

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***



Step 5
“for reasons of...”
The Nexus to a Convention
Reason

Allan Mackey, IARMJ, October 2019

“For reasons of...”

Art. 1A(2)

“... owing to well-founded fear of being persecuted **for reasons of** race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;...”

“For reasons of...”

It is the essential link between the predicament of the claimant and a Convention ground

“For reasons of”

What does “for reasons of” mean in the refugee context?

The language of the Convention is passive: “being persecuted” = the **predicament** of the claimant

The motive of the persecutor *may* be obvious but its absence does not mean that the person’s predicament is not for a Convention reason – cf. US jurisprudence

Example: FGM is often practised by women who think they are acting in the best interests of the girl.

Nothing need be established, except for the harm and its linkage to a Convention reason.

“For reasons of...”

This approach is consistent with the Convention purpose of surrogate protection.

It is not about “blaming” other states (see the Preamble, which focuses on the predicament of refugees, not the cause, and avoids tension between states)

Evidentiary issues: no ability to cross-examine persecutor

“For reasons of...”

The Convention reason can attach to either the:

Serious Harm; or

Failure of State Protection

See, for example, *Refugee Appeal No 71427* (16 August 2000) – an Iranian domestic violence claim, in which the RSAA held, at [120]:

“In conclusion our finding is that while the serious harm faced by the appellant at the hands of her first husband is not for a Convention reason, the failure by the state to protect her from that harm is for the Convention reasons of membership of a particular social group, religion and political opinion.”

“For reasons of...”

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Degree of causation

It is enough to show that the Convention ground is a **contributing** cause of the risk of being persecuted. It need not be the sole cause, the main cause, the direct cause, the indirect cause or the ‘but for’ cause.

The *Michigan Guidelines on Nexus to a Convention Ground* (2002) 23 Mich. J. Int’l L. 210, adopted in NZ in *Refugee Appeal No 72635* (6 September 2002), state:

13. In view of the unique objects and purposes of refugee protection, and taking account of the practical challenges of refugee status determination, 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. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

Convention reason

Actual or imputed reason?

The Convention ground does not have to be an actual attribute of the claimant. It suffices that the persecutor *perceives* the existence of the attribute, or even has the attribute itself.

Where the persecutor perceives that the claimant has the attribute, say a political opinion, we speak of “an imputed political opinion”.

The 5 Convention reasons

Convention reasons

Art. 1A(2)

“... owing to well-founded fear of being persecuted for reasons of **race, religion, nationality, membership of a particular social group or political opinion ...**”

Convention reason

Race

No definition in the Convention but includes:

- ethnicity
- tribe
- clan

Today, race is generally seen as a socially constructed notion, involving race, colour, descent and national or ethnic origin.

Convention reason

Religion

ICCPR, Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The right to religion includes the right *not* to have a religion.

Convention reasons Religion

“Freedom of thought, conscience and religion” can include:

- Conscientious objection to military service
- Passivism
- Falun Gong?
- Atheism

Convention reason

Convention reason

Nationality

Nationality can be equated with citizenship.

Hathaway suggests that it may encompass ethnic or linguistic groups and so overlap with notions of race.

Significantly, *lack of* nationality is relevant. Persons made stateless, or denied full citizenship, as an act of discrimination may well be able to ground a claim to being persecuted for reasons of nationality.

Convention reason

Political opinion

Perceived opposition to a political opinion held by the persecutor will usually suffice because it adequately imputes a political opinion to the claimant.

While caution must be exercised as to the extent to which a view or a standpoint is a “political” opinion, there is no doubt that political opinion exists in many power imbalances – notably in gender cases. See, for example, *Refugee Appeal No 76044* (11 September 2008).

Convention reason

Particular Social Group

Interpretation of the particular social group category must allow for the fact that the Refugee Convention does not apply to all individuals who have a well-founded fear of persecution and is limited by anti-discrimination notions inherent in civil and political rights.

- *Refugee Appeal 1312/93* (30 August 1995)

Convention reason

Various jurisdictions take a different approaches.

In the **EU and United Kingdom**, the members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or 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;

The **United States** took the ‘immutable characteristic’ approach for many years (see *Matter of Acosta*), but has recently *also* required that the person establish two additional criteria: particularity and social visibility (*Matter of E-A-G*, 24 I&N Dec. 591 (BIA 2008)). This has attracted much criticism.

UNHCR favours a hybrid approach, using the ‘immutable characteristic’ test, but permitting the ‘social perception’ approach to be used as an alternative pathway.

New Zealand adopts “innate/immutable characteristics” approach

Convention reason

Particular social groups which have been recognised:

Women

Children

Homosexuals

Early decisions on the meaning of ‘particular social group’ are unreliable. Attempts were made to define the group as narrowly as possible, ie “Muslim women alone in their home country without a male to support them”. Such assessments missed the fundamental point that the immutable characteristic was simply that of women. Other jurisdictions (notably Australia) continue to err in this way.

Convention reason

Not all groups are necessarily particular social groups, however. Much depends on country and context.

In Iran, where women occupy a cognisable social strata and are the subject of proscriptive, discriminatory laws directed at their civil and political status, it is clear that they comprise a particular social group for the purposes of the Convention. That may not be the case, however, in a western democracy that makes serious efforts to uphold the rule of law and to address discrimination.

You cannot assume, simply because an earlier Iranian decision found women to be a particular social group, that, in the Peruvian case before you, women are a particular social group. It will require consideration of the facts and the country in question.

Convention reason

Consider:

- A person at risk of being beaten up or killed by the Russian mafia for failing to repay a debt to them.
- A Swedish woman at risk of beatings from her drunken, violent husband.
- An Afghani woman at risk of beatings from her drunken, violent husband.
- A 11-year-old Ugandan girl at risk of FGM.
- A 14-year-old Israeli boy who objects to being circumcised.

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Internal Protection Alternative (IPA) aka Internal "flight" (IFA) or Relocation.

The New Zealand Approach

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the **protection of that country**;...”

The New Zealand Approach

- Internal **Protection** Alternative as opposed to internal flight / relocation alternative

‘Once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access domestic protection which is meaningful.’

Refugee Appeal No 76044 (11 September 2008)

The New Zealand Approach: 4 questions

- Is the proposed internal protection alternative accessible to the appellant and is that access practical, safe and legal?
- Is the proposed site of internal protection one where there is no risk of being persecuted for a Convention reason?

The New Zealand Approach: 4 questions

- In the proposed site of internal protection, are there any new risks of being persecuted or exposed to other forms of serious harm or of *refoulement*?
- In the proposed site of internal protection, are basic norms of civil, political and socio-economic rights provided by the State, by reference to human rights standards suggested by the Refugee Convention itself?