 1002664, [2010] RRTA 1075 (Aus. RRT, Nov. 29, 2010), at [169] (emphasis added). Conversely, in the same decision the tribunal found that Ethiopians who have been living in a Western country could constitute a particular social group because they could "possess common characteristics which would be apparent": *ibid.*, at [173] (emphasis added). In another case the Refugee Review Tribunal appeared to suggest that Filipinos who have "witnessed violent crimes" are a particular social group because such crimes are reported in the media, thus giving witnesses a social profile: 0807544, [2009] RRTA 267 (Aus. RRT, Feb. 12, 2009), at [55].

<sup>482</sup> *Henriquez-Rivas v. Holder*, (2011) 449 Fed. Appx. 626 (USCA, 9th Cir., Sept. 7, 2011), at 630. In the only US Circuit categorically to have rejected the "social visibility" test, Posner J. noted that "it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference": *Ramos v. Holder*, (2009) 589 F.3d 426 (USCA, 7th Cir., Dec. 15, 2009), at 430. This is well borne out in a recent decision in *Escamilla v. Holder*, (2012) 459 Fed. Appx. 776 (USCA, 10th Cir., Mar. 9, 2012), in which the applicant suggested four different potential social groups (no doubt due to the confusion as to what is required), but had all claims rejected.

<sup>483</sup> *Applicant S* (Aus. HC, 2004), at 400 [34]. <sup>484</sup> *Ibid.*, at 400 [35]. <sup>485</sup> See *supra* Ch. 2.5.

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“[t]here is little in the background evidence of record to indicate that the relevant group is perceived as a group by society.”<sup>486</sup> While the onus is squarely placed on the applicant to produce the requisite evidence in the US context, even in Australia where the process is more inquisitorial the tribunal has acknowledged the evidentiary difficulties:

With regard to whether or not “young, Hazara Shi’a Moslem males” constitute a particular social group, the Tribunal notes that despite its best efforts to find such information, the Tribunal has not found any country information to indicate that since the fall of the Taliban Government in Afghanistan, “young, Hazara Shi’a Moslem males” constitute a particular social group. The Tribunal has looked for such information from sources including Department of Foreign Affairs and Trade (DFAT), the US Government, Amnesty International or Human Rights Watch. The Tribunal does not accept that they constitute a particular social group.<sup>487</sup>

5 Yet it is surely patently clear that country information is not generally prepared specifically for refugee law purposes, and hence is incapable of addressing the refugee law specific issue of “social perception.”<sup>488</sup>

10 In short, the lack of clarity inherent in both the test and the means of satisfying it justify the conclusion expressed by two American appellate judges that in light of the “current confusion” in US case law on social group, “there is no discernible basis for these divergent outcomes – other than, perhaps, a given panel’s sympathy for the characteristics of the group at issue.”<sup>489</sup> This observation, which in our view is apt to describe the social perception approach in any incarnation, was said to be problematic because a refugee claimant “deserves a legal system governed not by the vagaries and policy preferences of a given panel, but by  
15 well-defined and consistently-applied rules.”<sup>490</sup> Hence, in light of the manifold uncertainties

<sup>486</sup> *Re SEG* (USBIA, 2008), at 587. See also *Matter of W-G-R*, *supra* n. 455, at 222.

<sup>487</sup> *STQB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 882 (Aus. FC, Jul. 8, 2004), in which the Federal Court of Australia recited the Refugee Review Tribunal’s reasoning, concluding that there was no jurisdictional error disclosed in this reasoning: at [9]–[10], [13]–[14].

<sup>488</sup> As the New Zealand Immigration and Protection Tribunal observed in *AC (Russia)* (NZ IPT, 2012), given that there was “little or no evidence before the Tribunal to qualify ‘businessmen’ in the Russian Federation as being a socially visible or perceived group,” to apply the social perception approach would effectively require “the tribunal to unilaterally assert a distinct social perception or visibility”: at [79].

<sup>489</sup> *Henriquez-Rivas* (USCA, 9th Cir., 2011), at 631.

<sup>490</sup> *Ibid.*, at 632. As Anker eloquently summarizes the position: “Both social visibility and particularity threaten the *Acosta* framework and its statutory and logical integrity”: Anker, *supra* n. 29, at 348. Indeed, in a recent proposal to introduce a new Refugee Protection Act in the US, it is proposed that, “[a]ny group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement”: Refugee Protection Act of 2011 (US), s. 5. In the accompanying Sectional Analysis of the Draft Act, it is noted that the “*Acosta* precedent has been clouded in recent years by BIA opinions that require asylum applicants to prove additional factors, some of which are unnecessary or contrary to the spirit of domestic law and the Refugee Convention. Most damaging is a requirement that the social group in question be ‘socially visible’”: available at: [www.leahy.senate.gov/imo/media/doc/SectionBySection-RefugeeProtectionAct.pdf](http://www.leahy.senate.gov/imo/media/doc/SectionBySection-RefugeeProtectionAct.pdf) (accessed Jun. 24, 2013).



inherent in the “social perception” test,<sup>491</sup> in practice it amounts to little more than a license for subjective assessment of merit.<sup>492</sup>

The *ejusdem generis* approach, by contrast, comports with the principles of treaty interpretation in focusing not only on text but also on context, object, and purpose. Further, it provides a principled framework for interpreting the social group ground, promoting consistency, and permitting evolution in line with developments in non-discrimination norms at international law. Reaffirmation of the interpretation that is not only mandated by principles of treaty interpretation, but fundamental to the principled extension of Convention protection to groups defined by non-discrimination norms is, in our view, vital to the continued viability of the social group ground. The balance of this part of the sub-chapter therefore examines the application of the membership of a particular social group criterion, interpreted by reference to the *ejusdem generis* approach, as it relates to issues of gender, sexual orientation, family, age, disability, economic or social class, voluntary associations, and groups defined by reference to a former status.

### 5.9.1 Gender

The Refugee Convention, unlike most modern constitutions and international human rights instruments,<sup>493</sup> does not explicitly list sex or gender as a protected ground, a position likely attributed to its historical origins.<sup>494</sup> But it is surely axiomatic that a gender-based group is defined by an innate, immutable characteristic and hence within the *ejusdem generis* approach to social group. Indeed, acknowledgment that gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic and are properly within the ambit of the social group category is now decades old.<sup>495</sup> As Baroness Hale observed in *Fornah*,

<sup>491</sup> In recent guidelines, the UNHCR explained that the “social perception approach” requires “neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public.” Nor is it “necessary that particular members of the group or their common characteristics be publicly known in a society”: UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [49]. However, in explaining what *is* required, the agency offered only the following: “[t]he determination rests simply on whether a group is ‘cognizable’ or ‘set apart from society’ in a more general, abstract sense”: *ibid.*, at [49].

<sup>492</sup> Hathaway and Foster, *supra* n. 16, at 484. Even though he advocated for the social perception approach, Aleinikoff acknowledged in his background paper for the UNHCR’s Global Consultations that “one must not underestimate the difficulties” in the social perception approach: Aleinikoff, *supra* n. 468, at 298. As he explained: “Exactly how, it might be asked, is an adjudicator to determine the ‘social perceptions’ of other societies? Furthermore, *whose* perceptions count? Should an adjudicator examine the views of the alleged persecutors, a majority of the society, the views of ruling elites? A major benefit of the protected characteristics approach is that it avoids some of these evidentiary problems”: *ibid.* The approach advocated by Goodwin-Gill and McAdam is similarly vague: *supra* n. 33, at 85.

<sup>493</sup> See *Fornah* (UKHL, 2006), at [84], per Baroness Hale. At international law, *cf.* e.g. Civil and Political Covenant, *supra* n. 147, at Art. 2(1); Economic, Social and Cultural Covenant, *supra* n. 170, at Art. 2(2).

<sup>494</sup> See *Shah* (UKHL, 1999), at 652, per Lord Hoffmann.

<sup>495</sup> The Executive Committee of the UNHCR endorsed this approach in UNHCR Executive Committee Conclusion No. 39 (XXXVI), “Refugee Women and International Protection” (Oct. 18, 1985): “States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1(A)(2) of the 1951 United Nations Refugee Convention”: at para. (k). The Executive Committee adopted additional conclusions that addressed the special needs of women refugees in each of 1988 and 1989. UNHCR,

The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.<sup>496</sup>

Widespread state practice – across both common law<sup>497</sup> and civil law states<sup>498</sup> – now reflects the notion that women, sex, or gender may constitute a particular social group for the purposes of refugee law.<sup>499</sup> While the Qualification Directive’s minimum standard is regrettably more equivocal, recognizing only that “[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group,”<sup>500</sup> there is nonetheless widespread recognition in Europe that women constitute a social group for Convention purposes.<sup>501</sup> As the Austrian High Court for Asylum straightforwardly observed, “[w]omen

*Guidelines on International Protection No. 1*, *supra* n. 26, observe that, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics”: at [30]. Men, too, have occasionally benefited from gender-specific interpretations of the social group category, but gender-based claims are made overwhelmingly by women.

<sup>496</sup> *Fornah* (UKHL, 2006), at [86], per Baroness Hale. As noted in *Refugee Appeal No. 76044* (NZ RSAA, 2008), “it is indisputable that sex and gender can be the defining characteristic of a social group and that ‘women’ may be a particular social group”: at [92].

<sup>497</sup> The two most well-known cases are, of course, *Khawar* (Aus. HC, 2002) and *Shah* (UKHL, 1999). In Canada and New Zealand, the jurisdictions that have most consistently and exclusively relied on the protected characteristics test, the notion that women can constitute a particular social group has become very well established and accepted. The Canadian Supreme Court in *Ward* (Can. SC, 1993), at 739, cited gender as an obvious example of an innate characteristic, and this is routinely applied by the Federal Court such that groups described as “women” (*Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [2011] FC 1055 (Can. FC, Sept. 8, 2011), at [37]–[39]), “Haitian women” (*Josile v. Canada (Minister of Citizenship and Immigration)*, (2011) 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]–[30]; see also *Dezameau v. Canada (Minister of Citizenship and Immigration)*, [2010] FC 559 (Can. FC, May 27, 2010), at [18]–[19]), “women in the DRC [Democratic Republic of the Congo]” (*KN v. Canada (Minister of Citizenship and Immigration)*, (2011) 391 FTR 108 (Can. FC, Jun. 13, 2011), at [30]), and “single and or widowed women in Pakistan” (*Begum v. Canada (Minister of Citizenship and Immigration)*, [2011] FC 10 (Can. FC, Jan. 6, 2011), at [53]) have been accepted as particular social groups, often by adopting the statement in the Immigration and Refugee Board of Canada, *Guideline 4*, *supra* n. 388, that “[g]ender is an innate characteristic and it may form a particular social group” (at D.2), cited in, for example, *El Romhaine v. Canada (Minister of Citizenship and Immigration)*, (2011) 389 FTR 288 (Can. FC, May 12, 2011), at [18]. In New Zealand, see e.g. *Refugee Appeal No. 71427/99* (NZ RSAA, 2000); *AV (Iran)*, [2011] NZIPT 800150 (NZ IPT, Nov. 22, 2011), at [47]. In the US Circuit Courts of Appeal applying the immutability test (in the US Department of Homeland Security, *Training Guidelines on Gender*, *supra* n. 39, it is noted that “[g]ender is an immutable trait and has been recognized as such by the BIA and some federal courts”: at 30), groups based on gender have been recognized in a straightforward manner.

<sup>498</sup> See text *infra*, at nn. 503–11. <sup>499</sup> *Foster*, *supra* n. 403, at 41–43.

<sup>500</sup> Qualification Directive, *supra* n. 28, at Art. 10(1). The original 2004 version of the Qualification Directive was very controversial and hence has been amended: see 2004 Qualification Directive, *supra* n. 77, at Art. 10(1).

<sup>501</sup> For domestic codification, see Swedish Code of Statutes, Act Amending the Aliens Act (2005: 719), c. 4, s. 1; German Residence Act (*Aufenthaltsgesetz*), s. 60; and Refugee Act 1996 (Ireland), s. 1. In addition, case law in various EU countries recognizes gender or sex as an aspect of social group. In Spain in several decisions involving FGM and forced marriage, gender has been recognized as a particular social group by the Supreme Court. See e.g. 2781/2009 (Sp. TS [Spanish Supreme Court], May 11, 2009); 5931/2006; 735/2003; 1836/2002; 3428/2002; and 3930/2002. In *STS 5931/2006* (Sp. TS, Oct. 6, 2006), the Supreme Court stated that “persecution based on sex definitely amounts to social persecution,” citing *STS*

for example represent a ‘particular social group’ within the meaning of the Geneva Refugee Convention.”<sup>502</sup> Perhaps most strikingly, many Latin American states, including Costa Rica,<sup>503</sup> El Salvador,<sup>504</sup> Guatemala,<sup>505</sup> Mexico,<sup>506</sup> Nicaragua,<sup>507</sup> Paraguay,<sup>508</sup> Uruguay,<sup>509</sup> and Venezuela,<sup>510</sup> make clear in domestic codification of the Refugee Convention that gender-based claims are within the ambit of Convention protection.<sup>511</sup>

Reservations about the broad ambit of gender-defined social groups have long been resolved, at least on a theoretical level, by recognizing that race, nationality, religion, and even political opinion are also traits which are shared by large numbers of people.<sup>512</sup> In short, it is now widely understood that where a woman has a well-founded fear of being persecuted for reasons of her gender, it is not, as well explained by the Spanish Supreme

1836/2002 (Sp. TS, May 31, 2005); STS 3428/2002 (Sp. TS, Sept. 9, 2005), and STS 3930/2002 (Sp. TS, Nov. 10, 2005) (unofficial translation). Further, although in earlier decisions the Supreme Court appeared to reject claims based on domestic violence, hence taking a different approach to particular social group depending on the nature of the claim (see e.g. STS 3603/2004 (Sp. TS, May 25, 2004)), more recently in STS 4013/2011 (Sp. TS, Jun. 15, 2011) the Supreme Court discussed the legislative change in 2007 which introduced gender as a ground for refugee status and applied it to grant refugee status in the context of a case concerning domestic violence. The court cited from various UN sources, including the UNHCR, *Guide for the Protection of Refugee Women* (1991), noting that this document “argues that women who fear persecution or discrimination because of their sex should be considered as a member of a social group for purposes of determining the status of the person”: STS 4013/2011 (unofficial translation). In Germany, see e.g. 5 K 1181/10.TR (Ger. VG Trier [German Administrative Court, Trier], Mar. 23, 2011); A 11 K 553/10 (Ger. VG Stuttgart [German Administrative Court, Stuttgart], Mar. 14, 2011); 5 K 402/10 TR (Ger. VG Trier, Nov. 3, 2010); 2 K 562/07 (Ger. VG Aachen [German Administrative Court, Aachen], May. 10, 2010); 11 K 413/09.A (Ger. VG Münster [German Administrative Court, Münster], Mar. 15, 2010); 1 A 3954/06 (Ger. VG Hanover [German Administrative Court, Hannover], Jan. 13, 2010); 22 K 4844/08.A (Ger. VG Düsseldorf [German Administrative Court, Düsseldorf], Aug. 25, 2009); 3 K 1530/08.KS.A (Ger. VG Kassel [German Administrative Court, Kassel], Apr. 21, 2009); 8 E 1047/06.A (1) (Ger. VG Darmstadt [German Administrative Court, Darmstadt], Oct. 17, 2007); 2 A 56/06 (Ger. VG Göttingen [German Administrative Court, Göttingen], Jul. 17, 2007).

<sup>502</sup> For example, in *E1-248.714/2008 v. Federal Asylum Authority* (Au. AGH [Austrian High Court for Asylum], Jan. 31, 2011). See also *DZ v. Federal Asylum Authority, E3-239.432-0/2008* (Au. AGH, Jan. 12, 2009), in which the High Court for Asylum held that the claim had been made, *inter alia*, based on “gender-specific persecution, which is also included in the concept of ‘particular social group’” (unofficial translation). This approach has been affirmed by the Constitutional Court: *U431/08 v. High Court for Asylum* (Au. VfGH [Austrian Constitutional Court], Nov. 30, 2009), citing *2007/01/0284 v. Independent Federal Asylum Board (UBAS)* (Au. VwGH [Austrian Administrative Court], Sept. 23, 2009).

<sup>503</sup> *Ley N° 8.764 de 19 de agosto de 2009 – Ley General de Migración y Extranjería* (entered into force Mar. 1, 2010), at s. 5; Art. 106.

<sup>504</sup> *Decreto Ley N° 918, Ley para la determinación de la condición de personas refugiadas*, at Art. 4(a).

<sup>505</sup> *Acuerdo gubernativo N° 383-2001 del 14 de septiembre de 2001, reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala*, at Art. 11(a).

<sup>506</sup> *Ley sobre Refugiados y Protección Complementaria, 2011*, at Art. 13(1).

<sup>507</sup> *Ley N° 655 del 26 de junio de 2008, Ley de Protección a Refugiados*, at Art. 1(A).

<sup>508</sup> *Ley N° 1938. – General Sobre Refugiados (2002)*, at Art. 2(A).

<sup>509</sup> *Ley N° 18.076 – Estatuto del Refugiado (2006)*, at Art. 2(A).

<sup>510</sup> *Ley Orgánica sobre refugiados o refugiadas, asilados o asiladas. Publicada en la Gaceta Oficial N° 37.296* (Oct. 3, 2001), at Art. 5.

<sup>511</sup> There is similar legislation in some European countries as well, for example Sweden and the Czech Republic: see Foster, *supra* n. 403, at nn. 112–13.

<sup>512</sup> See text *supra*, at nn. 410–11.

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Court, sufficient to extend protection based on “humanitarian reasons”<sup>513</sup> or subsidiary status.<sup>514</sup> Rather, refugee status ought to be recognized.

Notwithstanding these positive theoretical developments, applicants may nonetheless still encounter practical difficulties in successfully establishing gender-based claims, in large part due to an ongoing reticence to recognize that women per se are capable of constituting a social group for refugee law purposes. Although in some cases it is appropriate to recognize that the reason a person is at risk is her membership of a subset of “women” defined by a convergence of Convention grounds, for example, because she is a Muslim woman, a young woman, or a woman of particular race or ethnicity,<sup>515</sup> there is an unfortunate tendency to formulate overly complicated and unnecessarily detailed social groups, rather than simply recognize that in most cases it is women *qua* women that constitutes the relevant social group.<sup>516</sup> In an extreme example of this phenomenon, the Canadian Federal Court held in one case that the relevant group was defined as

[w]omen who have recently immigrated to Israel from the former Soviet Union and who, despite generous support by the host government, fail to integrate, are subsequently lured into prostitution, and are confronted with indifference by the front line supervisors responsible for their safety.<sup>517</sup>

Only modestly less egregious is the formulation adopted in the seminal US decision of *Kasinga*, where the Board of Immigration Appeals described the relevant social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>518</sup>

<sup>513</sup> *STS 4013/2011* (Sp. TS [Spanish Supreme Court], Jun. 15, 2011). In this case the court held that: “According to the above, we share the view of the Board of first instance, which, based on an interpretation of the Spanish legislation on asylum, argues that it is appropriate to grant asylum to Doña Alejandra, a national of Algeria, because, once it was established that she was forced to marry her husband, a family agreement, and had been the subject of constant attacks and harassment of continuous physical and psychological abuse that has affected her children, victims also of ill-treatment, and given that the authorities of the country of origin, in this case, have not provided legal protection against the reports filed, reveals the need to effectively protect her from the well-founded fear and the real risk of continuing to suffer degrading treatment, the decision of the Interior Ministry to authorize the continued stay in Spain for humanitarian reasons, in accordance with Article 17.2 of the Law on Asylum, is not therefore sufficient” (unofficial translation).

<sup>514</sup> We note that in Sweden, the previous position was that there was specific provision in the Aliens Act for individuals having a well-founded fear of being persecuted on account of gender or sexual orientation, but this relegated its beneficiaries to subsidiary protection precluding the grant of Convention refugee status and its accompanying benefits: see generally G. Noll, “The Qualification Directive and its Transposition into Swedish Law,” in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (2007). This has been amended, see *supra* n. 500, and is no longer accepted to be appropriate.

<sup>515</sup> See Foster, *supra* n. 18, at 326. <sup>516</sup> *Ibid.*

<sup>517</sup> *Litvinov v. Canada (Secretary of State)*, [1994] FCJ 1061 (Can. FCTD, Jun. 30, 1994). Sometimes this is because of the way the group is presented by counsel. In an extreme example of this phenomenon, the Australian Refugee Review Tribunal refused to recognize the applicant’s posited “Indian woman who has suffered from domestic and sexual violence and against whom her husband’s family has made a claim in the nature of a dowry claim” as qualifying as a social group on the basis that it was “a description of the applicant’s personal circumstances”: 0904298, [2010] RRTA 149 (Aus. RRT, Mar. 4, 2010), at [89]. It did however recognize women as a particular social group: at [90], [91].

<sup>518</sup> *Re Kasinga*, (1996) 21 I & N Dec. 357 (USBIA, Jun. 13, 1996), at 365.

This approach remains prevalent,<sup>519</sup> but is erroneous because it inappropriately imports other elements of the definition such as whether the applicant has a well-founded fear of serious harm (“who have not had FGM”); the nature of the harm feared (prostitution; FGM); and the inability or unwillingness of the state to protect (“indifference by the front line supervisors”) into what should be an inquiry focused only on articulating the relevant social group. It is not a phenomenon generally found in respect of other Convention grounds, nor does it tend to arise in respect of other applications of the social group category.<sup>520</sup> Rather it appears largely confined to gender-based social groups and is often underpinned by an implicit concern that a group based on “women” is simply too broad,<sup>521</sup> in other words a “floodgates” concern that is otherwise understood to be inappropriate in interpreting the refugee definition.<sup>522</sup>

This conceptually unwieldy approach to defining gender-based social groups leads in practice to two problems.

First, this overly complicated analysis is often undertaken because evidence suggests that not all women in the applicant’s country are at risk, leading to a perceived need to narrow the social group accordingly. Yet the difficulty with this approach is that often the group is then defined so narrowly as to fall foul of the established principle that “it is impermissible to define the group solely by reference to the threat of the persecution.”<sup>523</sup> For example, in a claim by a Salvadoran girl at risk of gang violence, the US Court of Appeals for the Sixth Circuit rejected the social group “Salvadoran teenage girls” as “simply too broad, as it . . . could include all Salvadoran teenage girls who are currently not in the [gang].”<sup>524</sup> When the applicant attempted to “narrow her proposed group by emphasizing that its members are harassed, beaten, tortured, and even killed for not joining the *Maras*” the court rejected

<sup>519</sup> Indeed, even in the seminal decision in *Khawar* (Aus. HC, 2002), although Gleeson C.J. was prepared to define the group simply as “women,” other judges on the High Court formulated the group not merely as “women” but respectively as “married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household”: at 27 [81], per McHugh and Gummow JJ., and “a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands’ families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law”: at 43–44 [129], per Kirby J. For an example in German jurisprudence, see the decision of *A 4835/05* (Ger. VG Hanover [German Administrative Court, Hannover], Jan. 30, 2008), which found that the relevant particular social group was “young women from a family whose self-image and archaic patriarchal ideas require them to choose a husband and marry them against their will, without the woman having a say in the choice of a spouse” (unofficial translation).

<sup>520</sup> Indeed in *SB (PSG – Protection Regulations – Reg 6) Moldova CG*, [2008] UKAIT 00002 (UKAIT, Nov. 26, 2007), the Asylum and Immigration Tribunal explicitly held that it is only gender that needs to be narrowed down in this way.

<sup>521</sup> See e.g. *Da Silva* (USCA, 11th Cir., 2012), at 841: “The BIA determined that ‘women’ was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a ‘social group.’” See also *Fejza v. US Attorney General*, (2012) 489 Fed. Appx. 326 (USCA, 11th Cir., Sept. 4, 2012), at 329–30, and *Luz Marina Urias De Velasquez v. Attorney General*, (2012) 490 Fed. Appx. 266 (USCA, 11th Cir., Sept. 20, 2012), at 267–68.

<sup>522</sup> Several senior common law courts have emphasized that “floodgates” arguments are not valid in the refugee context. For example, see *Applicant A* (Aus. HC, 1997), at 241; *Chan* (Can. FCA, 1993), at [57]; *R v. Secretary of State for the Home Department; Ex parte Jeyakumaran*, [1994] Imm AR 45 (Eng. HC, Jun. 28, 1993), at 48.

<sup>523</sup> *Fornah* (UKHL, 2006), at 440, per Lord Bingham, reciting the reasons of Auld L.J. below.

<sup>524</sup> *Escobar-Batres v. Holder*, (2010) 385 Fed. Appx. 445 (USCA, 6th Cir., Jul. 2, 2010), at 447.

this more circumscribed formulation on the basis that “we have held that ‘a social group may not be circularly defined by the fact that it suffers persecution.’”<sup>525</sup>

As acknowledged by Baroness Hale in *Fornah*, this phenomenon is “a peculiarly cruel version of Catch 22,”<sup>526</sup> in that “if not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone.”<sup>527</sup> The fallacious reasoning underpinning this approach is revealed by reference to the well-established proposition that the size of the group is not a barrier to its recognition as a social group, nor is the fact that some women in the relevant group are able to avoid persecution an “answer to treating women . . . as a relevant social group.”<sup>528</sup> Further, the mere fact that a woman’s risk is properly identified as being for reasons of her gender does not mean that every woman in the applicant’s country would seek, let alone qualify for, refugee status. All other elements of the definition must, of course, be satisfied. To be preferred is the approach of the Belgian tribunal which found that a young Chechen woman who had been forcibly married was at risk because of her membership of the social group of “women,” with her age and arranged marriage being factors that heightened her vulnerability to gender-based persecution, rather than being pertinent to the delimitation of the relevant social group.<sup>529</sup>

<sup>525</sup> *Ibid.*, at 447. This is a particular phenomenon in US case law since the advent of the social visibility test, where claims involving gender-based violence by gangs directed at women are frequently rejected based on a lack of “social visibility” of the relevant social group: see for a recent example, *Luz Marina Urias De Velasquez* (USCA, 11th Cir., 2012), at 267–68. Decision-makers in the US, fixated on social visibility and particularity, have routinely characterized the relevant group as “persons who resist recruitment” (*Re SEG* (USBIA, 2008), at 585). An even more explicit example of this problem is evidenced in *Mendez-Barrera v. Holder*, (2010) 602 F.3d 21 (USCA, 1st Cir., Apr. 15, 2010), at 23, in which the Salvadoran applicant submitted that she was at risk of sexual abuse for failing to join a gang, yet the gender-specific nature of her claim was not grappled with at any level; rather, the claim was rejected on the basis that a ground based on recruitment by gang members lacked the requisite visibility and particularity. The court concluded that “[g]iven her loose description of the group, it is virtually impossible to identify who is or is not a member. There are, for example, questions about who may be considered ‘young,’ the type of conduct that may be considered ‘recruit[ment],’ and the degree to which a person must display ‘resist[ance]’”: at 27–28. By contrast, the Canadian Federal Court has, on numerous occasions, remitted the tribunal decision on the basis that it overlooked the specifically gendered nature of the risk to a (female) applicant: see e.g. *Spencer v. Canada (Minister of Citizenship and Immigration)*, [2011] FC 397 (Can. FC, Mar. 31, 2011), at [6]; *Gutierrez* (Can. FC, 2011), at [37]–[42].

<sup>526</sup> *Fornah* (UKHL, 2006), at 466. <sup>527</sup> *Ibid.* <sup>528</sup> *Shah* (UKHL, 1999), at 644, per Lord Steyn.

<sup>529</sup> 47053 (Bel. CCE [Belgian Council for Alien Law Litigation], Aug. 5, 2010). In cases involving gender-specific claims by women, the general approach in Belgium appears to be either simply to assert membership of a particular social group of “women,” or to recite the jurisprudential evolution of the category of particular social group with reference to *Ward* (Can. SC, 1993) and *Shah* (UKHL, 1999) as well as the Qualification Directive, *supra* n. 28, hold that it is therefore recognized that sex can form the basis of a particular social group, and then find the claimant at risk due to her membership of the group “women.” Note that while, in some decisions, the relevant social group has been defined as “young Cameroonian women” (01-0668/F1356 (Bel. CPRR [Belgian Permanent Refugee Appeals Commission], Mar. 8, 2002)), “women who are victims of human trafficking” (03-0582/F1611 (Bel. CPRR, Feb. 5, 2004)), or “divorced Iranian women” (35751 (Bel. CCE, Dec. 11, 2009)), the most common approach, especially in recent cases, is to define the group broadly simply as “women of country X” (unofficial translations). For example, in 13874 (Bel. CCE, Jul. 9, 2008), while the applicant claimed membership of a social group defined as “Russian women, victims of physical violence at the hands of their partner or husband, apparent and amplified in a specific socio-economic context linked to a failure by the State, transformed into a social problem, the object of policy and action by particular national and



A second, and especially pernicious, concern arising from the practice of defining overly specific gender-based groups is the constant re-litigating of such claims. The inquiry into social group in gender claims sometimes degenerates into an “obstacle course in which the postulated group undergoes constant redefinition”<sup>530</sup> and decision-makers and advocates engage in “nitpicking around the margins of the definition,”<sup>531</sup> when in truth the reason for an applicant’s risk is simply her membership in the social group “women.” In practice this represents a significant impediment to women securing protection, and raises questions of gender equality given that it is disproportionately gender-based claims that are subjected to such scrutiny and constant re-litigation. 5

In sum, the recognition that a particular social group can be defined simply on the basis of gender or sex, is, in the words of Lord Steyn, “neither novel nor heterodox”;<sup>532</sup> rather it is “simply a logical application of the seminal reason in *Acosta*”<sup>533</sup> – in other words the *ejusdem generis* approach. 10

### 5.9.2 Sexual orientation and gender identity

Claims based on sexuality – actual or imputed<sup>534</sup> – have long been accepted to fall within the social group ground on the basis of the *ejusdem generis* approach.<sup>535</sup> In *HJ (Iran)*, Lord Hope noted that since membership of a particular social group is treated “as being in *pari materia* with the other Convention reasons for persecution . . . [t]here is no doubt that gay men and women may be considered to be a particular social group for this purpose . . . The group is defined by the immutable characteristic of its members’ sexual orientation or sexuality.”<sup>536</sup> Whether such claims fall within the first or second of the *Acosta* categories<sup>537</sup> is irrelevant since, as recognized in a seminal decision by the New Zealand Refugee Status Appeals Authority,<sup>538</sup> “sexual orientation is *either* an innate or unchangeable characteristic or 15 20

international organisations,” the CCE preferred simply “women” in affirming her claim for refugee status.

<sup>530</sup> *Liu v. Secretary of State for the Home Department*, [2005] 1 WLR 2858 (Eng. CA, Mar. 17, 2005), at 2864 [12].

<sup>531</sup> *Ibid.* <sup>532</sup> *Shah* (UKHL, 1999), at 644. <sup>533</sup> *Ibid.*

<sup>534</sup> As is the case with respect to any other Convention ground, a claim may be based on imputed identity; hence in the context of homosexuality the question is whether the applicant “is gay, or . . . would be treated as gay by potential persecutors in his country of nationality”: *HJ (Iran)* (UKSC, 2010), at 647–48 [82].

<sup>535</sup> For example, the Higher Administrative Court of Hesse, Germany addressed the potential for homosexuality to define a “particular social group” in a 1986 decision involving the alleged persecution of an Iranian male by reason of his sexual orientation: *10 OE 69/83* (Ger. VGH Hesse, Aug. 21, 1986), reported at (1989) 1 Intl. J. Ref. L. 110. Noting the persecution of homosexuals in the Nazi concentration camps, the court recognized the viability of considering sexual orientation as the basis for a claim to refugee status, assuming it to be an irreversible personal characteristic. In *Ward*, the Canadian Supreme Court recognized that the protected characteristics approach would embrace individuals fearing persecution on bases such as sexual orientation: *Ward* (Can. SC, 1993), at 739. See generally, UNHCR, *Guidelines on International Protection No. 2*, *supra* n. 75, at [1] and [6]; UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19. For the most recent endorsement of sexual orientation as “a characteristic so fundamental to his identity that he should not be forced to renounce it,” see *Minister voor Immigratie en Asiel v. X* (C-199/12), *Y* (C-200/12) and *Z v. Minister voor Immigratie en Asiel* (C-201/12) (Nov. 7, 2013), at [46].

<sup>536</sup> *HJ (Iran)* (UKSC, 2010), 393–94 [10]–[11]; see also at 632–33 [42], per Lord Rodger. See also *RT (Zimbabwe)* (UKSC, 2012), at 353–54 [18].

<sup>537</sup> See text *supra*, at nn. 422–23.

<sup>538</sup> See *Shah* (UKHL, 1999), at 643, per Lord Steyn, describing *Re GJ* (NZ RSAA, 1995) as an “impressive judgment.”

a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.”<sup>539</sup> Such recognition is now widespread in judicial interpretation across a range of common law<sup>540</sup> and civil law jurisdictions,<sup>541</sup> and countries as diverse as Sweden,<sup>542</sup> South

<sup>539</sup> *Re GJ* (NZ RSAA, 1995), at 420 (emphasis in original), adopted by the UK Supreme Court in *HJ (Iran)* (UKSC, 2010), at 645 [76]; see also at 621 [11]. In international human rights law it is well accepted that “other status” includes sexual orientation: see CESCR General Comment No. 20, *supra* n. 26, at [32], and HRC General Comment No. 18, *supra* n. 95, at [7].

<sup>540</sup> Canada appears to be one of the first jurisdictions to have recognized homosexuality as the basis of a particular social group based on the immutability test: see e.g. *Jorge Alberto Inaudi, T91-04459* (Can. IRB, Apr. 9, 1992); *M91-12609* (Can. IRB, Jun. 2, 1992); *V (OZ)*, [1993] CRDD 164 (Can. IRB, Jun. 10, 1993). For a recent Federal Court decision affirming this, see *Okoli v. Canada (Minister of Citizenship and Immigration)*, [2009] FC 332 (Can. FC, Mar. 31, 2009), at [36]. The immutability approach was clearly applied by the UK Supreme Court in *HJ (Iran)* (UKSC, 2010). Indeed, there does not appear to be any controversy surrounding this issue in the UK and it appears that the Secretary of State routinely accepts groups identified by sexuality as a particular social group: see e.g. *HJ (Iran)* (UKSC, 2010) and the earlier decision in *HS (Homosexuals: Minors, Risk on Return) Iran*, [2005] UKAIT 00120 (UKAIT, Aug. 4, 2005): “No issue has been raised as to the Appellant’s claim that he is a member of a particular social group, namely homosexuals in Iran. We find that his homosexuality is either an innate and unchangeable characteristic, or it is a characteristic that is so fundamental that he should not be required to change it”: at [146]. See also *SB (Uganda) v. Secretary of State for the Home Department*, [2010] EWHC 338 (Admin) (Eng. HC, Feb. 24, 2010): “homosexuals in Uganda form a particular social group”: at [2]. In the US, see for an extremely comprehensive discussion of homosexuality as a particular social group, *Karouni* (USCA, 9th Cir., 2005), in which the Ninth Circuit traced the history of such recognition, dating back to a BIA decision in 1990 (*Matter of Toboso-Alfonso*, (1990) 20 I & N Dec. 819 (USBIA, Mar. 12, 1990), at 821–23, adopting *ejusdem generis* reasoning) which was later adopted by the Attorney General as precedent and also recognized by INS General Counsel, culminating in the INS (as it then was) formally adopting the position “that homosexuals do constitute a particular social group”: at 1171. After recording the history of judicial case law, the court concluded that “all alien homosexuals are members of a ‘particular social group’”: *ibid.* (emphasis in original). See *Amanfi* (USCA, 3rd Cir., 2003), at 727–30 (extending protection to those who have had the particular social group of homosexuality imputed to them); *Boer-Sedano v. Gonzales*, (2005) 418 F.3d 1082 (USCA, 9th Cir., Aug. 12, 2005), at 1088. See also *Hernandez-Montiel* (USCA, 9th Cir., 2000), at 1091 (“gay men with female sexual identities”).

<sup>541</sup> Although the Qualification Directive, *supra* n. 28, is less definitive in providing that “[d]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation,” at Art. 10(1), there is authority in many jurisdictions, including Germany and Belgium, that accepts homosexuality as a particular social group. In Germany, in *4K 772/10.A* (Ger. VG Frankfurt (Oder) [German Administrative Court, Frankfurt an der Oder], Nov. 11, 2010), the court found that as a result of the Qualification Directive homosexuality is now seen as a characteristic that cannot be changed, but went on to state that the claimant would be a member of a particular social group “if homosexuality is formative of identity for the claimant and that homosexuals in Cameroon would be a group with a distinct identity, considered by the society around them as different” (unofficial translation; emphasis in original). In this case, the court found that homosexuals are considered in Cameroon by the surrounding majority society as different and therefore they are a group with distinct identity. The majority of society is not ready to see their emotion and affection, nor openly homosexual persons as equal citizens, but distinguishes them as “foreign” and “different.” See also *13 A 1013/09.A* (Ger. OVG Nordrhein-Westfalen [German Higher Administrative Court, North Rhine-Westphalia], Nov. 23, 2010); *5 K 1875/08.A* (Ger. VG Düsseldorf [German Administrative Court, Düsseldorf], Mar. 11, 2009); *RN 8 K 08.30020* (Ger. VG Regensburg [German Administrative Court, Regensburg], Sept. 15, 2008). In Belgium, in cases based on sexuality, the general approach of the Council for Alien Law Litigation appears to be simply to state that the claimant is a member of a particular social group of homosexuals in the country in question. In this regard see *35247* (Bel. CCE, Dec. 2, 2009), *36527* (Bel. CCE, Dec. 22, 2009), and *37316* (Bel. CCE, Jan. 21, 2010). No question appears to be raised of whether the claimant could live “discreetly” even if they had done so in the past.

<sup>542</sup> Swedish Code of Statutes, at c. 4, s. 1.

Africa,<sup>543</sup> Spain,<sup>544</sup> and Ireland,<sup>545</sup> have positively affirmed in their domestic codification of the Convention that sexual orientation is a protected ground. In general, decision-makers implementing the *ejusdem generis* approach have had little difficulty in identifying or articulating the social group as one based on sexuality<sup>546</sup> and, by contrast to claims based on gender, have largely resisted any attempt to artificially narrow the ground beyond simply “homosexuals.”<sup>547</sup> 5

While most of the relevant case law is concerned with claims by homosexual men, it is clear that the social group ground of sexual orientation or gender identity applies to a wide range of applicants, including lesbian,<sup>548</sup> bisexual,<sup>549</sup> intersex,<sup>550</sup> and transgender applicants.<sup>551</sup> This position is consistent with the non-discrimination principles underpinning the nexus clause since it is well accepted that gender identity is “recognized as among the prohibited grounds of discrimination” at international law, and includes persons who are “transgender, transsexual or intersex.”<sup>552</sup> As Lord Rodger noted in *HJ (Iran)*, “the Convention offers protection to gay and lesbian people – and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour – because they are entitled to have the same freedom from fear of persecution as their straight counterparts.”<sup>553</sup> 10 15

<sup>543</sup> Refugees Act 1998 (South Africa), at s. 1(xx).

<sup>544</sup> *Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*. B.O.E. N° 263 del 31 de octubre de 2009, at Art. 3, “[r]efugee status recognizes a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, membership of a particular social group, gender or sexual orientation . . .”

<sup>545</sup> Refugee Act 1996 (Ireland), at s. 1.

<sup>546</sup> As noted by Hathaway and Pobjoy, *supra* n. 175, the nexus criterion is “rarely a bar to the recognition of gay claims”: at 323. As they note, the courts in *S395/2002* (Aus. HC, 2003) and *HJ (Iran)* (UKSC, 2010) “unequivocally acknowledged that risk for reasons of one’s sexual *identity* falls squarely within the Convention’s requirement that the well-founded fear of being persecuted be causally connected to one of the five nexus grounds, specifically, ‘membership of a particular social group’”: at 371 (emphasis in original). However, those jurisdictions applying the “social perception” test have sometimes rejected claims on this basis. See also Foster, *supra* n. 403, at 52–53.

<sup>547</sup> Foster, *supra* n. 403, at 50.

<sup>548</sup> See e.g. in *HJ (Iran)* (UKSC, 2010), where Lord Rodger noted that the reasoning in that case would apply equally to “lesbian women”: at 648 [83]. See also Foster, *supra* n. 403, at 51 n. 296.

<sup>549</sup> For a recent Australian decision recognizing a claim from a bisexual man from Kenya, see *1011325*, [2011] RRTA 227 (Aus. RRT, Mar. 10, 2011).

<sup>550</sup> UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, explain that the term intersex or “disorders of sex development” refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female: at [10].

<sup>551</sup> As UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, note, transgender “is a gender identity, not a sexual orientation[,] and a transgender individual may be heterosexual, gay, lesbian or bisexual”: at [10].

<sup>552</sup> CESCR General Comment No. 20, *supra* n. 26, at [32], citing the International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (March 2007). As the UN Commissioner for Human Rights notes, “[i]n their jurisprudence, general comments and concluding observations, United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognized both sexual orientation and gender identity discrimination”: Office of the High Commissioner for Human Rights, “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law” (2012), at 41.

<sup>553</sup> *HJ (Iran)* (UKSC, 2010), at 645 [76].

The key issue that has arisen in the context of claims based on sexual orientation and identity is related to the fact that, as observed by the UK Supreme Court in *HJ (Iran)*,

the immutable characteristic of . . . sexual orientation or sexuality . . . is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests in behavior, it is less immediately visible than a person's race.<sup>554</sup>

This difference has led some decision-makers to reject refugee claims based on sexuality where it is deemed possible for the applicant to avoid persecution on return by concealing their sexuality.<sup>555</sup> Although still a live issue in some jurisdictions,<sup>556</sup> this approach is generally understood to be erroneous on the basis that “[t]o pretend that . . . the behavior by which [sexuality] manifests can be suppressed, is to deny the members of this group their fundamental right to be what they are.”<sup>557</sup> As explained above, it is only in the exceptional case that a limitation on behavior is legitimately imposed by the home state in accordance with international human rights law that a person can be expected to suppress or desist from conduct which would otherwise reveal his or her identity as a person to whom the Refugee Convention extends protection.<sup>558</sup> As such, attempts to delimit the scope of the protective ambit of “sexual orientation” as a Convention ground by reference to “criminal laws” – as regrettably authorized by the European Union’s Qualification Directive<sup>559</sup> – are clearly at odds with this basic principle.

In sum, the social group ground comfortably accommodates a wide range of claims founded in sexual orientation and gender identity. Any attempt to delimit the broad reach of this ground, for example on the basis that the applicant can legitimately be expected to refrain from engaging in certain conduct on return, must be undertaken in accordance with international human rights principles.

### 5.9.3 Family

In view of the recognition in international law of the family as “the natural and fundamental group unit of society [which] is entitled to protection by society and the State,”<sup>560</sup> it is not surprising that refugee claims based on family affiliation have long been recognized as

<sup>554</sup> *Ibid.*, at 621 [11], per Lord Hope.

<sup>555</sup> For an analysis of the “discretion” cases, see Hathaway and Pobjoy, *supra* n. 175, at 324–26.

<sup>556</sup> See e.g. S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (2011), at 33–39.

<sup>557</sup> *HJ (Iran)* (UKSC, 2010); see also *S395/2002* (Aus. HC, 2003) and *Karoumi* (USCA, 9th Cir., 2005).

<sup>558</sup> See *supra* n. 192 and accompanying text.

<sup>559</sup> The Qualification Directive, *supra* n. 28, states that “[s]exual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States”: at Art. 10(1)(d). Leaving aside the question why it is only in relation to sexual orientation that reference to criminal laws is made, this statement raises a question as to whether refugee status may be denied on the basis that the applicant is or should be required to desist from conduct because it is deemed criminal. Where criminalization of conduct is itself a violation of human rights law, such as is the case in relation to the criminalization of consensual same-sex relationships, refugee status cannot be denied merely on the basis of such prohibition: see *supra* Ch. 3.5.6.

<sup>560</sup> Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/810 (Dec. 10, 1948) (“Universal Declaration”), at Art. 16(3); Civil and Political Covenant, *supra* n. 147, at Art. 23(1).

within the scope of the *ejusdem generis* approach to social group.<sup>561</sup> After all, in formulating the *ejusdem generis* approach, the Board of Immigration Appeals in *Acosta* cited “kinship ties” as an obvious example of an innate or immutable characteristic,<sup>562</sup> a view that has been affirmed in subsequent jurisprudence which has described “kinship ties” as “paradigmatically immutable” given that “family bonds are innate and unchangeable.”<sup>563</sup> Indeed it has been said that “there can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.”<sup>564</sup> 5

As a rule, whenever there is an indication that the status or activity of a claimant’s relative is the basis for an applicant’s risk of being persecuted, a claim grounded in family background is properly receivable under the social group category.<sup>565</sup> This doctrine may be invoked in a variety of circumstances, including where it is the applicant’s status as a husband or wife, sibling, child,<sup>566</sup> or other relative that puts her at risk.<sup>567</sup> Moreover, understanding of family may be contingent on the cultural context, thus often extending beyond nuclear and blood relationships. As recognized by the Full Federal Court of Australia, 10

[a] “family” in its ordinary and natural meaning can mean, *inter alia*, parents and their children; a group of persons closely related by blood; all persons descended from a common progenitor; or other meanings which may be appropriate to the particular cultural, or any other relevant, context in which the question arises.<sup>568</sup>

While the quintessential cases in this category involve persons from politically, socially, 15  
or economically prominent or active families at risk from external forces, other examples

<sup>561</sup> In *16 A 10001/88* (Ger. OVG [German Higher Administrative Court], May 23, 1988), it was observed that “[p]ersecution of kin . . . is an objective reason which can be compared to the persecution of members of a specific social group, as in both cases one reason for the threat of political persecution is the persecution others suffer”: reported at Abstract No. IJRL/0021 in (1989) 1 Intl. J. Ref. L. 394. In *Sarrazola* (No. 2) (Aus. FFC, 2001), the Full Federal Court of Australia specifically relied on the affirmation in the Universal Declaration, *supra* n. 560, at Art. 16(3), that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” in finding that family can constitute a particular social group: at 193 [31].

<sup>562</sup> *Acosta* (USBIA, 1985), at 233.

<sup>563</sup> *Crespin-Valladares* (USCA, 4th Cir., 2011).

<sup>564</sup> *Gebremichael v. Immigration and Naturalization Service*, (1993) 10 F.3d 28 (USCA, 1st Cir., Nov. 23, 1993), at 36, cited with approval in *Thomas* (USCA, 9th Cir., 2005), at 1185. In the latter case, the Ninth Circuit cited the extensive case law supporting this position from other circuits: see at 1185–86, and, in this *en banc* decision, affirmed that “[w]e overrule all of our prior decisions that expressly or implicitly have held that a family may not constitute a particular social group”: at 1186.

<sup>565</sup> This analysis in Hathaway, *Refugee Status*, at 165–66, was cited with approval by the Full Federal Court of Australia in *Sarrazola* (No. 2) (Aus. FFC, 2001), at 193. The general discussion of family in Hathaway, *Refugee Status*, at 164–66, was cited with approval by the House of Lords in *Fornah* (UKHL, 2006), at [19].

<sup>566</sup> See Foster, *supra* n. 18, at Ch. 6 n. 197.

<sup>567</sup> The Qualification Directive, *supra* n. 28, recognizes: “Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status”: Preamble, para. 36.

<sup>568</sup> *Sarrazola* (No. 2) (Aus. FFC, 2001), at 193. The Qualification Directive, *supra* n. 28, recognizes, albeit in a different context, that: “Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time”: at Art. 23(5).

include persecution on the basis of being related to a person with a disability,<sup>569</sup> and persecution on the basis of a relative's sexuality or gender identity.<sup>570</sup> An emerging application of the family as a social group category is evidenced by those cases involving harm *within* the family unit. In such cases, particularly where a child is at risk of family violence, some courts have found that the applicant's well-founded fear of being persecuted is for reasons of family membership. For example, in a case involving a young Mexican girl's fear of her father, "[t]he undisputed evidence demonstrated that Mr Aguirre's goal was to dominate and persecute members of his immediate family."<sup>571</sup>

While most claims based on family membership are straightforward, there is one category that has proven highly controversial, namely where family members are targeted as a means of seeking retribution, revenge, or repayment of debt, in the circumstance that the initial dispute was not grounded in or connected with a Convention ground. The context to such claims was nicely encapsulated by a group of immigration and refugee law scholars in an *amicus* brief to the US Supreme Court:

The threat to harm innocent family members as a means of retaliation or coercion is all too pervasive. The tactic is found in a wide variety of circumstances, including retaliation for a family member's cooperation with U.S. forces in foreign countries (notably Afghanistan and Iraq) or with government law enforcement activities; punishing or deterring political activists acting against the ruling regime, openly supporting U.S. foreign policy, or assisting local or foreign news media; forcing a relative to reveal the whereabouts of a close family member who will be harmed once found; forcing family members to join the militia or other armed groups; and coercing cooperation with foreign despots, terrorists, human traffickers, or drug cartels.<sup>572</sup>

While in some of these examples the primary target of harm could be said to be at risk for reasons of a Convention ground (for example, a family member's cooperation with US forces as imputed political opinion), in other cases that may not be so (for example, a family member's involvement in a drug cartel). The question thus arises whether the secondary target can fairly be said to be at risk for reasons of family membership and hence secure access to refugee status, despite the fact that the primary target would not so qualify. In several jurisdictions the position has been taken – either through legislative amendment<sup>573</sup>

<sup>569</sup> Foster, *supra* n. 18, at 323. The Committee on Economic, Social and Cultural Rights has made a similar point in relation to the Economic, Social and Cultural Covenant, *supra* n. 170, at Art. 2(2), in noting that membership of a group "also includes association with a group characterised by one of the prohibited grounds (e.g. the parent of a child with a disability)": CESCR General Comment No. 20, *supra* n. 26, at [16].

<sup>570</sup> UNHCR, *Guidelines on International Protection No. 9*, *supra* n. 19, at [10].

<sup>571</sup> *Aguirre-Cervantes v. Immigration and Naturalization Service*, (2001) 242 F.3d 1169 (USCA, 9th Cir., Mar. 21, 2001), at 1178. But see for the opposite approach, *Gomez-Romero v. Holder*, (2012) 475 Fed. Appx. 621 (USCA, 6th Cir., Apr. 13, 2012). Such claims can also be analyzed in terms of the particular social group of children where it is a child's dependence on their family and/or guardians that gives rise to vulnerability to persecution within the family unit: see *infra* Ch. 5.9.4.

<sup>572</sup> *Demiraj v. Holder*, (2012) 132 S.Ct. 2454 (USSC, Jun. 21, 2010), Brief of *Amici Curiae* Immigration Law Scholars in Support of Petitioners (Jul. 25, 2011), at 6.

<sup>573</sup> See Migration Act 1958 (Cth), s. 91S. The background to and effect of these provisions is discussed by the High Court in *STCB v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2006) 231 ALR 556 (Aus. HC, Dec. 14, 2006), at [16]–[19]. For subsequent case law, see *SZLGS v. Minister for Immigration*, [2008] FMCA 253 (Aus. FMC, Mar. 13, 2008).



or judicial interpretation<sup>574</sup> – that a claim based on membership of a family cannot succeed unless the primary targeting is also based on a Convention ground such as race or political opinion. The apparent logic is that where the original family member was at risk for reasons of greed, revenge, or an entirely personal dispute, then the claim must fail notwithstanding that it is her status as a relative of the original target that places the applicant at risk of being persecuted. In other words, even where a persecutor applies “the time-honored theory of *cherchez la famille* (‘look for the family’) to extract information about [an applicant’s] brother or force the brother to come forward,”<sup>575</sup> refugee status would be denied. 5

In truth, there is no principled basis for this dual nexus requirement.

One argument put forward is that to recognize refugee status based on family as a social group in this context would result in the conferral of “refugee status on all victims of vendettas or feuds that have swept in the family of the initial target, and all victims of ‘street wars’ between rival criminal families.”<sup>576</sup> This approach did not find favor with the US Court of Appeals for the Ninth Circuit, which categorically stated its unwillingness to “erect artificial barriers to asylum eligibility.”<sup>577</sup> Where the person seeking recognition of refugee status has not engaged in criminal or other activities, but is exposed to harm because of her family relationship to someone who has engaged in such activities, it is her status as a family member – not the criminal activities of the relative – that puts *her* at risk of being persecuted. 10 15

In any event, such policy concerns cannot justify an interpretation that would effectively negate membership of a family as an independent basis for refugee protection. As the Court of Appeals for the Ninth Circuit explained, 20

[w]e decline to hold, as the government urges, that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with one of the other four grounds . . . [T]here is nothing in the statute itself, nor in the BIA’s interpretation of the relevant provisions, to suggest that membership in a family is insufficient, standing alone, to constitute a particular social group.<sup>578</sup>

Similarly, the House of Lords eloquently explained that persecution of a person “simply because he is a member of the same family as someone else is as arbitrary and capricious and just as pernicious, as persecution for reasons of race and religion.”<sup>579</sup> Further, to restrict claims based on family only to those in which a person’s family member was originally targeted for an independent Convention reason is incapable of justification because it would 25

<sup>574</sup> This is particularly the case in Germany and Canada. In Germany, see *1 B 131.06* (Ger. BverwG [German Federal Administrative Court], Jan. 5, 2007). In Canada, see *Diaz v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 705 (Can. FC, Jun. 17, 2011), at [7]–[8]; *Mancia v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 949 (Can. FC, Jul. 27, 2011), at [11]–[13]; *Ramirez Aburto v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1049 (Can. FC, Sept. 6, 2011), at [16]–[18]. For earlier authority, see *Zaidi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1080, at [4]; but see *De Leon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 127, which appears to take a different position.

<sup>575</sup> *Gebremichael* (USCA, 1st Cir., 1993), at 35. In this case refugee status was granted.

<sup>576</sup> This was the government’s argument in *Thomas* (USCA, 9th Cir., 2005), at 1187. The decision was successfully appealed to the US Supreme Court on technical grounds: *Gonzales v. Thomas*, (2006) 547 US 183 (USSC, Apr. 17, 2006).

<sup>577</sup> *Thomas* (USCA, 9th Cir., 2005), at 1189. <sup>578</sup> *Ibid.*, at 1187.

<sup>579</sup> *Fornah* (UKHL, 2006), at 445 [45], per Lord Hope.

effectively require “more of an asylum seeker who claims that the particular social group of which he or she is a member is the family than is required of those who claim that the persecution of which they have a well-founded fear is for reasons of race, religion, nationality or political opinion.”<sup>580</sup>

5 In sum, family is properly understood as constituting a particular social group for Convention purposes, regardless of how family-based risk arises.<sup>581</sup> Accordingly, where a person is at risk for reasons of her family membership, refugee status is appropriately recognized.

### 5.9.4 Age

Another classification logically embraced within the immutability criterion of the *ejusdem generis* approach is a social group defined on the basis of age, given that age is not within  
10 one’s ability to change and is recognized as a protected status under non-discrimination law.<sup>582</sup> While this could apply to groups such as the elderly, in practice it is most frequently relevant to claims by children.

While the Convention on the Rights of the Child defines a child as being every human being below the age of eighteen years,<sup>583</sup> refugee decision-makers have appropriately declined  
15 to adopt an overly categorical approach to delineating the social group of children, recognizing that it is often the fact of being young and vulnerable that makes a person susceptible to a risk of being persecuted.<sup>584</sup> As the English Court of Appeal has recognized, “[i]t is not easy to see that the risks of the relevant kind to a person who is a child would continue until the eve of that [eighteenth] birthday, and cease at once the next day.”<sup>585</sup>

20 Indeed, while it will be appropriate in many cases to define the relevant social group as “children,” “teenagers,” or “youth,” a more straightforward approach may be simply to recognize that it is the person’s age that underpins the risk of being persecuted. An application of the *ejusdem generis* approach tends to produce precisely this result given that “[a]ge is an immutable characteristic,”<sup>586</sup> being “innate or unchangeable . . . for the foreseeable  
25 future.”<sup>587</sup> While one US Circuit Court of Appeals has questioned the immutability of age

<sup>580</sup> *Ibid.*, at 446 [47]. For successful cases in this context in other jurisdictions, see *Refugee Appeal No. 76485* (NZ RSAA, Jun. 17, 2010), [80]–[83], adopting the House of Lords’ position in *K v. Secretary of State for the Home Department*, [2007] 1 AC 412 (UKHL, Oct. 18, 2006), and in Austria, see *2007/20/1490 v. Independent Federal Asylum Board (UBAS)* (Au. VwGH [Austrian Administrative Court], Dec. 16, 2010).

<sup>581</sup> Foster, *supra* n. 403, at 57.

<sup>582</sup> The Human Rights Committee has recognized “age” within the “other status” criterion: see S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2005), at 690, citing several decisions. See also CESCR General Comment No. 20, *supra* n. 26, at [29].

<sup>583</sup> Convention on the Rights of the Child, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, 1577 UNTS 3, at Art. 1.

<sup>584</sup> Foster, *supra* n. 18, at 330.

<sup>585</sup> *DS (Afghanistan) v. Secretary of State for the Home Department*, [2011] INLR 389 (Eng. CA, Mar. 22, 2011), at [54]. See also the decision in *Jakitay v. Secretary of State for the Home Department*, 12658 (UKIAT, Nov. 15, 1995), noting the practical difficulties in assessing age: Foster, *supra* n. 18, at 329–30.

<sup>586</sup> *LQ (Age: Immutable Characteristic) Afghanistan*, [2008] UKAIT 00005 (UKAIT, Mar. 15, 2007), at [6]; *DS (Afghanistan)* (Eng. CA, Mar. 22, 2011), at [4].

<sup>587</sup> See *Re B (PV)*, [1994] CRDD 12 (Can. IRB, May 10, 1994), at 7, one of the earliest decisions to recognize children as a particular social group.

on the basis that “unlike innate characteristics such as sex or color, age changes over time,”<sup>588</sup> this analysis is unsustainable since, as explained by the UNHCR,

[a]lthough age, in strict terms, is neither innate nor permanent as it changes continuously, being a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.<sup>589</sup>

A change in age cannot, therefore, be relied upon as a basis to reject a claim since the ability to dissociate from the protected status must be a presently available – not hypothetical or contingent – option.

For reasons previously discussed, the fact that a social group defined simply as children or children in a particular society is potentially very large does not affect its formulation as a social group for Convention purposes; nor is it necessary that every child be at risk of being persecuted. Hence, decision-makers have been appropriately willing to articulate the social group in a straightforward manner, finding that groups such as “children,”<sup>590</sup> “minors,”<sup>591</sup> “youths,”<sup>592</sup> and “young people”<sup>593</sup> are capable of constituting a social group in refugee law.

In some cases it is the intersection of age and other factors – including Convention-related grounds such as race, religion, gender, or economic class – that truly explains a risk of being persecuted, as in the case of girls, or of black or gay children. Accordingly, age-based social groups have appropriately been formulated, *inter alia*, as “orphaned children,”<sup>594</sup> “abandoned children,”<sup>595</sup> “illegitimate children,”<sup>596</sup> “street children,”<sup>597</sup> “impoverished

<sup>588</sup> *Lukwago* (USCA, 3rd Cir., 2003). See also *Escobar v. Gonzales*, (2005) 417 F.3d 363 (USCA, 3rd Cir., Jul. 29, 2005), at 367.

<sup>589</sup> UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [49].

<sup>590</sup> *LQ* (UKAIT, 2007). The Canadian Federal Court has accepted that minors can constitute a particular social group. For example, in *Xiao v. Canada (Minister of Citizenship and Immigration)*, [2001] FCT 195 (Can. FCTD, Jan. 31, 2001), the court noted: “When counsel attempted to develop the argument regarding the applicant’s particular social group, the presiding member implied that this aspect of the claim was fundamental and did not have to be reiterated. In oral submissions, counsel introduced the leading Supreme Court of Canada decision on membership in a particular social group and referred the tribunal to a number of CRDD and Federal Court decisions to support the proposition that persons under the age of 18 constitute a particular social group, i.e. children”: at [14].

<sup>591</sup> In a series of cases which failed on other grounds, the Federal Court of Canada accepted that either “children” or “minors” could constitute a social group: see e.g. *Canada (Minister of Citizenship and Immigration) v. Li*, (2001) 203 FTR 154 (Can. FCTD, Apr. 23, 2001), at [11]; *Zhu v. Canada (Minister of Citizenship and Immigration)*, (2001) 16 Imm. L. R. (3d) 227 (Can. FCTD, Aug. 13, 2001), at [39].

<sup>592</sup> *SGBB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCA 709 (Aus. FC, Jul. 16, 2003), at [23].

<sup>593</sup> See *Tobias Gomez* (Can. FC, 2011), at [29], in which the Federal Court of Canada found that the Board had erred in failing to consider whether the applicant was a member of a particular social group “on the basis of his status as a young, male Salvadorean living in San Salvador, or as a youth who refused to join a gang.” See also *Paramananthan* (Aus. FFC, 1998), in which “young displaced Tamil males from Jaffna” were held to be a particular social group; Foster, *supra* n. 18, at 333–36; *Applicant S* (Aus HC, 2004) (“young able-bodied men”: 393 [16]).

<sup>594</sup> *Re WBT, V98-00787*, [1999] CRDD 119 (Can. IRB, Jun. 4, 1999), cited in Jones and Baglay, *supra* n. 115, at 132 n. 157. See further Foster, *supra* n. 18, at Ch. 5 n. 183.

<sup>595</sup> See *Re MZJ, V97-03500*, [1999] CRDD 118 (Can. IRB, May 31, 1999), at [14], where the tribunal held that “abandoned children in Mexico can be a particular social group.”

<sup>596</sup> *B, 592688* (Fr. CRR [French Refugee Appeals Commission], May 11, 2007). In Germany, see *5 E 30444/98.A (3)* (Ger. VG Darmstadt [German Administrative Court, Darmstadt], Feb. 16, 2004).

<sup>597</sup> Foster, *supra* n. 18, at 335.

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children,”<sup>598</sup> “black children,”<sup>599</sup> or “hei haizi” (children ineligible for registration in China due to violation of the one-child policy),<sup>600</sup> and girls.<sup>601</sup> However, as discussed above in the case of gender, caution must be exercised so as not to artificially delimit age-based categories by reference to factors that are irrelevant to the articulation of the age-based social group.<sup>602</sup>

5 In sum, recognition of age as an immutable characteristic is consistent with the straightforward *ejusdem generis* approach to social group, and has been a particularly important development in giving voice to the independent refugee claims of children.

### 5.9.5 Disability

10 The question whether a person who suffers from an illness or physical or intellectual disability can be considered a member of a social group is not a heavily litigated issue. It is nonetheless clear that a group defined by reference to disability is within the ambit of social group under *ejusdem generis* analysis,<sup>603</sup> especially given the entry into force of the Convention on the Rights of Persons with Disabilities.<sup>604</sup> Under this treaty, states “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability,”<sup>605</sup> making it  
15 clear that disability is a protected status at international law, and hence within the *ejusdem generis* approach to defining a social group.<sup>606</sup>

A broad approach to the disability category is appropriate in light of the recognition that “persons with disabilities” includes “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and

<sup>598</sup> *JDJ (Re)*, No. A95-00633b, [1998] CRDD 12 (Can. IRB, Jan. 28, 1998).

<sup>599</sup> *Chen Shi Hai* (Aus. HC, 2000). In *Cheung* (Can. FCA, 1993), the Canadian Federal Court of Appeal held that the applicant was “poignantly described as a ‘black market person,’ denied the ordinary rights of Chinese children. As such, she is a member of a particular social group, that is, second children”: at 323.

<sup>600</sup> *Chen* (USCA, 7th Cir., 2010), at 333–34.

<sup>601</sup> The intersection of age and gender is important, as girls are often at risk of being persecuted because of this intersection: see Foster, *supra* n. 18, at 334. As the UNHCR notes: “Just as ‘women’ have been recognized as a particular social group in several jurisdictions, ‘children’ or a smaller subset of children may also constitute a particular social group. Age and other characteristics may give rise to groups such as ‘abandoned children,’ ‘children with disabilities,’ ‘orphans,’ or children born outside coercive family planning policies or of unauthorized marriages, also referred to as ‘black children.’ The applicant’s family may also constitute a relevant social group”: UNHCR, *Guidelines on International Protection No. 8*, *supra* n. 118, at [50]. See discussion in context of gang recruitment in Foster, *supra* n. 403, at 60–61.

<sup>602</sup> See *supra* nn. 516–22 ff.

<sup>603</sup> In addition to case law, we note that the Refugees Act 1998 (South Africa), s. 1 (xxi) states that social group includes, among others, “a group of persons of particular . . . disability.”

<sup>604</sup> Disability Convention, *supra* n. 95.

<sup>605</sup> *Ibid.*, at Art. 4(1). Even prior to the entry into force of this treaty, “disability” was properly understood as a protected status given that it was recognized to fall within “other status” in the Civil and Political Covenant, *supra* n. 147, and Economic, Social and Cultural Covenant, *supra* n. 170: CESCR General Comment No. 20, *supra* n. 26, at [28]. The Committee on Economic, Social and Cultural Rights also separately includes “health status” as a ground within the broader “other status” category: Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4 (Aug. 11, 2000), at [18].

<sup>606</sup> Foster, *supra* n. 403, at 63. For a recent academic article examining this and other aspects of refugee status adjudication for persons with disabilities, see M. Crock, C. Ernst, and R. McCallum, “Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities,” (2012) 24 Intl. J. Ref. L. 735.

effective participation in society on an equal basis with others.”<sup>607</sup> Accordingly, decision-makers have been willing to accept, in a straightforward manner, that a social group may be constituted by a range of physical and intellectual disabilities, and illness, including visual impairment,<sup>608</sup> congenital deafness,<sup>609</sup> HIV/AIDS,<sup>610</sup> autism,<sup>611</sup> and mental illness.<sup>612</sup> In adjudicating such claims, it has been recognized that “[w]hile not all disabilities are ‘innate’ or ‘inherent’ . . . they are usually, unfortunately, ‘immutable.’”<sup>613</sup> Further, mental illness has been understood as an “innate and unchangeable characteristic” notwithstanding that “its severity may fluctuate with treatment.”<sup>614</sup> 5

As is the case in respect of all Convention grounds, a person may fall within the social group ground on the basis of an imputed disability. Thus, while it may not be technically correct to classify albinism as a disability, the New Zealand tribunal nonetheless recognized that “[a]lbinism is an immutable characteristic which is beyond the power of the appellant to change.”<sup>615</sup> Having determined that albinos were in fact at risk of being persecuted in Egypt, a Convention claim grounded in membership of a particular social group was appropriately recognized.<sup>616</sup> 10 15

In sum, persons whose fear of persecution is due to their physical, mental, or intellectual illness or disability fall comfortably within the *ejusdem generis* approach to social group and hence are entitled to refugee status on this basis.

### 5.9.6 Economic or social class

Class background, origin, or status may well have been – given the historical moment in which the Refugee Convention was drafted – the context in the mind of the drafters in inserting the social group ground.<sup>617</sup> Indeed, the long history of such persecution was acknowledged by Lord Millett in *Shah*: 20

Persecution of dissident minorities has often followed in the wake of social and cultural revolution. Class war has not been confined to our own continent and bloodstained century. Aristocrats during the French Terror, Kulaks in pre-war Soviet Russia, the intelligentsia and professional classes in Cambodia, have all been victims of monstrous persecution not readily covered by other Convention grounds.<sup>618</sup>

<sup>607</sup> Disability Convention, *supra* n. 95, at Art. 1.

<sup>608</sup> *Re BOG*, VAO-03441, [2001] CRDD 121 (Can. IRB, Jul. 16, 2001), cited in Foster, *supra* n. 18, at 319.

<sup>609</sup> *Re H (GY)*, T94-05654 and T94-05655, [1995] CRDD 70 (Can. IRB, Feb. 1, 1995), at 4, cited in Foster, *supra* n. 18, at 319.

<sup>610</sup> See e.g. *Kuthyar v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 110 (Aus. FC, Feb. 11, 2000) and *Okado v. Attorney General*, 2005 U.S. App. LEXIS 24989 (USCA, 3rd Cir., Nov. 17, 2005).

<sup>611</sup> Foster, *supra* n. 18, at 322–23. <sup>612</sup> *Kholyavskiy* (USCA, 7th Cir., 2008).

<sup>613</sup> *Tchoukhrova v. Gonzales*, (2005) 404 F.3d 1181 (USCA, 9th Cir., Apr. 21, 2005), at 1189.

<sup>614</sup> *Liaqat v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 893 (Can. FC, Jun. 23, 2005), at [14].

<sup>615</sup> *AC (Egypt)*, [2011] NZIPT 800015 (NZ IPT, Nov. 25, 2011), at [111].

<sup>616</sup> *Ibid.* See generally S. Larson, “Magic, Mutilation and Murder: A Case for Granting Asylum to Tanzanian Nationals with Albinism,” (2011) 2(8) Pace Intl. L. Rev. Online Companion.

<sup>617</sup> See e.g. the remarks of Kirby J. in *Dranichnikov v. Minister for Immigration and Multicultural Affairs*, (2003) 197 ALR 389 (Aus. HC, Mar. 8, 2003): “Such categories appear to be precisely what the originators of the ‘particular social group’ category had in mind, although in later years, the class has developed and been applied more broadly”: at 403 [66].

<sup>618</sup> *Shah* (UKHL, 1999), at 660, per Lord Millett (in dissent, but not relevantly).

As this example highlights, the designation of a particular social class or status tends to be immutable, particularly since it often pertains to a past or former status, that is, to a person's position prior to a revolution or major societal disruption such as civil war or violent change of government, which is of course impossible to alter in retrospect. As Justice LaForest of the Canadian Supreme Court explained in *Ward*, the Cold War context in which the Refugee Convention was drafted indicates that persecution "was imposed upon the capitalists not because of their contemporaneous activities but because of their *past status as ascribed to them by the Communist leaders*."<sup>619</sup> In other words, even where a person has been divested of wealth and privilege, the attribution of a particular social class, status, or category is likely to remain.<sup>620</sup> This was recognized by the US Court of Appeals for the Seventh Circuit in accepting that the "educated, landowning class of cattle farmers targeted by Colombian rebels" constituted a social group:

A particular characteristic that defines a social group within a society such as education, manner of speech, or profession may be more mutable than one's race, ethnicity, or religion, but these traits are nevertheless distinguishing markers within a given society that are not easily changed or hidden.<sup>621</sup>

Such cases hence fall straightforwardly within the *ejusdem generis* approach to interpreting social group since one's social position and status in such contexts is largely immutable.<sup>622</sup> This is further supported by the non-discrimination principles underpinning the nexus clause given that "social origin, property, birth or other status" are grounds on which discrimination is prohibited at international law.<sup>623</sup>

A second well-established manifestation of a class-based social group is membership in a particular social class within a society that is highly stratified by reference to clans, tribes, or castes. Where a person is at risk on the basis of membership of a clan,<sup>624</sup> tribe,<sup>625</sup> or

<sup>619</sup> *Ward* (Can. SC, 1993), at 729 (emphasis added).

<sup>620</sup> The analysis set out in Hathaway, *Refugee Status*, at 166 (differently worded), was cited with approval in *Applicant A* (Aus. HC, 1997), at 304, per Kirby J.

<sup>621</sup> *Tapiero de Orejuela v. Gonzales*, (2005) 423 F.3d 666 (USCA, 7th Cir., Sept. 8, 2005), at 672.

<sup>622</sup> We note that the Refugees Act 1998 (South Africa), s. 1(xxii) states that "social group" includes, among others, "a group of persons of particular . . . class or caste."

<sup>623</sup> Civil and Political Covenant, *supra* n. 147, Art. 2(1); Economic, Social and Cultural Covenant, *supra* n. 170, Art. 2(2).

<sup>624</sup> For example, in Germany, the category "clan" has been recognized in many cases in recent years: see e.g. *M 11 K 09.50585* (Ger. VG München [German Administrative Court, Munich], Jan. 22, 2010) ("Abgal Clan"); *M 11 K 08.50201* (Ger. VG München, Aug. 13, 2008) ("Ogaden clan"); *M 11 K 06.51033* (Ger. VG München, Apr. 5, 2007) ("clan membership Somalia"); *788/09 WI.A* (Ger. VG Wiesbaden [German Administrative Court, Wiesbaden], Nov. 17, 2009) ("Shaanshi clan"); *7 A 172/06* (Ger. VG Braunschweig [German Administrative Court, Braunschweig], Jun. 24, 2008) ("Midgan clan").

<sup>625</sup> Even in those US circuits which adopt the "social visibility" test for determining particular social group, it has been recognized that members of a particular tribe are likely to "share a common dialect and accent, which is recognizable to others": *Malonga* (USCA, 8th Cir., 2008) (dealing with the Lari ethnic group of the Kongo tribe). In that case the court noted that previous decisions of the Eighth Circuit and of the BIA had recognized that "members of certain Somali ethnic clans" constitute a particular social group: see *Brima Bah v. Gonzales*, (2006) 448 F.3d 1019 (USCA, 8th Cir., May 15, 2006), at 1024; *Awale v. Ashcroft*, (2004) 384 F.3d 527 (USCA, 8th Cir., Sept. 13, 2004), at 529; *Hagi-Salad v. Ashcroft*, (2004) 359 F.3d 1044 (USCA, 8th Cir., Mar. 9, 2004), at 1046; *Re H*, (1996) 21 I & N Dec. 337 (USBIA, May 30, 1996), at 342–43, cited in *Malonga* (USCA, 8th Cir., 2008). But see *Gatimi* (USCA, 7th Cir., 2009), where the Seventh Circuit overturned the Board of Immigration Appeals' decision which had held that



caste,<sup>626</sup> decision-makers have had little difficulty in recognizing a claim grounded in social group. For example, the New Zealand tribunal recognized the Midgan caste in Somalia as a social group given that documentary evidence suggests it is “a low caste, akin to the Dalits or ‘untouchables’ in India” which are “often kept as slaves by other clans.”<sup>627</sup> This is consistent with non-discrimination norms given that “descent” has been understood to include “communities based on forms of social stratification such as caste and analogous systems of inherited status.”<sup>628</sup> 5

A third immutable form of class is that based on poverty or economic subordination, since the ability to dissociate from such a status must be a logically present option, not merely one that is possible on an abstract or theoretical level.<sup>629</sup> Accordingly, it has been accepted that broad categories such as the “Haitian poor” are capable of constituting a social group for Convention purposes.<sup>630</sup> To be clear, as earlier explained,<sup>631</sup> the simple fact of being poor is not, of course, the basis for entitlement to refugee status per se. Nonetheless, where poverty provides the causal connection to a well-founded fear of being persecuted, it is sensibly understood to be the basis for a recognition of refugee status under the rubric of the social group ground. 10 15

As in the case of other categories within the social group ground, a group may be defined by reference to poverty alone, or by the intersection of poverty with other Convention grounds such as age, race, or social status. Hence refugee status has appropriately been recognized where a well-founded fear of being persecuted is for reason of a social group such as poor children or “street children,”<sup>632</sup> “campesinos,”<sup>633</sup> “disposables,”<sup>634</sup> or “undesirables.”<sup>635</sup> These developments mirror those in international human rights law, which is increasingly recognizing economic class as a protected status.<sup>636</sup> 20

a defector from the Kikuyu tribe in Kenya was not a member of a particular social group based on social visibility.

<sup>626</sup> For analysis of the numerous decisions regarding “caste” at the tribunal level, see Foster, *supra* n. 18, at 304–5.

<sup>627</sup> *Refugee Appeal No. 71509/99* (NZ RSAA, Jan. 20, 2000), at 2; see generally Foster, *supra* n. 18, at 304–5.

<sup>628</sup> Joseph, Schultz, and Castan, *supra* n. 582, at 691, citing UN Committee on the Elimination of Racial Discrimination, “General Recommendation No. XXIX: Article 1, paragraph 1 of the Convention (Descent)” (2002), UN Doc. A/57/18 at 111 (Nov. 1, 2002), Preamble.

<sup>629</sup> Foster, *supra* n. 403, at 68. For this reason, decisions that have argued that poverty is not immutable because it is possible for a person to get out of poverty cannot be defended: see e.g. *Refugee Appeal No. 71553/99* (NZ RSAA, Jan. 28, 2000) at 9.

<sup>630</sup> *Sinora v. Canada (Minister of Employment and Immigration)*, (1993) 66 FTR 113 (Can. FCA, Jul. 13, 1993), at [2].

<sup>631</sup> See *supra* Ch. 3.3.5.

<sup>632</sup> Social groups defined by reference to disadvantaged socio-economic conditions, in combination with other Convention factors, include “young girls from Nigeria whose economic circumstances are poor” (*Ogbeide v. Secretary of State for the Home Department*, HX/08391/2002 (UKIAT, May 10, 2002)) and “children from Fujian province” (*Li v. Canada (Minister of Citizenship and Immigration)*, (2000) 198 FTR 81 (Can. FCTD, Dec. 11, 2000), at [22]).

<sup>633</sup> *Re WBT* (Can. IRB, 1999). <sup>634</sup> N98/22948, [2000] RRTA 1055 (Aus. RRT, Nov. 20, 2000), at 10–15.

<sup>635</sup> *Ibid.* For further discussion of such cases, see Foster, *supra* n. 18, at 304–13.

<sup>636</sup> The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by UNGA Res. 45/158, Dec. 18, 1990, entered into force Jul. 1, 2003, 2220 UNTS 3, lists “economic position” as a protected ground. The Committee on Economic, Social and Cultural Rights has interpreted the non-discrimination ground of “other status” to include “economic and social situation,”

### 5.9.7 *Voluntary associations*

Perhaps the most contentious aspect of the social group concept relates to membership in associations or groups from which voluntary dissociation is possible. In the sub-categories considered thus far, membership of a particular social group has been defined by reference to immutable characteristics – gender, sexual orientation, family, age, disability, and most aspects of economic or social class – which are beyond the control of a person to change. It is, however, widely accepted that application of the *ejusdem generis* approach to interpreting social group includes membership in a group defined by a characteristic that is “so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>637</sup> As in the case of religion or political opinion, where the voluntary association is essential to individual identity or conscience, social group is appropriately recognized for refugee law purposes.

Some groups will uncontroversially fall within this category, for example, membership of an organization that is concerned with the realization of human rights, with groups such as trade unions<sup>638</sup> and student organizations easily accommodated within the *ejusdem generis* approach, in part due to their grounding in “the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>639</sup> Students are frequently targeted in political campaigns and, in addition to recognition on the basis of actual or imputed political opinion, fall within the social group ground since the pursuit of education is a basic international human right.<sup>640</sup>

By contrast to these relatively straightforward categories, there are two that remain controversial – groups based on occupation and on wealth – in part because their description as immutable or fundamental to dignity is disputed.

First, there is conflicting authority as to whether a group defined by reference to an occupation or profession can constitute a social group. The lack of consistency is prevalent regardless of whether a decision-maker adopts the social perception or *ejusdem generis* approach to interpreting social group. On the one hand, the Australian Federal Court

noting that: “A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places”: CESCR General Comment No. 20, *supra* n. 26, at [35].

<sup>637</sup> *Acosta* (USBIA, 1985); *Ward* (Can. SC, 1993).

<sup>638</sup> We note that the Refugee Act 1996 (Ireland), s. 1 defines the phrase “membership of a particular social group” to include “membership of a trade union.”

<sup>639</sup> Civil and Political Covenant, *supra* n. 147, at Art. 22(1). We note however that this right is not absolute but rather may be limited in accordance with Art. 22(2) which provides: “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

<sup>640</sup> Universal Declaration, *supra* n. 560, at Art. 26; Economic, Social and Cultural Covenant, *supra* n. 170, at Art. 13.

applied the social perception test to find that “beauty industry workers” constituted a social group,<sup>641</sup> explaining that

the situation in Cambodia under Pol Pot, where “teachers, lawyers, doctors and others . . . were regarded as potentially dangerous to the new order,” [is] a textbook example of persecution for membership of a social group . . . In *Zamora* the Full Court instanced human rights workers in some countries. It is easy to think of other illustrations, such as landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, and ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural revolution.<sup>642</sup>

On the other hand, the Full Federal Court of Australia, relying on the same social perception test, opined that “one should be cautious in characterizing an occupational group as a particular social group” as “in many cases an occupational group will not satisfy the requirement that it be recognized within the society as a group, even though it may fairly be said that the members of an occupational group have common characteristics not shared by their society.”<sup>643</sup> A similar stance is taken in the US, where the “social visibility” requirement – the predecessor to the current “social distinction” requirement – has been applied so as to reject social groups such as “bank employees,”<sup>644</sup> “female teachers who are not party supporters,”<sup>645</sup> and “employees at the US Embassy in Haiti,”<sup>646</sup> at least in part on the basis that the group “did not possess the requisite ‘social visibility’ to qualify” as a social group.<sup>647</sup>

Yet in practice the *ejusdem generis* approach to interpreting social group has not proven more reliable in the context of groups defined by reference to occupation. This is perhaps unsurprising given that in *Acosta* – the jurisprudential foundation for the *ejusdem generis* approach – the Board of Immigration Appeals held that a Salvadoran taxi cooperative did not constitute a particular social group on the basis that the “internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.”<sup>648</sup> Relying on this reasoning, claims grounded in a risk for reasons of occupation have sometimes been rejected in Canada,<sup>649</sup> the United Kingdom,<sup>650</sup> and New Zealand.<sup>651</sup> But given that the freedom to choose one’s occupation is an internationally protected human

<sup>641</sup> *Nouredine v. Minister for Immigration and Multicultural Affairs*, (1999) 91 FCR 138 (Aus. FC, Aug. 18, 1999), at 143.

<sup>642</sup> *Ibid.*, at 143–44.

<sup>643</sup> *Minister for Immigration and Multicultural Affairs v. Zamora*, (1998) 85 FCR 458 (Aus. FFC, Aug. 5, 1998), at 464.

<sup>644</sup> *Castro-Paz v. Holder*, (2010) 375 Fed. Appx. 586 (USCA, 6th Cir., May 3, 2010), at 590.

<sup>645</sup> *Mushayahama* (USCA, 6th Cir., 2012), at 447. <sup>646</sup> *Pierre* (USCA, 11th Cir., 2011).

<sup>647</sup> *Castro-Paz* (USCA, 6th Cir., 2010), at 588.

<sup>648</sup> Foster, *supra* n. 403, at 72, citing *Acosta* (USBIA, 1985), at 234.

<sup>649</sup> In *Ward* (Can. SC, 1993), at 739, the Canadian Supreme Court approved the outcome in *Acosta* (USBIA, 1985).

<sup>650</sup> See e.g. *Ouanes v. Secretary of State for the Home Department*, [1998] 1 WLR 218 (Eng. CA, Nov. 7, 1997), at 225: “A common employment does not ordinarily have that impact upon individual identities or conscience necessary to constitute its employees a particular social group within the meaning of the Convention.”

<sup>651</sup> *Re KR, Refugee Appeal No. 61/92* (NZ RSAA, Jul. 22, 1992), at 10.

right,<sup>652</sup> such decisions are difficult to understand. Since the *ejusdem generis* approach includes as particular social groups those groups defined by pursuit of a fundamental interest – surely including by pursuit of a human right – is there really a basis to recognize some occupations as particular social groups, but not others?

5 In practice, decisions about whether or not to recognize an occupation-based group tend to reflect a class bias in that a claim from a professional person, or one whose occupation is more likely to be considered noble or particularly worthy such as a member of a religious order<sup>653</sup> or human rights worker,<sup>654</sup> is more likely to succeed than a claim from a relatively unskilled person such as a tourist guide.<sup>655</sup> This is so even though an unskilled person  
10 may have far more difficulty in finding alternative work or sustaining an adequate standard of living as a result of renouncing his or her occupation on return.<sup>656</sup> For example, the Canadian Federal Court dismissed a claim from a taxi driver on the basis that the “vocation of taxi driver does not constitute an innate characteristic or one that is fundamental to human dignity” and “the applicant acknowledges that he would change professions if he has  
15 to return to Haiti.”<sup>657</sup> This result was reached notwithstanding the court’s acceptance of the “difficult living conditions in Haiti and the chronic unemployment that continues to plague that country.”<sup>658</sup>

In our view, a correct application of the *ejusdem generis* approach would result in the inclusion of occupation-based groups per se within the ambit of the particular social group  
20 category. The cases that have rejected occupation-based social groups under the *ejusdem generis* framework have relied on the principle that dissociation is to be expected as it does not require renunciation of basic human rights or entitlements, on the basis that there is no guarantee at international law to a particular job.<sup>659</sup> This is, however, a mistaken analysis. It is true that “the right to work, which includes the right of everyone to the opportunity  
25 to gain his living by work which he freely chooses or accepts,” enshrined in Art. 6(1) of the Economic, Social and Cultural Covenant, does not guarantee a right to a particular job.<sup>660</sup> However, that is no answer to the question whether a person can be expected to abandon his or her ordinary means of obtaining a livelihood in order to avoid a risk of being persecuted. To the contrary, the better analysis is to focus on the right “not to be  
30 unfairly deprived of employment,”<sup>661</sup> and the notion that, as recognized by the UNHCR, “[r]equiring an applicant to abandon his or her occupation in order to avoid persecution

<sup>652</sup> This was recognized in *Jahazi* (Aus. FC, 1995), at 299, relying on analysis in Hathaway, *Refugee Status*, at 168. See Universal Declaration, *supra* n. 560, at Art. 23; Economic, Social and Cultural Covenant, *supra* n. 170, at Art. 6. Accord Grahl-Madsen, who includes “civil servants, businessmen, professional people, farmers, workers” within the social group category: *supra* n. 193, at 219.

<sup>653</sup> *Ouanes* (Eng. CA, 1997). <sup>654</sup> *Nouredine* (Aus. FC, 1999).

<sup>655</sup> *Zamora* (Aus. FC, 1998). <sup>656</sup> See Foster, *supra* n. 18, at 317.

<sup>657</sup> *Orphee v. Canada (Minister of Citizenship and Immigration)*, [2011] FC 966 (Can. FC, Jul. 29, 2011), at [20].

<sup>658</sup> *Ibid.* <sup>659</sup> See e.g. *Ouanes* (Eng. CA, 1997).

<sup>660</sup> The phrase “work which he freely chooses or accepts” was designed to prohibit forced labor. It was agreed that the state could not be expected to provide everyone with work of their own choosing: see M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998), at 197–99.

<sup>661</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, UN Doc. E/C.12/GC/18 (Feb. 6, 2006), at [6]. This can be implied from Art. 6(1) on its own, or in combination with Art. 2’s non-discrimination provision.

amounts to a violation of the right not to be arbitrarily deprived of the right to work.”<sup>662</sup> Accordingly, occupational-based groups are properly understood to fall within the *ejusdem generis* approach to social group on the basis that they are groups defined by pursuit of a human right, and hence defined by a characteristic that is fundamental to individual identity or conscience. 5

A second controversial category is a social group based on wealth, economic privilege, or business interests. Where wealth or economic status is associated with class and is, in the context of the person’s country of origin, effectively immutable, a person may claim protection on the social group ground as discussed above.<sup>663</sup> Alternatively, where land is essential to pursuing one’s occupation, the claim may be analogous to occupation-based social groups and hence assessed accordingly. 10

However, where a person is at risk merely because he or she is wealthy – a particularly prevalent scenario in the context of a risk of extortion – the question of social group is significantly more ambiguous. While such claims are sometimes, but not always, accepted under the social perception analysis,<sup>664</sup> they are often assumed to fall outside the purview of social group under the *ejusdem generis* analysis since there is no “right to private property” at international law.<sup>665</sup> This may not be so given that “property” is recognized as a prohibited ground of discrimination at international law.<sup>666</sup> The strongest argument for recognition under the *ejusdem generis* approach is that in the context of non-discrimination, “property” has been interpreted broadly to include “real property (eg land ownership or tenure) and personal property (eg intellectual property, goods and chattels, and income) or the lack of it.”<sup>667</sup> Yet an effort must also be made to give effect to the overarching commitment to include as nexus grounds only immutable factors – either in the sense that the characteristic cannot be renounced, or that renunciation should not be required given that the characteristic is fundamental to identity or conscience. Given the ease with which one can dissociate from wealth and the fact that loss of property occasioned by such divestiture is not a protected interest at international law, there is a sound basis for concluding that wealth per se is not appropriately within the purview of social group for the purposes of defining those in need of international refugee protection. 25

### 5.9.8 Former status or association

The third and final variant of the *ejusdem generis* approach encompasses groups defined by a former status, since history or experience is not within a person’s current power to 30

<sup>662</sup> UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, at [39].

<sup>663</sup> See *supra* Ch. 5.9.6.

<sup>664</sup> In Australia they are more likely to be accepted (see Foster, *supra* n. 403, at 69 n. 418), whereas in the US they are more likely to fail the “social visibility” test: *ibid.*, n. 419.

<sup>665</sup> The relevant provision in the Universal Declaration, *supra* n. 560, was not replicated in the Civil and Political Covenant, *supra* n. 147.

<sup>666</sup> See Civil and Political Covenant, *supra* n. 147, Art. 2(1); Economic, Social and Cultural Covenant, *supra* n. 170, Art. 2(2).

<sup>667</sup> CESCR General Comment No. 20, *supra* n. 26, at [25]. Compare with the *obiter* comments in *Re AME and JGU* (USBIA, 2007): “We would not expect divestiture when considering wealth as a characteristic of which a group might be based”: at 73–74.

change.<sup>668</sup> Accordingly, claims have been appropriately recognized where a person is at risk due to her status as a former victim of trafficking,<sup>669</sup> a former child soldier,<sup>670</sup> a former employee, including of the police or military,<sup>671</sup> a former bodyguard of the daughter of the president,<sup>672</sup> and a KGB defector.<sup>673</sup>

5 One element of such cases that has proven particularly troubling concerns former membership of a group that has criminal aims or objectives, or is engaged in criminal behavior, such as gangs.<sup>674</sup> Clearly a claim based on current membership of such groups falls outside the nexus clause given that there is no right to engage in criminal activity, nor can criminal association be said to be fundamental to identity or conscience. However, where  
10 a person is at risk of being persecuted on the basis of his or her *former* membership in such an association or entity, the claim ought logically to be included within the ambit of social group since former status is immutable. Indeed, where a person was forced into the relevant group or compelled to undertake certain criminal action, there appears little difficulty in readily accepting that this is so.<sup>675</sup> Yet where a person freely joined such a group,  
15 some decision-makers have expressed (sometimes vehement) opposition to the notion that a social group can be defined by a “shared past experience” that includes “violent criminal activity.”<sup>676</sup>

The difficulty is that rejection of a social group on the basis that a decision-maker views the applicant’s background as unsavory is in essence the exercise of a subjective  
20 judgment as to whether the applicant deserves rather than needs protection. Leaving aside the inconsistent outcomes that will inevitably ensue once such a degree of policy-based subjectivity is permitted to enter the analysis,<sup>677</sup> there are serious questions about the legitimacy of such an interpretation as a matter of international law.

<sup>668</sup> *Acosta* (USBIA, 1985); *Ward* (Can. SC, 1993).

<sup>669</sup> *SB* (UKAIT, 2007), at [54]–[56]. In *Norway, the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm* (Immigration Act) 2008 states in s. 30(d) that “[f]ormer victims of human trafficking shall be regarded as members of a particular social group.”

<sup>670</sup> *Lukwago* (USCA, 3rd Cir., 2003); *Gomez-Zuluaga* (USCA, 3rd Cir., 2008), at 345–48.

<sup>671</sup> See e.g. *Chanco v. Immigration and Naturalization Service*, (1996) 82 F.3d 298 (USCA, 9th Cir., Apr. 19, 1996), at 302–3, and *Cruz-Navarro* (USCA, 9th Cir., 2000), where the court recognized that “[p]ersons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA”: at 1028–29, and the authorities cited therein. See also *Matter of Fuentes* (USBIA, 1988), at 662.

<sup>672</sup> *Velarde* (USCA, 9th Cir., 1998), at 1311–13. <sup>673</sup> *Koudriachova* (USCA, 2nd Cir., 2007), at 262–63.

<sup>674</sup> Such cases have involved former gang members (*Ramos* (USCA, 7th Cir., 2009)); persons who have “cooperated with international investigators” (*Gashi v. Holder*, (2012) 702 F.3d 130 (USCA, 2nd Cir., Dec. 18, 2012), at 132); “civilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs” (e.g. *Garcia* (USCA, 3rd Cir., 2011), at 504); and refusal to join a gang (the UNHCR, in its “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, notes that “[p]ast actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable”: at [37]. For relevant US jurisprudence, see Anker, *supra* n. 29, at 385–88. There is however considerable contrary authority, especially in the US, based on the social visibility criterion: see e.g. *Rivera-Barrientos* (USCA, 10th Cir., 2011); *Velasquez-Otero v. US Attorney General*, (2012) 456 Fed. Appx. 822 (USCA, 11th Cir., Feb. 1, 2012); and *Zelaya v. Holder*, (2012) 668 F.3d 159 (USCA, 4th Cir., Jan. 11, 2012)).

<sup>675</sup> UNHCR, “Guidance Note on Victims of Organized Gangs,” *supra* n. 9, recognizes that “[p]ast association with a gang may be a relevant immutable characteristic in the case of individuals who have [been] forcibly recruited”: at [37].

<sup>676</sup> *Arteaga* (USCA, 9th Cir., 2007), at 945. <sup>677</sup> *Foster*, *supra* n. 403, at 66.



The Convention itself provides at least two answers to this dilemma.

First, the Convention sets out grounds on which a person may be denied refugee status when he or she is deemed “undeserving,” and one of those bases – that there are “serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge”<sup>678</sup> – denies refugee status to fugitives from justice.<sup>679</sup> Indeed, this was precisely the basis on which the Canadian Supreme Court in *Ward* rejected the argument that the relevant social group could be limited because of the applicant’s criminal activity, noting that to do so would “render[] redundant the explicit exclusionary provisions.”<sup>680</sup> Similarly, in overturning the Board of Immigration Appeal’s rejection of a social group on the basis that the applicant had voluntarily joined a gang, the US Court of Appeals for the Seventh Circuit opined that the BIA “has never given a reasoned explanation for why the statutory bars to which we have just referred [the domestic equivalent of Article 1(F) of the Convention] should be extended by administrative interpretation to former members of gangs.”<sup>681</sup>

Second, if the true concern in such cases is risk to the asylum state, the Convention allows an asylum state to divest itself of protection obligations to even a recognized refugee where critical issues of safety and security are demonstrated.<sup>682</sup>

Most fundamentally, reference to the non-discrimination norms that underpin the nexus clause supports the inclusion of groups based on former status within the social group ground, notwithstanding some element of undesirability. The Economic Committee, for example, has noted that “other status” as a protected ground of non-discrimination at international law could include, for example, “the denial of a person’s legal capacity because he or she is in prison.”<sup>683</sup> As abhorrent as a person’s behavior may appear, if their immutable or protected status will give rise to a risk of being persecuted (which in itself may involve a consideration of permissible limitations on rights),<sup>684</sup> refugee status cannot be denied based on subjective ideas of merit. Rather, any exclusion from status must be undertaken in light of the explicit provisions set by the Refugee Convention which define when a person is appropriately deemed to be undeserving of international protection. The sound approach to adjudicating claims based on former criminal group membership is therefore to consider separately the distinct issues of the existence of a particular social group on the one hand, and any possible grounds of exclusion on the other, rather than conflating the two issues into a subjective assessment of moral worth.<sup>685</sup>

In sum, we believe that the only principled and sustainable method of interpreting the membership of a particular social group ground is to adopt the *ejusdem generis* principle, meaning that a group is protected where it is defined by a common characteristic that is either immutable or fundamental to identity or conscience. In our view, it is time for the global interpretative community to relinquish the unprincipled and fundamentally unworkable social perception test, and reclaim the dominant *ejusdem generis* test as the

<sup>678</sup> Art. 1(F)(b), see *infra* Ch. 7.2.

<sup>679</sup> Although we note Art. 1(F)(a) might also be relevant in extreme cases: see *infra* Ch. 7.3.

<sup>680</sup> *Ward* (Can. SC, 1993), at 740. <sup>681</sup> *Ramos* (USCA, 7th Cir., 2009), at 430.

<sup>682</sup> See Art. 33(2); but see discussion of the strict requirements in order to engage this provision in J. C. Hathaway, *Rights of Refugees under International Law* (2005), at 342–55.

<sup>683</sup> CESCR General Comment No. 20, *supra* n. 26, at [27]. Further it is important to ensure that “one does not suffer discrimination owing to characteristics one cannot change”: Joseph, Schultz, and Castan, *supra* n. 582, at 693.

<sup>684</sup> See *supra* Ch. 3.5. <sup>685</sup> *Foster*, *supra* n. 403, at 67.

sole method of assessing membership of a particular social group for Convention purposes. Analyzing the ground in this manner provides, as we have endeavored to show in this sub-chapter, a principled and coherent framework capable of consistent application, and amenable to evolutionary developments in international non-discrimination law, thereby ensuring the continued relevance of the Refugee Convention to the claims of modern refugees.