

Credit :

UTokyo Online Education, Refugee Recognition

- Understanding the Essentials 2019 Allan Mackey

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University of Tokyo, Graduate Program on Human Security.
International Refugee, Complementary Protection, Migration
and Human Rights regimes - *Course 1. Oct 2019*



WELL FOUNDED FEAR...

***THE RISK ELEMENT OR “RISK BOX”
ISSUE***

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“...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...”



Well founded fear...

A fear is well-founded when there is :-

- Objectively
- a real chance of it occurring
- in the future
- on the accepted facts as found

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Well founded fear...

- The standard is objective, *not* subjective
- The degree of risk of it happening is measured by the “real chance” test
- The decision-maker’s gaze is forward-looking/prospective (the relevant date for the assessment is the date of determination)



An objective test

A subjective fear will not suffice

“...in order for a “fear” of “persecution” to be “well-founded” there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. [The Refugee Convention] does not enable the claimant to decide whether the danger of persecution exists.”

Lord Templeman, *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] 1 All ER 193,

Objective Test

- An objective assessment is principled and defensible
- A subjective test depends too much on the individual
- A subjective test is incapable of assessment
- An objective standard provides a *measurable* reality of serious harm



Objective Test

Hathaway and Foster...

- Persons facing the same harm should not face differential protection based on individual temperament or tolerance
- This is the implication of giving substantial weight to the appellant's subjective fear
- The *central* issue is whether or not the individual can safely return to her state
- **International human rights standards are common to all** and provide a measurable framework against which the risk of harm can be objectively assessed



Future Harm

Past persecution alone is not enough

The central issue is whether the applicant can safely return to their state = it is a *forward looking* assessment by the decision maker.

Past persecution, even objectively established, does not suffice. It may, however, be an excellent indicator of what will happen in the future.

- see *Refugee Appeal 70366* (22 September 1997)



The “Real Chance” Test

The “Real Chance” Test



A real chance is...

- less than the balance of probabilities
- more than a mere possibility or a remote or speculative chance
- not capable of precise, or bright-line, definition, nor is it helpful to talk in terms of percentages

The “Real Chance” Test



“Real chance” = substantial, not remote

Refugee Appeal 72668/01 (Minute) (5 April 2002)
at [128]



The “Real Chance” Test

Its origins lie in Atle Grahl-Madsen’s *The Status of Refugees in International Law* (1969):

“...the real test is the assessment of the likelihood of the applicant’s becoming a victim of persecution upon his return to his country of origin. **If there is a real chance that he will suffer persecution, that is reason good enough, and his ‘fear’ is ‘well-founded’.**”

The “Real Chance” Test



Adopted in Australia, in *Chan*, though:

“That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgements will have to be made from time to time.”

Toohey J,
Chan v Minister for Immigration and Ethnic Affairs
(1989) 169 CLR 379 (HCA) at [407]



The Michigan Guidelines

The Michigan Guidelines



New Zealand has adopted *The Michigan Guidelines on Well-Founded Fear*, which justifies the real chance test on:

- The uncertainty inherent in a forward-looking assessment of risk
- Consistency with the plain English meaning, the dominant French meaning, the internal structure of the Convention and the human rights approach
- The assessment of well-foundedness is purely evidentiary in nature and there are significant evidentiary shortcomings in all assessments

The Michigan Guidelines



Important factors in assessing whether there is a real chance of serious harm

- All material evidence from whatever source must be considered with care and in context
- Past persecution is relevant but not a prerequisite
- The applicant should make best efforts to provide supporting evidence but an assessment of well-foundedness may need to be based largely or even solely on (credible) personal testimony

Relevance of Michigan Guidelines



- Not binding, but we are looking for the “international harmonious meaning”
- Created by a colloquium of leading academic minds
- Principled
- Adherence to the human rights framework

The New Zealand View



- An objective standard of fear
- Forward looking
- Real chance test
- Not speculative