WHO IS A REFUGEE?
The High Court's Interpretation:
from *Chan* (1989) to *Ibrahim* (2000)

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Since 1989, when *Chan v Minister for Immigration and Ethnic Affairs* ("Chan")[1] was decided in the High Court, until October, 2000 when the High Court handed down judgment in *Minister for Immigration and Multicultural Affairs v Ibrahim* ("Ibrahim")[2], there has been here in Australia an evolving jurisprudence which has examined this most universal of legal questions "Who is a refugee?" in the context of the Migration Act 1958 (Cth). This paper examines, albeit in a summary way, whence that definition is derived, how it is presently being construed, and possible future areas of controversy in defining a refugee.

The Migration Act 1958

An applicant for asylum, who is an unauthorised arrival in Australia, has to say enough "to engage Australia's protection obligations" as an essential condition to obtaining a Protection Visa.

Under s36(2) of the Migration Act 1958:

> A criterion for a Protection Visa is that the applicant for the visa is a non citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the refugee protocol.

As explained in s5 of the Act, the Refugees Convention means "the convention relating to the Status of Refugees done at Geneva at 28 July 1951" and the Refugees Protocol means "the Protocol relating to the Status of Refugees done at New York at 31 January 1967".

The 1951 convention defined a refugee as any person who:

> … *as a result of events occurring before 1st January 1951 and* owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence *as a result of such events*, is unable, or owing to such fear, is unwilling to return to it. (emphasis added)

The Convention included provisions about dual or multiple nationality and the circumstances in which a person may cease to be a refugee or be excluded from the benefits of refugee status.

In 1967 the Protocol achieved the universalisation of the convention definition of refugee status by removing the words which are italicised. The requirement that the claim relate to a pre-1951 event in Europe was eliminated by the Protocol and the Protocol today is read omitting the italicised words. The Convention definition is part of the law of Australia

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1 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989-90) 169 CLR 379.

2 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 175 ALR 585.

because, and only because, the Migration Act 1958 in s36(2) recognises the Convention definition.

The Background to the Definition of a Refugee

Before the twentieth century there was little concern about the precise definition of a refugee since most of those who could move from one country to another for shelter were not perceived as a burden but a "source of communal enrichment". However, the adoption of policies by western States during the early twentieth century changed this. Immigration was no longer a right in the individual to exercise self determination but more a vehicle to facilitate the selection by States of new inhabitants who could contribute skills and wealth to the national wellbeing.

In the early twentieth century the most prominent migrations were those of more than one million Russians during and after the Bolshevik revolution and the exodus in the early 1920s of Armenians from Turkey.

Professor Hathaway considers that between 1920 and 1935 refugees were defined in largely jurisdictional terms, which meant that they were treated as refugees because they were groups of persons deprived of formal protection in the country of origin. Mostly these groups were movements of people who found themselves abroad and unable to settle because no nation was prepared to assume responsibility for them.[3]

Between 1935 and 1939 the refugee agreements reflected a social approach to the definition of "Who is a Refugee". Now help would be extended to ensure the refugee's safety or wellbeing because that person had been caught up in an upheaval or dislocation such as National Socialism in Germany.[4]

The third phase comprised the accords between 1938 and 1950 where the refugee was now judged by individualistic standards as a person in search of an escape from perceived injustice and such person desired the opportunity to build a new life abroad. This approach affected the determination procedures because the decision whether a person was a refugee was no longer made strictly, on the basis of political or social categories, but rather on the merits of each applicant's case.[5]

This subjective concept of a refugee, whose individual merit was examined against the tenets and beliefs of the political system from which they came, was not embraced by the Socialist States. During the United Nations debates in 1946 the Socialist States asserted the impropriety of including political dissidents among the ranks of refugees protected by international law.

The definition agreed upon gave priority in protection matters to persons whose flight was motivated by Eurocentric political values. The more numerous western States were able to establish a definition of a refugee moulded to their own wishes. First, the concept of "fear of persecution" was sufficiently open ended to allow ideological dissidents to continue to receive protection from western countries. Secondly, only persons disenfranchised by their States for reasons of race, religion, nationality, membership of a particular social group or political opinion were included. Those were areas of discrimination where the eastern bloc countries were vulnerable. The western States absence of guarantees of socio-economic rights rather than human rights was protected. Victims from third world countries, suffering

3 James C Hathaway, *The Law of Refugee Status*, Toronto, Butterworths 1991, ("Hathaway") at 2-3.

4 Hathaway, at 4.

5 Hathaway, at 5.

from generalised political oppression, absence of health care, food, or education were more likely to be excluded from the definitions as were victims of natural disaster.[6]

The Status of the Convention

In October, 2000 the High Court delivered judgement in *Ibrahim*. Gummow J,[7] with whom the majority agreed, reaffirmed that under customary international law the right of asylum is a right of States, not of the individual, and no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national. Every State has a competence to regulate admission of aliens at will. A State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State. In the absence of an extradition treaty the asylum State has no international obligation to surrender fugitives to the State from which they have fled and the fugitives are protected against the exercise of jurisdiction by that State.
The 1951 Refugee Convention followed the Universal Declaration of Human Rights adopted in 1948. By Article 14 of the 1948 Declaration, it was declared that "everyone has the right to seek and enjoy another country's asylum from persecution". The "right to seek" asylum was not accompanied by any assurance that the quest would be successful. In the subsequent International Convention on Civil and Political Rights (the ICCPR) which Australia signed on 13 November 1980, Article 12 stipulated freedom to leave any country and forbad arbitrary deprivation of the right to enter one's own country, but the ICCPR did not provide for any right of entry to seek asylum any more than had the Universal Declaration of Human Rights.

The Refugee Convention was negotiated and agreed between States so that it needs to be understood at the State level.

In reinforcing the limited nature of the Convention definition which has been brought into Australian law, Gummow J stated:

> The definition (in Article 1A(2)) does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention.[8]

In *Applicant A*,[9] Dawson J had said:

> No matter how devastating may be epidemic, natural disasters or famine, a person fleeing them is not a refugee within the terms of the Convention.

Conversely in *Ibrahim*, Kirby J said:

> this court should not narrowly confine the operation of the Convention language… it is an even more serious mistake to impose upon the Convention definition of "refugee" Eurocentric ideas, which are not, and never have been, a necessary part of the operation of the Convention.[10]

The history of the Convention does, however, suggest a Eurocentric bias in its creation but Kirby J was perhaps indicating that the Convention definition does not of necessity and

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6 Hathaway, at 10.

7 *Ibrahim*, at 619-622.

8 *Ibrahim*, at 622.

9 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996-7) 190 CLR 225.

10 *Ibrahim* at 639-640.

never did require a Eurocentric construction. For now, however, his view that the court should not narrowly confine the Convention language is a minority view.

The 1989 Decision of *Chan*

Much of the Australian case law in the last eleven years may be regarded as the progeny of the 1989 High Court decision in *Chan*. Mr Chan Yee Kin was a member of a faction of the Red Guards who lost a struggle for control of that organisation in his local area. He and members of his faction were questioned by the police and he was detained. On a number of occasions he sought to escape from his local area and each time was captured and imprisoned. He stowed away on a ship to Australia in 1980. His application for refugee status was initially rejected. However, 9 years after his arrival the High Court decided a delegate's decision should be set aside. Some important principles were decided.

First, that the determination of the status of an applicant is to be ascertained at the time when the determination is itself made. Secondly, that the degree of persuasion required to meet the definition is "a real chance" of persecution because this conveys a notion of substantial, as distinct from a remote chance, of persecution occurring.[11] It does not mean that the burden of persuasion is transformed into a standard of "more likely than not"[12] (citing *Immigration and Naturalisation Services v Cardoza-Fonseca*[13]). A real chance is one that is not remote, regardless of whether it is less or more than 50%. Thirdly, the phrase "well founded fear of being persecuted" requires both a subjective and an objective assessment.[14]

As McHugh J said:

> … a fear may be well founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in *Cardoza-Fonseca*, an applicant for refugee status may have a well founded fear of persecution even though there is only a 10% chance that he may be shot, tortured or otherwise persecuted. Obviously, a far fetched possibility of persecution must be excluded, but if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as "well founded" for the purpose of the Convention and Protocol.[15]

Some features of *Chan's* case have cast their shadows forward. In determining that the status of a refugee turns upon the facts existing when a person seeks recognition rather than deriving from some earlier point in time, the court was acknowledging that the language of the Convention itself tells against a construction that "once a refugee, always a refugee". Under article 1C a person ceases to be a refugee if he or she can no longer, because the circumstances which provided the basis for recognition as a refugee have ceased to exist, continue to refuse to avail him or herself of the protection of the country of nationality (Article 1C(5)). Likewise under Article 1C(6) if the applicant is a person who has no nationality, but because the circumstances in which he or she has been recognised as a refugee have ceased to exist, he or she is able to return to the country of former habitual residence, the applicant ceases to have that status. It could be that the current adoption of temporary protection visas by the government has been influenced in part by Article 1C(5) and (6) of the Convention the limiting effect of which was recognised by Toohey J in *Chan's* case. His Honour said:

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11 *Chan Yee Kin*, per Mason CJ at 389.

12 *Chan Yee Kin*, per Dawson J at 396.

13 1987 480 US 421.

14 *Chan Yee Kin*, per Dawson J at 396.

15 *Chan Yee Kin*, per McHugh J at 429.

> The structure of article 1 implies that status as a refugee is to be determined when recognition by the State party is sought, and that, if granted, the status may thereafter be lost because the circumstances giving rise to recognition have ceased to exist.[16]

Following the decision in *Chan*, the Full Federal Court held that the "real chance" test did not allow the Refugee Review Tribunal to engage in a process of weighing up evidence in order to determine the likelihood of future persecution. It found that the use of expressions such as "I give greater weight to" suggested that the Tribunal was assessing claims on a "balance of possibilities". The court maintained that assessing likelihood of persecution in this fashion ran counter to statements in *Chan* that a real chance of persecution may arise where the likelihood is less than 50%.[17] The Tribunal's decisions were also criticised for avoiding speculation of the likely fate of applicants. In 1996 the Full Court ruled that application of the "correct" real chance test involved a five stage process.[18] This led to a degree of confusion and the High Court criticised the Federal Court for scrutinising too closely the reasons of the Tribunal, and said that there should be a return to a simple application of the test, as framed by the High Court in 1989, the essence of which was to look to the future.[19]

The Scope of Well Founded Fear of Persecution

The High Court in *Chan* also devoted time to interpreting the words "well founded fear of persecution" in the Refugees Convention. Mason CJ saw persecution as a real chance that the applicant will suffer "some serious punishment or penalty or some significant detriment or disadvantage if he returns". Harm or threat of harm as part of a course of selective harassment of a person amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm though not every deprivation of a guaranteed freedom would do so.[20] Dawson J considered the phrase contained both a subjective and an objective requirement. There must be a state of mind, being fear of persecution, and a basis for that fear which is well founded. A fear can be well founded without any certainty or even probability that it will be realised. On the other hand it must mean something more than plausible.[21]

Clearly a threat to life or freedom may constitute persecution. McHugh J agreed with Toohey J that an applicant for refugee status may have a well founded fear of persecution even though there is only a 10% chance that he or she will be shot, tortured or otherwise persecuted. If there is a real chance that the applicant will be persecuted the fear should be characterised as "well founded". The notion of persecution involves selective harassment. It is not necessary that the conduct should be directed against the person as an individual and he or she may be persecuted because of membership of a group which is the subject of systematic harassment. A single act of oppression may suffice as long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person. The threat need not be the product of any policy of the government or the person's country. It is not confined to harm threatened which will result in loss of life or liberty.[22]

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16 *Chan Yee Kin*, per Toohey J at 405.

17 *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 55 FCR 375.

18 *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421.

19 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 278.

20 *Chan*, per Mason CJ at 388.

21 *Chan*, per Dawson J at 397.

22 *Chan*, per McHugh J at 429-430.

McHugh J said in *Chan* that persecution may be loss of employment because of political activities, denial of access to the professions and to education, or the imposition of restrictions traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement.[23]

In April, 2000 the High Court upheld a finding that a Chinese child, whose persecution took the form of discrimination on the grounds of being born outside the Chinese "one child policy", suffered persecution by deprivation of access to essential services such as health care, housing and food, and would be likely to face little prospect of employment.[24]

More recently still in *Ibrahim*, the High Court returned again to examine the meaning of "a well founded fear of persecution". McHugh J said it amounted to more than a random act. To amount to persecution there must be a form of "selective harassment" of an individual or a group of which the individual is a member. One act of selective harassment may be sufficient. The expression "systematic conduct" did not require that the applicant have to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Because of the misunderstanding that had arisen from using the term "systematic conduct", his Honour considered it was better to refrain from using it in the Convention context, but, if used, it is not to be regarded as requiring, for the purposes of obtaining refugee status, that a person fears persecution and must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic, but rather it means reference to non random acts.[25] Kirby J commented that McHugh J had thereby qualified his earlier statement in *Chan* about the necessity for "systematic conduct".[26]

The Convention does not require that persecution be perpetrated by the State. It is sufficient if the State is "unable or unwilling" to offer protection against persecution. In *Nagyari*[27] it was said that purely private, individual or sectional persecution does not implicate the controlling authorities of the country of original nationality and does not amount to persecution. However, State acquiescence in persecution may suffice. In 1999 the House of Lords in *R v Immigration Appeal Tribunal ex parte Shah*[28] found that domestic violence practised by the husbands of two applicants when in Pakistan, for which the applicants could not gain protection from the Pakistani authorities, constituted persecution because there was a failure of State protection.

Persecution and Laws of General Application

In *Applicant A*[29] McHugh J said conduct will not constitute persecution if it is appropriate and adapted to achieving some legitimate object of the country. A legitimate object will ordinarily be an object whose pursuit is required to protect the welfare of the State. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. In *Applicant A*, the applicants were a Chinese couple who had one child, and wanted more, and feared persecution in the form of sterilisation if returned to China. The Chinese "one child policy" was expressed in laws that limited couples as to the number of children permitted.

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23 *Chan*, per McHugh J at 430-431.

24 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (2000) HCA 19.

25 *Ibrahim*, per McHugh J at 609.

26 *Ibrahim*, per Kirby J at 637.

27 Unreported, Federal Court of Australia, O'Loughlin J, 22 May 1997.

28 [1999] 2 AC 629.

29 Above n 9.

Subsequently in *Chen Shi Hai*,[30] the High Court considered again the Chinese "one child policy", though this time the applicant was a $3^1/_2$ year old child. The High Court first referred with approval to McHugh J's comments in *Applicant A*:

> Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct (but) … on whether it discriminates against the person because of race, religion, nationality, political opinion or membership of a social group.[31]

Their Honours then continued:

> In that context, his Honour (McHugh J) also pointed out that "enforcement of a generally applicable criminal law does not ordinarily constitute persecution." That is because the enforcement of a law of that kind does not ordinarily constitute discrimination. To say, that ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that the selective enforcement of a law of general application may result in discrimination. As a general rule a law of general application is not discriminatory.[32]

In *Chen Shi Hai* a third child of unmarried parents, would have been deprived by Chinese law of essential benefits such as health care, education and basic foods if returned to China. It was held by the High Court that the child was a victim of persecution even though the State sanctioned penalties against children such as the applicant, who had been born outside the "one child policy". It was argued that China's "one child policy" was expressed in laws of general application, which directly or indirectly penalised children such as Chen Shi Hai but such laws were selective and discriminatory, impacting upon a class, and therefore could properly be regarded as persecutory. Since some of the laws specifically punished the child rather than the parents, these laws even if regarded as laws of general application operated in a discriminatory way and so could be regarded, if sufficiently draconian, as persecutory.

"For reasons of"

The opening words of the preamble to the Convention relating to the status of refugees affirms the principle that:

> Human beings shall enjoy fundamental rights and freedoms without discrimination.

These words were referred to by Brennan CJ in Applicant A as demonstrating that the persecution envisaged must be discriminatory and the term "for reasons of" excludes indiscriminate persecution.[33]

In *Ibrahim*[34] the applicant was born in Somalia. Somalia's population is divided into clans and sub-clans. After the overthrow of Siad Barre, who exercised a dictatorship in Somalia, civil unrest broke out. During the civil unrest the applicant's house was destroyed and another clan took him and his family to a farm, where he was compelled to work in conditions of slavery and his wife was raped. Later the applicant and his family escaped. He made his way to Australia where he told immigration officials that if he was sent back to

30 *Chen She Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553.

31 (1997) 190 CLR 225 at 258.

32 At 558-559.

33 (1997) 190 CLR 225 at 233; see also Dawson J at 345, McHugh J at 355.

34 Above n 2.

Somalia his life would be at risk. On one view, it was his membership of a clan or sub-clan that provided the dominant reason for the potential persecution of the applicant. Another view was that the potential persecution that he feared arose because the perpetrator of the persecution, a rival clan, were competing for land and resources. The clans attack anyone who opposes or is perceived to oppose their claims to the land and resources of Somalia. The Tribunal found that the applicant's fear of persecution was not for reasons of his membership of a specific clan but because of the instability, anarchy and murderous shiftings which are the consequence of power struggles between clans and sub-clans. The Tribunal said there was not "a differential impact which is over and above the ordinary risk of clan warfare" likely to be suffered by the applicant because members of the other clans or sub-clans in that area are potential victims of the civil unrest, and so the fear of persecution was not for a Convention reason. In applying the wording "differential impact" the Tribunal was applying language used recently by the House of Lords in the case of *Adan v Secretary of State*[35] which also involved a Somalian. The High Court (by 4 to 3), found that the Tribunal had not erred in concluding that persecution was not "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. The House of Lords test of "differential impact" was not favoured by some members of the High Court.

A claimant needs to show that there is a connection between the persecution feared and one of the five Convention reasons. In *Applicant A*, the two Chinese applicants feared sterilisation once returned to China. It was conceded by the Minister that forced sterilisation, in the particular circumstances, gave rise to a fear of persecution but it was argued by the Minister that it was not "for reasons of" membership of a particular social group or political opinion. It was held by a majority of the court that the persecution was not for reasons of the applicants belonging to a particular social group as the applicants (being Chinese parents with one child and desiring a second) could not be regarded as a "particular social group."

In *Applicant A* it was difficult to escape the conclusion that any definition of the claimants as a "particular social group" relied at least in part upon a definition which had as a component the apprehended fear of persecution.

The Court adopted what had been said by the Full Federal Court in *Ram*:[36]

> Persecution 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...

Later in *Chen Shi Hai*,[37] the High Court accepted that although persecution usually contains an element of motivation for the infliction of harm it may be carried out without "enmity" or "malignity", and adopted what French J had said as the single judge:

> Motivation connecting persecution to the relevant attribute is sufficient. Persecution may be carried out ... efficiently and with no element of personal animus directed at its objects.[38]

It is enough that the reason for the persecution is found to lie in one of the five Convention attributes.

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35 [1999] 1 AC 293.

36 *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 314 at 317, per Burchett J.

37 (2000) 170 ALR 553.

38 At 561.

Persecution for Reasons of "Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion"

"Race"

The term "race" arose in *Commonwealth v Tasmania*,[39] where Brennan J said that the word "race" is not a precise concept and constitutional discrimination against racial minorities may not necessarily result in an applicant coming within the definition of the refugee.

In *Uma Chand*[40] a Fijian Indian failed in his claim that effective disenfranchisement under the Fiji Constitution rendered him a refugee on grounds of "race".

"Nationality"

In *Gunaseelan*[41] the applicant was a Malay of Indian descent who claimed that preferential treatment was given to Malays in employment and education and this constituted persecution. The Court held that affirmative action policies may not necessarily involve persecution of the non-assisted group. The nationality ground requires that in order to obtain protection an applicant needs to show an absence of protection in all countries where he or she has nationality. So if an applicant has dual nationality it must be shown that he or she cannot obtain protection in either of the countries for which nationality is claimed. Dr. Crock states where refugee claims are made on grounds of nationality:

- This term seems to be used synonymously with the notion of ethnicity.[42]
- There is some doubt whether "nationality" covers Stateless persons.[43]

"Religion"

Where asylum is sought on grounds of religion cases have often involved oppression of religion on generalised grounds such as destruction of places of worship or proscribing religious observance outside the home. There are some Refugee Review Tribunals which have held that this does not amount to persecution of individuals.[44]

"Particular Social Group"

The "particular social group" category has given rise to the most difficulty. As earlier discussed, in *Applicant A*, the Chinese couple, who claimed persecution on the basis of apprehended sterilisation on return to China, were defined as a social group by reference, at least in part, to the fear of persecution they would share with like couples with one child. The majority in the High Court held that a "particular social group" ground was not intended to be a safety net for those who could not be conveniently classified under one of the other four Convention attributes.

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39 (1983) 159 CLR 1.

40 Unreported, Federal Court of Australia, Branson J, 17 March 1997.

41 Unreported, Federal Court of Australia, French J, 9 May 1997.

42 Mary E Crock, *Immigration and Refugee Law in Australia*, NSW, Federation Press, 1998 at 144.

43 Hathaway, n 3, at 60-63.

44 Crock, n 42 at 145-146.

"Political Opinion"

"Political opinion" has been defined in broad terms as "any opinion or any matter in which the machinary of State, government and policy may be engaged".[45]
There has been Canadian judicial criticism of this passage since the definition assumed persecution was always by the government or ruling party. The Federal Full Court has held in Australia that political opinion need not be expressed outwardly and it need not necessarily be the claimant's true belief.[46] The High Court has said it is sufficient for these purposes that such an opinion is imputed to the claimant by the perpetrators of the persecution.[47]

Persons without Nationality (the Second Half of the Definition)

A reading of the Convention definition of a Refugee shows that it is in two parts separated by a semi colon. The first half refers to a person who is outside his or her country of nationality, the second part to a person without nationality outside his or her country of former habitual residence. The person without nationality (i.e. stateless) on a literal reading of the definition, comes within the definition of a refugee if he or she is "unable to return" to the country of former residence. There is no express requirement that such a person have a well founded fear of persecution for one of the five convention reasons. However, a person, without nationality, who is "unwilling to return" to the former country of residence, has to show that unwillingness is "owing to such fear".

In *MIEA v Savvin*[48] a Full Federal Court held that the definition of a refugee does require that a stateless person prove that inability to return to the place of former habitual residence is "owing to a well founded fear of persecution" for a Convention reason. In so holding their Honours reversed the decision of a single judge[49] who had found that this was not a requirement that Mr and Mrs Savvin had to establish. The couple were Soviet nationals who had resided in Latvia and, on the collapse of the Soviet Union, had continued to reside there without nationality. The Full Federal Court considered that there was "obiter dicta" and support from the House of Lords decision of *Adan*[50] for this view.
The High Court in *Ibrahim* did not unreservedly adopt the reasoning in *Adan*. Furthermore, it is curious that none of the Full Federal Court judgements refer to the weighty view of the author Grahl Madsen who said of the 1951 Convention definition:

> ..he must be outside the said country owing to a well founded fear of being persecuted for any of the reasons set forth in Article 1A(2) …This provision does not, however, apply to a person not having a nationality who is unable to return to the country of his former residence. This exception is of particular import with respect to stateless persons who have been expelled by a new government.[51]

Perhaps *Savvin* may not be the last word on this matter.

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45 Guy S Goodwin-Gill, *The Refugee in International Law*, 2nd ed, 1996 at 49.
46 *Salibu v Minister for Immigration and Ethnic Affairs* (1998) 89 FCR 38 at 46.
47 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571.
48 (2000) 171 ALR 483.
49 (1999) 166 ALR 348.
50 Above n 35.
51 Grahl Madsen, *The Status of Refugees in International Law*, Vol 1, 1966 at 143-144.

Refugees 'sur place'

A reading of the definition of a refugee under the Convention shows that there is no formal requirement that a refugee be someone who derives his or her fear from experiences in the country of nationality. Indeed, sometimes the claimant may never have set foot in their country of nationality - such was the case with the 3½ year old Chen Shi Hai. On occasions, an adult claimant may derive fear of persecution from their own conduct of defiance outside their country of nationality. But difficult issues arise where a claimant commits acts after arrival in Australia for the purpose of manufacturing or enhancing a claim to refugee status. If someone does deliberately provocative acts which are likely to give rise to a self engineered fear of persecution if returned to the country of nationality, then the question arises whether there is a "bad faith" exemption which applies to the definition.

In *Somaghi*[52] the claimant was Iranian. Having failed to obtain a protection visa *Somaghi* wrote a provocative letter to the Iranian Embassy (amongst others) abusing the Iranian Government. In the Full Federal Court, Gummow J said:

> ... it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to a well-founded fear of persecution should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be "well-founded.[53]

More recently the Full Federal Court in *Mohammed*[54] considered the circumstances of a Sudanese applicant rejected by the Refugee Review Tribunal who sent a letter to his brother in Sudan. The applicant contended at a second Tribunal hearing that the letter had been intercepted, and his brother interrogated and questions asked about when the applicant himself would be returning to Sudan. It was accepted that he had a well-founded fear of persecution but the Tribunal, influenced by *Somaghi*, found that the applicant had sent the letter expecting that it might be intercepted by the security authorities and so had acted in bad faith in engineering a basis for his subsequent claim. His claim was rejected but, on appeal, Lee J said the Tribunal ought to have considered that the applicant might still have a legitimate basis to fear persecution even if his fear was partly generated by his own conduct.

By majority the Full Federal Court agreed with Lee J and adopted the approach of the English Court of Appeal in *Danian v Secretary of State for the Home Department*,[55] where the court had held that, although a Nigerian cynically and blatantly brought to the attention of the Nigerian authorities his own opposition, this did not of itself defeat a claim for asylum on the basis of "bad faith", though that conduct may well be relevant to his credibility. The English Court of Criminal Appeal had read Lee J's reasons and expressed a preference for his approach over the approach adopted in *Somaghi*. The Minister has now sought special leave to appeal to the High Court.

Exclusion of a Refugee on the Basis of a Safe Third Country and Article 33 of the Convention

Article 1E of the Refugee Convention reads:

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52 *Somaghi v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 100 and see also *Heshmati v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 123, decided on the same day.

53 At 118.

54 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 173 ALR 23.

55 Unreported, 28 October 1999.

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

It was said by the Full Federal Court in *Thiyagarajah*:[56]

> If it is clear on the information before the decision maker that the applicant has taken residence in a country other than his country of nationality and is recognised by the competent authorities of that country as having rights and obligations which are attracted to the possession of the nationality of that country (so as to come within Article 1E), there is neither need nor practicable purpose in the decision maker exploring whether the applicant still falls, or indeed whether he ever fell, within Article 1A(2).

In recent years there has been some dilution by the courts of what constitutes "rights and obligations which are attached to the possession of the nationality" of a country. To discuss safe third country issues is beyond the scope of this paper but the matter was taken up recently in *Patto*.[57] Where there is a safe third country there is ordinarily no obligation for Australia to consider if the applicant is a refugee. However, a decision maker has to be mindful of Article 33 of the Convention which provides:

> 1. No contracting State shall expel or return "refouler" a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present position may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

In *Patto*, French J drew some conclusions from the case law in relation to Australia's protection obligations under Article 33 and how far an applicant who has stayed in a third country should be assessed under Article 1A(2):

1 Return of a person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harm therein.

2 Return of the person to the third country will not contravene Article 33, whether or not the person has a right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

3 Return of the person to a third country will not contravene Article 33 even though the person has no right of residence in that country and the country is not a party to the Convention, provided the country can be expected, nevertheless, to afford the person claiming effective protection against threats to his life or freedom for a Convention reason.[58]

This is not seen as an exhaustive list but raises the question, which is likely to be debated in the courts, about the scope of Article 1E and Article 33 as those articles are applied in the context of the *Migration Act 1958*.

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56 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 555.

57 *Patto v Minister for Immigration and Multicultural Affairs* (2000) FCA 1554.

58 Ibid, at para 37.

Under s36(3) of the Migration Act, Australia does not have protection obligations to a claimant "who has not taken all possible steps to avail himself or herself of a right to enter and reside in … any country apart from Australia" provided that he or she would not apprehend persecution (s36(4) and (5)).

The Future

So what of the future? A few signs can perhaps be discerned. These are:

1 The Convention definition of a refugee is likely to be given a confined meaning, at least in the short term, given Gummow J's interpretation in *Ibrahim* of the Convention's historical legacy.

2 At present a stateless person who is unable to return to their country of habitual residence has to prove a well founded fear of persecution. The High court may one day consider the Full Federal Court's view in *Savvin*.

3 Will Australian Courts require those who have travelled to Australia "from safe third countries" to be assessed against the definition of a refugee under Article 1A(2) or just send them back and, if so, in what circumstances?

4 What are the implications of Article 33 of the Convention and the prohibition contained in that definition about returning a refugee to a country where his or her life or freedom would be threatened?

5 The attitude of the High Court to a "bad faith" exemption under Article 1A(2) of the Convention.