



IMMIGRATION AND CITIZENSHIP SERVICE AUTHORITY

REFUGEE DETERMINATION GUIDELINES PART 1: LEGAL GUIDELINES

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INTRODUCTION

These Guidelines provide legal and procedural guidance on refugee determination under the law and policy of the Independent State of Papua New Guinea (PNG). Legal guidance is provided in Part 1 of the Guidelines. Part 2 of the Guidelines provides guidance on the process associated with refugee determination in PNG. Relevant forms are also annexed to these Guidelines.

These Guidelines will assist Protection officers and Review officers in determining whether a person is a refugee, as well as assist other officers who may be involved in refugee determination to understand the process and apply the relevant law. An 'officer' is generally a reference to a person working for the Immigration and Citizenship Service Authority (ICSA).

Part 1 explains the legal framework for refugee determination in PNG. It covers the domestic law of PNG and how this provides the legal criteria for refugee determination. Part 1 will also explain how domestic implementation of PNG's obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol of the same name (together referred to in the Guidelines as the Refugees Convention) is to be interpreted and applied under the domestic law. Relevant international and regional legal concepts of refugee determination are referred to and cited, including guidance from the United Nations High Commission for Refugees (UNHCR).

Part 2 is the Procedures Manual which provides procedural guidance on refugee determination processes including assessing and researching claims, interviewing, consideration of credibility, providing natural justice and communication with the non-citizen seeking refugee determination.

The annexures provide the application form to be used by transferees seeking refugee determination in PNG, as well as assessment and notification templates for use by officers.

The Guidelines draw on guidance from the UNHCR and other jurisdictions as necessary to help provide examples to assist officers understand the concept, process and application of refugee determination in PNG. Such guidance will be referred to and cited accordingly.

PNG AND THE INTERNATIONAL LEGAL FRAMEWORK

Refugees Convention and Protocol

PNG acceded to the 1951 Convention relating to the Status of Refugees (the Convention) and the 1967 Protocol relating to the Status of Refugees (the Protocol) on 17 July 1986.¹ In order to implement its obligations under the Convention in good faith, PNG as a Contracting State, is committed to applying the definition of refugee under Article 1A of the Convention and complying with the key principle of non-refoulement (non-return) under Article 33(1) of the Convention.

Article 1A provides the definition of who is a refugee, that is, a person who:

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

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 33(1) provides:

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.

This means PNG cannot expel or return a refugee to the frontiers of territories where his/her life or freedom would be threatened on account of a Convention ground (refoulement), subject to the exceptions provided for Article 33(2). In addition, Papua New Guinea has an obligation not to send a refugee to a country if that country is likely to send the refugee to a place where his life or freedom is so threatened (onward refoulement).

The effect of acceding to the Protocol is that it removes the temporal and geographic restriction imposed by the Convention which limits the refugee definition to events occurring before 1 January 1951 in Europe. See further *Background to Refugees Convention and Protocol*.

PNG provided for determination of a non-citizen as a refugee in the 1989 amendments to the Migration Act 1978², however, until 2013 there was no formal enabling legislation providing a process for such a determination.³ Whilst the legislation does not expressly refer to the 1951 Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention), the wording incorporates major components of the definition of refugee under Article 1 of the Refugees Convention.

¹ With reservations to: Article 17(1) – wage earning employment; Article 21 – housing; Article 22(1) – public education (elementary education); Article 26 – freedom of movement; Article 31 – refugees unlawfully in the country of refuge; Article 32 – expulsion; and Article 34 – naturalization.

² Section 15A provides for the Minister to determine a non-citizen to be a refugee.

³ See sections 14 and 15 of the Migration (Amendment) Regulation 2013.

Background to the Refugees Convention and Protocol

The Convention was drafted between 1948 and 1951 with the principal aim of creating a mechanism to cope with the large numbers of persons who had been displaced by the Second World War. The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons on 28 July 1951 and entered into force on 22 April 1954.

Article 1 of the Convention provides the definition of 'refugee' and this definition is temporally and geographically limited to events occurring before 1 January 1951 in Europe. With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the Convention applicable to post-1951 refugees and beyond Europe. As a result, the 1967 Protocol relating to the Status of Refugees removed the restrictions, meaning that a person could be considered a refugee as a result of events occurring before or after 1 January 1951 and with no geographical limitation. The Protocol entered into force on 4 October 1967. Contracting States to the Protocol agree to apply the Convention with no time or geographical restriction. The Protocol does not otherwise change the obligations under the Convention.

The Convention consists of 46 articles setting out the rights and obligations of Contracting States. Of particular relevance to refugee determination are:

- the definition of who is a refugee – Article 1A 'the inclusion clause';
- the circumstances where refugee status ceases – Article 1C 'the cessation clauses'; and
- the circumstances whereby someone is excluded from the protection of the Convention – Article 1D, 1E and 1F 'the exclusion clauses.'

The Convention also contains provisions defining the legal status of refugees and the rights and obligations of refugees in the country of refuge (for example, expulsion – Article 32, the key obligation of non-refoulement – Article 33(1) and the exceptions to non-refoulement – Article 33(2)), as well as provisions dealing with the administrative and diplomatic implementation of the Convention.⁴

Article 1A is reproduced above.

Article 1C cessation provides six circumstances where a person ceases to be a refugee based on his or her: voluntary re-availment in the country of his or her nationality (Article 1C(1)); voluntarily reacquiring a lost nationality (Article 1C(2)); acquiring and gaining protection of a new nationality (Article 1C(3)); voluntarily re-establishment in the country of claimed persecution (Article 1C(4)) and a change in circumstances in the country of claimed persecution for those with nationality (Article 1C(5)) and those without a nationality (Article 1C(6)).

⁴ See footnote 1 above relating to PNG's reservations to the Convention.

Article 1F exclusion provides three circumstances where a person is excluded from the protection of the Convention: firstly, by virtue of being provided with protection or assistance by another United Nations organ or agency (Article 1D); secondly, by having the same rights and obligations as a national in another country to which the person has residence (Article 1E); or thirdly, by not deserving protection because there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity (Article 1F(a)), by committing a serious non-political crime outside the country of refuge before being admitted to the country of refuge (Article 1F(b)), or by being guilty of an act contrary to the purposes and principles of the United Nations (Article 1F(c)).

Article 32 commits Contracting States to not expel a refugee lawfully in their territory save on grounds of national security or public order. This obligation is qualified by ensuring the refugee has due process of law and is given a reasonable period of time to seek legal admission into another country.

Article 33(1) relating to the key obligation of non-refoulement is reproduced above.

Article 33(2) provides two exceptions under the Refugees Convention to the obligation of non-refoulement, meaning there are two circumstances where a Contracting State can refoule (return) a person to a country of claimed persecution, despite the person being a refugee, where:

- there are reasonable grounds for regarding the person as a danger to the security of the host country; or
- having been convicted by final judgment of a particularly serious crime, the person constitutes a danger to the community of the host country.

These Guidelines do not provide guidance on the Article 1C cessation clauses, Article 1D exclusion, Article 32 expulsion, or the exceptions to non-refoulement under Article 33(2), as these are not expressly captured in the legislation, however, officers can access UNHCR guidance on these topics for further information.⁵ [UNHCR material on Articles 32 and 33(2)?]

The Guidelines do provide guidance on the inclusion clause and the exclusion clauses: see further *Definition of refugee – section 14(1)(b) and (c)* and *Exclusion from Refugee Determination – sections 14(2)(a), (b), (c) and (d)*.

⁵ *The Cessation Clauses: Guidelines on Their Application*, UNHCR (April 1999); *Guidelines on International Protection: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, HCR/GIP/03/03, UNHCR (February 2003); *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, UNHCR (October 2009);

Other relevant international law

Obligations under relevant human rights treaties have relevance to protection claims and how PNG treats transferees throughout and after the RSD process. Whilst these obligations may not necessarily result in a separate consideration, it will be important for officers to understand.

PNG acceded the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) on 21 July 2008. The ICCPR and ICESCR commits Contracting States to respect such rights as freedom of thought, conscience and religion,⁶ the right to life⁷ and to be free from torture and other cruel, inhuman or degrading treatment or punishment.⁸

PNG ratified the Convention on the Rights of the Child on 2 March 1993, which commits Contracting States to consider the best interests of a child as a primary consideration in its dealings with children.⁹

PNG also acceded the Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁰ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹ as well as signed the Convention on the Rights of Persons with Disabilities (CRPD).¹² These human rights treaties ensure Contracting States commit to eliminating discrimination against more vulnerable groups in society.

⁶ Article 18 ICCPR.

⁷ Article 6 ICCPR.

⁸ Article 7 ICCPR.

⁹ Article 3.

¹⁰ 27 January 1982.

¹¹ 12 January 1995

¹² 2 June 2011.

PNG'S DOMESTIC LEGAL FRAMEWORK

Overview of RSD legislation

The *Migration Act 1978* (the Act) regulates the movement of persons entering Papua New Guinea (PNG). The Act also prescribes certain powers and duties of Migration officers and the Minister for Foreign Affairs and Citizenship (the Minister). The Act, through its 1989 amendments, introduced section 15A, which permits the Minister "to determine a non-citizen to be a refugee." Whilst this provision enables refugee determination, no process was set up to do so and PNG previously sought assistance from the UNHCR in refugee determination, in the absence of domestic legislation formally enabling such a process.

On 8 September 2012, the Government of the Independent State of Papua New Guinea (PNG) signed a Memorandum of Understanding (MOU) with Australia formalising arrangements in relation to the transfer and assessment of asylum seekers and for establishing a Regional Processing Centre in PNG. The MOU provides for refugee status determination under the Refugees Convention and a commitment that asylum seekers are to be treated with dignity and respect in line with human rights standards. On 9 September 2012, Australia designated PNG as a Regional Processing Country, which allowed Australia to transfer asylum seekers arriving by boat in Australia, to PNG.

Subsequent to signing the MOU, PNG agreed to assume responsibility for determining asylum claims of persons transferred to PNG under the MOU and passed legislation providing domestic legal processes for refugee determination. On 26 April 2013, the *Migration (Amendment) Regulation 2013* (the Regulation), amending the *Migration Regulation 1979*, was passed, adopting sections 14 and 15. Section 14 relates specifically to refugee determination for transferees under the MOU and outlines the criteria that must be satisfied for the Minister to determine a non-citizen to be a refugee for the purposes of section 15A of the Act. Section 14 of the Regulation provides:

- (1) *For the purposes of Section 15A of the Act, the Minister may determine a non-citizen to be a refugee for the purposes of the Act if the Minister is satisfied that –*
 - (a) *the non-citizen has been transferred to Papua New Guinea under the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related Issues; and*
 - (b) *the non-citizen holds a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and*
 - (c) *the non-citizen –*
 - (i) *is outside of the country of his or her nationality and is unable or owing to such fear, is unwilling to avail himself of herself of the protection of that country; or*
 - (ii) *does not have a nationality and being outside his or her country of former habitual residence is unable, or, owing to sure fear, is unwilling to return to it; and*
 - (d) *the non-citizen is not excluded from recognition as a refugee in Papua New Guinea under Subsection (2).*
- (2) *A non-citizen is excluded from recognition as a refugee in Papua New Guinea if the Minister is satisfied that the non-citizen-*
 - (a) *Has been recognised by the competent authorities of a country in which he or she has taken residence or held residence as having the rights and obligations which are attached to possession of*

- the nationality of that country; or*
- (b) Has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; or*
 - (c) Has committed a serious non-political crime in another country; or*
 - (d) Has been found guilty of acts contrary to the purpose and principles of the United Nations; or*
 - (e) Is a threat to the national security or defence of Papua New Guinea if he or she remains in Papua New Guinea; or*
 - (f) Is a member of, or adheres to, any organisation or group of persons that has engaged in, or has claimed responsibility for, a terrorist act in or outside Papua New Guinea and the continued presence of that person in Papua New Guinea constitutes a threat to public safety; or*
 - (g) Has engaged in, or has claimed responsibility for, a terrorist act in or outside Papua New Guinea and the continued presence of that person in Papua New Guinea constitutes a threat to public safety; or*
 - (h) Has, during the period of his or her residency at the regional processing centre anywhere or within Papua New Guinea, exhibited a demeanor incompatible with a person of good character and standing.*

Section 15 relates to notification of the Minister's decision. Please see further notification procedures under Part 2 of the Guidelines.

Overview of RSD Process

Refugee status determination (RSD) under section 14 of the Regulation involves protection officers from the Immigration and Citizenship Service Authority (ICSA) making an assessment as to whether a transferee should be determined to be a refugee. Non-citizens provide their claims to officers using an application form and may receive assistance in submitting their claims. The non-citizen is interviewed and the officer makes an assessment based on the information provided and other relevant information including country of origin information. The assessment forms the basis of a recommendation made to the Minister for Foreign Affairs and Immigration (the Minister) for decision. If the recommendation is negative, it will be reviewed and the result of the review will be the new basis of the recommendation made to the Minister for decision.

Where a non-citizen is determined to be a refugee, he or she will ultimately be resettled, safe from the persecution feared. Where a non-citizen is found not to be a refugee or is excluded from refugee determination under PNG legislation, consideration will be given to whether there are any other legal reasons why the non-citizen may require protection or cannot otherwise be returned to the non-citizen's country of origin. This consideration will be undertaken in a return risk assessment prior to the non-citizen's removal from PNG.

Approach to Refugee Determination

Under section 15A of the Act, the Minister must be satisfied the non-citizen is a refugee. In consideration of section 14 of the Regulation, in order to get to this satisfaction, a recommendation made to the Minister by an officer must determine the following:

1. **Identity** of the non-citizen and that the non-citizen is a **transferee** under the MOU
2. The **country** to assess refugee claims against

- (a) The non-citizen is outside his or her country/countries of nationality or former habitual residence
- (b) Whether the non-citizen is unable or unwilling to avail him or herself of the protection of his or her country/countries of nationality or former habitual residence
3. The non-citizen has a **well-founded fear** of being persecuted
 - (a) **Risk threshold**
 - (b) Whether **State protection** is available
 - (c) Whether an **internal flight alternative** is available
4. The non-citizen fears harm that amounts to **persecution**
5. The non-citizen's fear of persecution is **for reasons of a Convention ground**, that is: race, religion, nationality, membership of a particular social group and/or political opinion
6. The non-citizen is not **excluded** from refugee determination

Officers will be required to determine the credibility of the non-citizen and the claims made. Officers will be required to accept or reject claims made by making findings of fact, as well as provide natural justice to the non-citizen where appropriate. Officers will be expected to provide a clear and concise recommendation for the Minister's consideration which clearly demonstrates the reasons for coming to the recommendation of whether a non-citizen should or should not be determined to be a refugee.

Guidance is provided for each of these steps in Part 1 of these Guidelines. See the sections on *Credibility* and *Natural Justice* in Part 2 of the Guidelines.

Regular refugee claims and sur place refugee claims

Officers have to identify the claims made by the non-citizen and assess these claims against the legislation and in consideration of relevant independent information. It may be useful for officers to think of refugee claims as being regular refugee claims or sur place refugee claims.

Regular refugee claims can be described as claims that arise at the time the refugee has departed his or her country of origin. Sur place refugee claims are refugee claims that arise after departure from the country of origin. Sur place refugee claims can arise in four circumstances:

- through actions undertaken by the country of origin (for example, since the non-citizen left their country of origin as a student, the country has developed a policy for shooting students in public,
- through the actions undertaken by the non-citizen (for example, by raising their profile through social media),
- through the actions of the host country (for example, a host country inadvertently informing a non-citizen's Consular official of the non-citizen's location in the host country), or
- through the actions of a third party such as the media (for example, televised footage being available in the country of origin, raising the non-citizen's profile since departing the country of origin).

Sur place refugee claims are to be dealt with in the same manner as regular refugee claims but should be identified as a sur place claim in the assessment record, with a description as to how that claim arose. Officers are to consider the circumstances of how the sur place claim arose, whether such actions may have come to the notice of the authorities or others in the non-citizen's country of origin and how the non-citizen is likely to be viewed by the authorities or others, as relevant. As with regular refugee claims, the issue to determine is whether the non-citizen has a well-founded fear of being persecuted for a Convention reason upon return to his or her country of reference.

Derivative status

All non-citizens can submit an individual refugee determination application form. However non-citizens seeking refugee determination, who are present in PNG accompanied by family, may wish for the family members to be considered for derivative refugee status as listed dependants on the non-citizen's application form. Derivative status is where an accompanying family member/dependant of a person seeking refugee determination, obtains refugee status by virtue of being the family member/dependant of that person. The way this operates procedurally in PNG is that the principal applicant non-citizen's accompanying family member/dependant must meet the definition of dependant under the Act to be listed as a dependant on the application form. If the principal applicant is determined to be a refugee, so will the principal applicant's dependants, based on the principal applicant's refugee claims. Section 2 of the Act defines dependant as meaning:

in relation to a person, the spouse of that person, not living apart from that person under a decree of court or a deed of separation, and an unmarried child of that person under the age of 16 years

The definition of dependant excludes defacto partners, married children and children above the age of 16 years old. Although an accompany family member/dependant may meet the definition of dependant under the Act, this will not prevent such a non-citizen from lodging an individual application form.

DETERMINATION OF IDENTITY

Identity

An officer must make a finding as to the identity of the non-citizen in order to be able to assess the non-citizen's refugee claims. Many non-citizens may not have genuine documents or any documents at all to support their claim of identity. See further: Procedural Guidelines - *Identity*.

The non-citizen is a transferee under MOU with Australia – section 14(1)(a)

Section 14(1)(a) of the Regulation provides a non-citizen may be determined to be a refugee, if he/she is a transferee under the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related Issues.

Officers will be made aware the non-citizen is a transferee by acknowledging the non-citizen is located in the Regional Processing Centre on Manus Island and the officer having access to the initial screening interview which provides information on how the non-citizen arrived in PNG. This includes information about the non-citizen being transferred from Australia to PNG under the terms of the MOU. Officers will also take the non-citizen's claims regarding his or her travel and immigration history into account.

For application forms received from non-citizens who are not transferees and therefore do not meet section 14(1)(a) of the Regulation the non-citizen will be advised to complete a separate application form and as there is no enabling legislation providing a process for determining refugee status for a non-transferee, the non-citizen will be further advised on the process for consideration, pursuant to s15A of the Act.

COUNTRY OF REFERENCE

Overview

An officer must identify which country or countries the non-citizen is seeking protection from. In order to do this, the officer needs to understand what a country is, whether the non-citizen is a national of that country or countries, what statelessness is and how statelessness relates to a country or countries of former habitual residence. Officers should also make findings against each criterion in s14 of the Regulation, specifically subsections 14(b) and (c).

What is a country?

In the absence of a legislated definition, the ordinary meaning is given to the term 'country'.¹³ The Oxford English Dictionary and Macquarie Dictionary (respectively) describe 'country' as:

- *A nation with its own government, occupying a particular territory; or an area or region with regard to its physical features.*
- *A relatively large area of land occupied by a group of people organised under a single, usually independent, government; nation; state; land; or any considerable territory demarcated by geographical conditions or by a distinctive population.*

A country can be any nation or state which is generally recognised as such in international law and international relations. Further considerations for whether a place is recognised as a country, include having a permanent population, a discrete territorial area, a government, immigration laws and the capacity to enter into relations with other States.

Nationality and statelessness

Nationality involves questions of fact and law

An officer must determine whether a non-citizen has a particular nationality and this is a question of both fact and law. A non-citizen's country will be readily identifiable if the non-citizen has entered PNG on a genuine passport. However, many non-citizens arrive without any form of documentation or with fraudulent documents. In such circumstances, officers may need to consider other aspects of the non-citizen's claims and other available information. Local knowledge may be used to establish the appropriate country of reference and form the basis of such a factual enquiry.

Whether a non-citizen is a national of a particular country is determined by reference to the law of that country. This would also apply to countries that have disintegrated (for example the former Yugoslavia) or emerged (for example, South Sudan). When such events occur, the status of former nationals may be either that they are nationals of a new country that is created or that they are stateless.

Only a State can grant nationality and therefore provide a country of nationality for the purposes of the Convention. Where a new country comes in to being, it may be necessary for decision makers to consider whether the country meets the criteria for statehood under international law and has gained international recognition as such.

¹³ Article 31 of the 1969 Vienna Convention on the Law of Treaties provides for the *General rule of interpretation*: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

An individual's legal status can be identified only by an examination of the new country's citizenship laws. Typically the new country's citizenship law will grant citizenship to permanent or habitual residents, but will also recognise the right of individuals to decline citizenship.

If not covered by the citizenship laws of any other country and citizenship is not bestowed by automatic legal right, an individual who declines citizenship under the law will become stateless.

Evidence of nationality

A non-citizen will identify their citizenship on the application form. If the non-citizen holds a passport they must submit a copy with the application and this will usually confirm the non-citizen's citizenship. The UNHCR Handbook¹⁴ states at paragraph 93:

Possession of ... a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise.

The UNHCR Handbook continues to explain at paragraph 93 that a person who holds a passport showing the person to be the national of the issuing country has to satisfy the decision maker that the passport is a 'passport of convenience', that is, issued to the non-national person for travel purposes only, if they are rebutting the presumption of nationality. Any evidence that is relevant to the issue of nationality can be provided and must be considered.

If the non-citizen used fraudulent documents or provided no documentation at all, officers will have to consider if there are inconsistencies in relation to the claimed nationality, and if these can be clarified by asking for further information from the non-citizen. The non-citizen's claimed citizenship should generally be consistent with their language and local knowledge. However, inconsistencies are not necessarily proof that the non-citizen is not from the country claimed. Generally, if doubts or inconsistencies cannot be proved, officers should give the non-citizen the benefit of the doubt.

If it is not possible to make a finding of fact on citizenship based upon the non-citizen's own evidence, the following general points may assist officers in making a determination:

- The citizenship laws of a country should indicate whether a person in this non-citizen's circumstances has acquired or lost citizenship.
- Although general enquiries may be made to an embassy or consulate, officers should be careful that they do not disclose the non-citizen's identity or presence in PNG, as this could give rise to refugee sur place claims.
- The non-citizen's claimed citizenship should generally be consistent with their language and local knowledge; however, any inconsistencies should prompt only further appropriate enquiries and should generally not be considered proof that the non-citizen's claims are false.

If a non-citizen is properly refused on some other basis, such as the harm feared does not amount to persecution, or the non-citizen comes within an exclusion clause, it may not be necessary for officers to determine all other aspects of the claim, including making findings as to actual nationality.

¹⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, re-edited 1992

Stateless persons

A stateless person is an individual who has no nationality. In other words, he or she lacks identity as a national of a State and is not entitled to the rights, benefits, or protection ordinarily available to a country's nationals. Statelessness is established where no country recognises the person as holding its citizenship.

Statelessness is not in itself enough to attract refugee status. There must still be a well-founded fear of persecution for a Convention reason (that is, a stateless person still has to fulfil the refugee definition). Under Article 1A(2) of the Convention, a stateless person must be assessed against their *country of former habitual residence*.

Former habitual residence

If a non-citizen is stateless, then officers need to consider his or her claims against the country of former habitual residence. Former habitual residence refers to residence or settlement of some duration that is more than a short term or temporary stay, and it need not require formal permanent residence or domicile. Former habitual residence may be established where a non-citizen can demonstrate a stay of long duration, continuity of stay, and/or a settled intention or purpose to stay.

A country of former habitual residence does not have to be a State. However, in determining whether a territory that is not a State is a country of former habitual residence for the purposes of the Convention, decision makers must look to whether its geographic territory and population is sufficiently defined to come within the notion of a country.

Multiple countries of reference – section 14(1)(c) of the Regulation

The second paragraph of Article 1A(2) of the Convention states:

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

This means that the Convention excludes from refugee status those who can avail themselves of the protection of at least one of the countries of which they are a national. As the UNHCR Handbook advises, wherever available, national protection takes precedence over international protection. As a result, there is no basis for refugee determination for a non-citizen who has dual or multiple nationalities and does not have a well-founded fear in each of those countries. This issue will be considered in relation to s14(1)(c) of the Regulation.

The same applies for a non-citizen with more than one country of former habitual residence. It is not necessary to find a well-founded fear of persecution in each such country but it will be necessary for officers to consider whether one of those countries offers protection.

It is important to note that officers may be presented with cases where family members are of different nationalities or different countries of former habitual residence. The Convention still requires each person to satisfy the definition of a refugee with respect to their own country of reference or country of former habitual residence unless derivative refugee status is given and this is where the family member meets the definition of *dependant* in section 2 of the Act.

Outside country of reference and unable or unwilling to avail of protection and return to country of reference – section 14(1)(c) of the Regulation

Outside the country of reference

Section 14(1)(c) of the Regulation requires that the *non-citizen* –

- (i) *is outside of the country of his or her nationality and is unable or owing to such fear, is unwilling to avail himself or herself of the protection of that country; or*
- (ii) *does not have a nationality and being outside his or her country of former habitual residence is unable, or, owing to sure fear, is unwilling to return to it;*

It will be straightforward for officers to determine that a non-citizen is outside their country of nationality or former habitual residence given the non-citizen will be physically in PNG for refugee determination.

Dual nationality

Section 14(1)(c) is a general provision which includes consideration of single or dual nationality. This is because *of the country of his or her nationality* can be read as being one country or two countries of nationality if that is the case. The same requirement would apply for the non-citizen to disclose information relating to dual nationality for officers to determine whether there is a well-founded fear in relation to one or both countries of nationality.

Officers should note that dual nationalities are a different consideration to whether the non-citizen can gain protection in a country of which he or she is not a national. This is considered under Article 1E exclusion, incorporated into the legislation by s14(2)(a) of the Regulation.

Unable or unwilling

It will be a question of fact as to whether the non-citizen is unable or unwilling to obtain protection of the country of reference. See further the section on *State Protection*.

WELL-FOUNDED FEAR

Overview

The non-citizen must have a well-founded fear of being persecuted for a Convention reason to be found to be a refugee under Article 1A of the Convention and for the Minister to be satisfied in making a refugee determination under s14(1)(b) of the Regulation.

Well-founded fear has been described by UNHCR in the Handbook¹⁵ as requiring a subjective element, which involves the applicant's state of mind and whether they genuinely fear harm, and an objective element which involves assessing the factual basis of the non-citizen's fear of harm if returned to the country of claimed persecution. The emphasis for officers is the objective element, given that incapacities such as age and mental health and/or intellectual disability may impact on a non-citizen's subjective fear. Satisfying the objective element requires country research and an analysis of independent information assessed against information provided by the non-citizen. The harm will be objectively well-founded if there is information to suggest the non-citizen will be harmed upon their return, in the foreseeable future, meaning it is a forward looking test. This is determined by the information considered at the time of the non-citizen's assessment for refugee determination, rather than information as at the date of the non-citizen's departure from the country of claimed persecution, date of transfer from Australia, or date of application for refugee determination.

A non-citizen may not be considered to have a well-founded fear of being persecuted for a Convention reason if the non-citizen can be protected from such persecution by his or her own State (whether the State of which he or she is a national, or the State that is his or her former habitual residence). This is referred to as State protection.

A non-citizen may also not be considered to have a well-founded fear of being persecuted for a Convention reason if the non-citizen can reasonably avail him or herself of protection by relocating within his or her own State (again State refers to the country of which the non-citizen is a national, or having no nationality, the country where the non-citizen was formerly habitually resident). This is referred to as having an internal flight alternative.

Assessing well-founded fear

In assessing whether a non-citizen's fear is well-founded, there must be **an objective factual basis for the fear**. This involves looking at independent evidence, such as country information and reports, as well as information provided by the non-citizen in his or her claims and supporting material (if any). Such an assessment is conducted in the context of the non-citizen's situation in the country of claimed persecution and in light of his or her personal circumstances, including the non-citizen's credibility. Officers need to develop a detailed understanding of the non-citizen's background, profile and experiences, as well as the experiences of family members and/or other persons with a comparable profile, where relevant.

¹⁵ See para x.

As a forward looking test, the well-founded fear assessment requires a future fear of being persecuted. Past instances of harm may be indicative of future risk of harm, however, past harm is not required to establish future harm in all cases. This can also be demonstrated by sur place refugee claims where the non-citizen experienced no harm and had no fear of harm prior to departure from his or her country of reference but new circumstances have resulted in a future fear of harm if returned to that country of reference. Officers must cumulatively weigh up and make findings on relevant incidents, circumstances, claims and information in determining whether a fear of being persecuted is well-founded.

Officers must consider the likelihood of harm in the foreseeable future and should be careful to not restrict consideration of the foreseeable future to periods which are either very brief (such as the day after return) or very long (such as 20 years after return). As a particular timeframe cannot be provided, instead officers should apply common sense and consider a reasonable period with regard to the facts of the case (in consideration of independent country information) and the nature of the non-citizen's claims. An officer's assessment should be based on what can reasonably be foreseen based on relevant information, not on mere speculation.

Well-founded fear threshold

The threshold for determining whether a claim of being persecuted constitutes a well-founded fear is to consider whether there is a **reasonable possibility** of the non-citizen being persecuted upon return. It has been consistent in international jurisprudence that the well-founded fear threshold should not equate to the criminal burden of proof being beyond reasonable doubt or the civil burden of proof being on the balance of probabilities. The UNHCR Handbook provides guidance that a well-founded fear can result from the non-citizen establishing, "...to a reasonable degree, that his continued stay in his country of origin has become intolerable..."¹⁶ The threshold for a reasonable degree, or a reasonable possibility means the likelihood of harm is more than a mere possibility and less than more likely than not. The likelihood of harm being more than a mere possibility means that the likelihood of harm cannot be remote or far-fetched. Despite the likelihood of harm being less than more likely than not, officers should **not** measure the likelihood of harm by percentages (for example by stating there is more or less than a 50% likelihood of harm).

State protection

Where a non-citizen's fear of being persecuted is from someone other than the State (that is, a persecutor who is not a State affiliated agency, for example, government officials, police and army), meaning the persecution is being perpetrated by a non-State actor, then it will be necessary for officers to question whether the non-citizen can avail him or herself of the protection of the State. Non-State actors can include neighbours, family or members of the local population, or non-governmental entities such as rebel groups.

In determining whether State protection is available to the non-citizen, it must be questioned whether the State is unable or unwilling to provide protection. Officers should consider:

- how the State's governing authorities treat persons in their country

¹⁶ Page x. See further: UNHCR's Note on Burden and Standard of Proof in Refugee Claims at <http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf>

- how the police, judicial and allied services function
- whether the State is governed by the rule of law or has an infrastructure of laws (including religious law if relevant) designed to protect against the kind of harm or treatment feared.

Reasons for a State's inability to provide protection from persecution could be because:

- the State's police force or legal system lacks resources
- the harm is uncontrollable, or action taken to address the harm is ineffective
- the harm is officially or unofficially tolerated or condoned
- the State turns a blind eye to such harm directed at particular groups or persons

Officers will be required to review the State's applicable laws, policies and practices (through country research) to assess whether State protection is available for the non-citizen in question. For example, legislation may prohibit the harm or treatment feared by the non-citizen but in practice no action is taken by the State to implement the prohibition, or no action is taken to enforce or otherwise respond to breaches of the prohibition because the State unofficially condones such harm or treatment, or lacks the power and/or resources to address it.

State protection and convention nexus

It will be important for officers to recognise that where persecution by a non-State actor is not for reasons of a Convention ground, the State's unwillingness to protect may be for reasons of a Convention ground. For example, a non-citizen's fear of being persecuted is domestic violence perpetrated by her spouse and the police will not respond to complaints because she is a particular religion. In this example, the domestic violence may not be perpetrated by the spouse (a non-State actor) for a Convention ground, however, the State's unwillingness to protect is for reasons of religion.

Level of State protection

The level of protection provided by the State has no defined threshold. However, an adequate level of State protection can be guided by cases in other jurisdictions. For example, the High Court of Australia suggests that a State must meet the 'standards of protection required by international standards' and is obliged to:

...take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police and justice system.¹⁷

The House of Lords in the United Kingdom suggest that:

In order to decide whether the protection is sufficient, it will of course be necessary to have some regard to its effectiveness. How much regard will depend upon the circumstances of the individual case.¹⁸

¹⁷ *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* [2004] HCA 18

¹⁸ *Horvath v Secretary of State for the Home Department*

It is important that officers note that a State's failure to act on insufficient evidence, or a failure to act where the State agency has not been given the opportunity to respond to harm, in circumstances where protection might reasonably have been forthcoming, would not amount to a lack of State protection. The adequacy of the relevant State protection is a question of fact, to be determined on the evidence of each case.

Protection from authorities other than the State

Where the State does not provide protection, it may be necessary for officers to consider whether protection may be provided by another source. Such sources could include other government forces combined with friendly forces, or forces from a neighbouring country or ally, or mercenaries (alone or paid to assist government forces), or United Nations forces invited to assist government forces in the State. If protection from such sources can be provided to the non-citizen, then it is open to the officer to consider the non-citizen does not have a well-founded fear of being persecuted in his or her country of reference.

Internal flight alternative

A non-citizen will not meet the definition of refugee if he or she only fears being persecuted in a specific part of the country of reference and can relocate to another part of the same country where he or she does not fear being persecuted, or can avail him or herself of the protection of the State there. This is known as *internal relocation* or the *internal flight alternative*. Although relocation within the country of claimed persecution does not form part of the refugee definition in Article 1A of the Convention, it is implied because it is consistent with the basic principle underlying the Convention that protection by the international community is appropriate only in the absence of protection within a State.

To assess whether a non-citizen has an internal flight alternative, consideration must be given to **whether relocation is safe and accessible in a reasonable and practical sense, in light of the non-citizen's personal circumstances.**

Safe and accessible means that the non-citizen does not have a well-founded fear of harm in the place of relocation and that the non-citizen can safely get there. For example, where the claim of being persecuted is by a non-State actor and this person/group would not follow the non-citizen to continue to persecute him or her, if the non-citizen was to relocate. Or for example, where State authorities do nothing to implement the legal prohibition on cultural practices that result in physical harm to young girls in a particular region of the State, but such prohibitions are implemented and legally enforced in the capital city of that State.

Whether it is reasonable and practical to relocate in light of the non-citizen's personal circumstances will require an assessment of the logistics of relocating, whether the officer can point to a particular place of relocation within the State, or that relocation is viable generally outside the non-citizen's particular region.

Requiring internal relocation to be reasonable has been adopted in various jurisdictions and academic commentary. Officers should consider factors relevant to the non-citizen in light of the following:

- *...a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him or her to seek refuge in another part of the same country.*¹⁹
- Reasonable means *reasonable in the sense of practicable* depending on the particular circumstances and impact of relocation on the person.²⁰
- The internal flight alternative ... *should be restricted in its application for persons who can genuinely access domestic protection, and for whom the reality of protection is **meaningful**. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.*²¹

Other factors for consideration include the age of the non-citizen, whether they have family networks or local support outside the place of feared persecution, language ability, education and employment background. It is not necessary for the place of relocation (if identified) to provide an improved or comparable state of living, rather, it is necessary that the non-citizen is safe from being persecuted for a Convention reason there.

For further guidance, see UNHCR Guidelines on International Protection No 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees.²²

¹⁹ *Januzi v Secretary of State for the Home Department per Lord Bingham of Cornhill.*

²⁰ *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40

²¹ Hathaway J, *The Law of Refugee Status* (1991).

²² <http://www.unhcr.org/3f28d5cd4.html>

PERSECUTION

Harm amounting to being persecuted

Type of harm

Not all claims of harm will amount to being persecuted, to satisfy the definition of refugee under Article 1A of the Convention and s14(1)(b) of the Regulation. Like other aspects of the refugee definition, *being persecuted* is not defined either in the Convention or in the Regulation or Act. Persecution can take a variety of forms. What is important for officers to remember is that the well-founded fear of being persecuted must be for reasons of a Convention reason.

A fear of the type of harm referred to in Article 33(1) of the Convention, that being **threats to life or freedom on account of a Convention reason, is inferred to be harm amounting to persecution.**²³ Fear of serious violations of fundamental human rights may also amount to persecution, for example physical or psychological violence involving torture or cruel or inhuman or degrading treatment, or a denial of access to basic means of survival that is otherwise available in the country of reference. A number of international human rights treaties set out a range of human rights obligations but there is little authority on which human rights obligations have precedence over others and the denial of which rights will amount to persecution. It has been suggested that the failure to provide for the following rights amounts to being persecuted:

- freedom from arbitrary deprivation of life
- protection against torture or cruel, inhuman or degrading punishment or treatment
- freedom from slavery
- the prohibition on criminal prosecution for retrospective offences
- the right to recognition as a person in law
- freedom of thought, conscience and religion.²⁴

Persecution may take the form of actual punishment for exercising such rights, or may take the form of a prohibition on the exercise of them. Officers should note that the mere fact that a particular right is denied is not necessarily enough to establish persecution. It will be important for officers to consider **how the violation of the right will affect the non-citizen in question and what importance the non-citizen places on the right.** **This will be straightforward for violations of or threats to life or liberty,** but further analysis may be required for rights relating to religion or freedom of expression for example. Mere harassment or empty threats may not amount to the level of harm required for such claims to be considered *being persecuted*.

Discrimination

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily being persecuted. Discrimination may only amount to being persecuted where there has been a persistent pattern of discrimination involving a restriction to the non-citizen exercising his or her fundamental human rights, as mentioned above. Some discriminatory treatment, which taken on its own may not amount to persecution, can at times, when taken together, have the combined

²³ See further UNHCR Handbook para 51.

²⁴ Hathaway *The Law of Refugee Status* (1991) p 109-111.

effect of rendering the discriminatory treatment to be persecutory on cumulative grounds. For example, UNHCR suggest:

*Where the harm feared involves the violation of a core human right, such as the sanction against torture, then an isolated episode might constitute persecution. Where the harm feared involves the violation of some lesser human right, then the decision maker might require evidence of a sustained or systemic denial of the rights that have a cumulatively intolerable effect, for the threshold of persecution to be met.*²⁵

Whether or not discriminatory treatment amounts to being persecuted must be determined in the light of all the circumstances. A claim of persecution may be stronger where a non-citizen has been the victim of a number of discriminatory measures and therefore the treatment taken cumulatively amounts to being persecuted.

Isolated incidents, cumulative harm and generalised violence

Fear of one act of harm, if it meets the level of harm that would constitute persecution, may also amount to being persecuted. Isolated incidents of harm in the past may indicate an isolated incident of harm in the future and this may amount to persecution. For example, attempted female genital mutilation in the past and fear of female genital mutilation upon return, may constitute one isolated incident of harm and this would amount to a fear of being persecuted. Alternatively and like discrimination above, **single incidents of harm that do not meet the required level of harm which in itself do not amount to being persecuted, when inflicted in a systematic or repetitive way, or when combined with other incidents of harm, may together when taken cumulatively, amount to being persecuted.** For example, threatening phone calls, defacing property and minor assault may not necessarily meet the threshold for persecution when taken on its own, however, taken cumulatively may demonstrate an escalation of violence that amounts to being persecuted.

However, officers must distinguish being persecuted upon return from incidents of generalised violence, meaning return to a situation of general civil unrest, poverty or random acts of violence or criminality, which may not amount to being persecuted.

Personal circumstances

Assessing whether the harm feared amounts to being persecuted will necessarily require consideration by officers of the individual circumstances of the non-citizen. This includes the previous history, profile and **vulnerability of the non-citizen**. It is not necessary for the non-citizen to have experienced persecution in the past as refugee determination is not a reward for suffering past harm, rather, such history may indicate that there is a real possibility of future harm for the non-citizen upon his or her return to the country of reference. Alternatively, the circumstances surrounding the reason or infliction of the past harm may in fact indicate that future harm is not a real possibility (therefore not a well-founded fear) upon return.

Who is the persecutor?

Officers need to identify who the non-citizen is claiming to be persecuted by. There may be multiple claims involving multiple persecutors. It is important to identify whether the claimed persecutor is

²⁵ *Note on International Protection 1998*

the State or a non-State actor. This will lead to questions of how the State is involved (if at all) or whether the State is taking any action to address the persecution if it is being perpetrated by a non-State actor. For further guidance, see the section on *State Protection* above. Officers are reminded that the State as the persecutor can include affiliated agencies of the State such as government officials, police and army, and that non-State actors can include neighbours, family or members of the local population, or non-governmental entities such as rebel groups.

Laws of general application

Overview

Where the non-citizen's claim of being persecuted is by the State, the harm feared must amount to persecution. The non-citizen may be claiming harm on the basis of being subjected to a criminal sanction, for example the non-citizen committed a crime and does not wish to return to his or her country of origin because he or she will be punished for the crime. This harm would be considered a fear of prosecution rather than persecution. As long as the law and punishment itself applies generally to the population of the country of origin and is not applied in a discriminatory way, **prosecution will generally not be considered to amount to persecution.** This is referred to as laws of general application.

Officers may need to consider the criminal code in the relevant country and its application to determine **whether the penalty is harsh, excessive, cruel, inhuman or degrading.** Officers should also be aware that in some circumstances, discrimination may be reinforced by laws or practices that appear to be generally applied but either may not be applied generally in practice, or the application of general laws impact differently on different persons and therefore operate discriminatorily and in practice are applied through selective enforcement of a law of general application.

Particular laws of general application have been considered in other jurisdictions, such as military conscription, common law offences, detention and interrogation.

Military conscription

Non-citizen's may claim to fear harm based on being a conscientious objector, or evading/deserting conscription, or compulsory national or military service. Avoiding or deserting service because the non-citizen dislikes the service, or fears combat and fearing the consequential punishment for that, does not in itself, constitute a well-founded fear of being persecuted. This is because military service generally applies to the whole population, or a section of the population generally, therefore conscription is not targeted or based on any particular attribute of the non-citizen.

However, in some situations, conscription or involvement in national or military service may amount to being persecuted when:

- persecution within the armed forces is feared for one of the Convention grounds (that is, there must still be a Convention nexus)
- there is disproportionately severe punishment for draft evasion or desertion for one of the Convention ground (for example, refusal to serve is perceived to be anti-government and therefore claim based on actual or imputed political opinion)

- the performance of the service would be contrary to political, religious or moral convictions, or for valid reasons of conscience and this is fundamental to the non-citizen in question.

Questioning or interrogation

A non-citizen claiming to fear being detained for questioning and interrogation does not amount to being persecuted, unless he or she fears interrogation and detention for a Convention reason and suffering harm as outlined above in *Type of harm*. Officers will need to consider whether detention is justifiable as appropriately adapted to achieving a legitimate State objective. Detention or interrogation which involves unnecessary and disproportionate acts of harm or the use of excessive force is not legitimate and, if arising for a Convention reason, can amount to being persecuted.

Claims involving detention and interrogation are likely to involve strong factual issues and officers need to carefully consider the facts of each individual case and determine if there is a causal connection between the harm and a Convention ground.

CONVENTION NEXUS

Overview

Article 1A of the Convention as incorporated by section 14(1)(b) of the Regulation, requires the non-citizen to have *a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*. These reasons constitute the five exhaustive Convention grounds. This means that if a non-citizen fears being persecuted for a reason other than a Convention ground, the non-citizen will not meet the definition of refugee.

Convention nexus

The terminology *for reasons of* necessarily requires a causal nexus between the well-founded fear of being persecuted and one or more Convention grounds. This is referred to as the *Convention nexus*. Refugee claims can involve multiple Convention grounds and officers will need to consider each claim carefully, noting some claims may overlap or be inextricably links, for example race and religion.

Imputed grounds

Non-citizens may claim to be persecuted for reasons of a Convention ground because they actually hold a belief or display one or more of those Convention grounds, or because they are imputed to be or hold such a belief based on a Convention ground. For example, a non-citizen may be perceived to hold a political opinion because he or she is a family member of a politician. On this basis, the non-citizen could claim to be persecuted *for reasons of* political opinion without even having a political opinion. This is referred to as having imputed grounds. It will be important for officers to consider what is the motivation of the persecutor to assist with the identification of a Convention ground/s.

Race

The Convention ground of *race* is not defined and is a broad concept, notably referring to identifiable ethnicity. Relevant factors when identifying a non-citizen's race may be: biological ancestry; self-identification as a member of a race; spiritual, cultural and linguistic heritage; and recognition by others as a member of a race including consideration of physical appearance, skin colour and ethnic origin.

Race has been suggested to be understood in its widest sense to include all kinds of ethnic groups which are commonly recognised as races. Included in the term are persons who are members of a *specific social group of common descent forming a minority within a larger population*.²⁶ Race can also be perceived. A non-citizen claiming to fear persecution for reasons of race can be either a majority or minority in the country of origin. Claims involving race can include issues of racial discrimination, apartheid, mixed marriages or a denial of citizenship.

Religion

What constitutes a religion for the purposes of the Convention is not defined. The plain ordinary meaning of religion includes:

²⁶ UNHCR Handbook paras 68-70.

- the quest for the values of the ideal life, involving three phases, the ideal, the practices for attaining the values of the ideal, and the theology or world view relating to the envioning universe;
- a particular system in which the quest for the ideal life has been embodied;
- action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; the exercise or practice of rites or observances implying this; or
- a particular system of faith and worship.²⁷

Claims of being persecuted for reasons of religion should be considered against known established religions. Where a claim of religion is not for an established religion, officers can consider whether then the belief system is analogous to an established religion, by having some kind of institutional characteristics. It is important that officers undertake appropriate research in testing the claims of religion and considering the individual circumstances of the non-citizen in making the claim.

Being persecuted for reasons of religion can be due to the non-citizen actually holding a religious belief, or being imputed to hold such a belief. Religious claims can also involve:

- prohibition of membership of a religious community, of worship in private or in public, and of religious instruction
- serious discrimination imposed on the practise of religion or because of membership to a particular religious community
- having a religion different to the State's religion
- failing to observe a particular religion or the customs the religion imposes
- having no religion.

Officers should note that mere membership of a religious community may not be enough to substantiate a refugee claim. Officers will also need to consider whether religious claims that relate to religious laws may constitute a law of general application.

See further UNHCR guidance on religious based refugee claims.²⁸

Nationality

Refugee claims on the basis of nationality may overlap with race, given nationality can be understood to refer to membership of an ethnic or linguistic group. For this reason, nationality is a concept that is broader than reference to citizenship and should not be limited to consideration of citizenship. Citizenship can be described as the narrow and legal meaning of nationality and can be viewed as a political and legal concept. By contrast, nationality can be viewed as a social and cultural concept. For example, many African tribes may be considered to have a national identity but do not have corresponding State borders, or similarly, a non-citizen may declare his or her citizenship of a State that is not recognised by international relations, meaning the non-citizen is actually stateless.

²⁷ Macquarie Dictionary.

²⁸ Annex 1: UNCHR 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 at <http://www.unhcr.org/40d8427a4.html>

The UNHCR Handbook provides the following advice on the concept of being persecuted for reasons of nationality:

...Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality".

Whereas in most cases persecution for reason of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.²⁹

Membership of a particular social group

Refugee claims for reasons of membership of a particular social group (PSG) involves identifying the PSG claimed which may also include formulating such a claim, and assessing whether the non-citizen is a member of such a group. Officers will need to consider the PSG formulated by the non-citizen.

A group will constitute a PSG if its members share a common characteristic that is innate, unchangeable or fundamental to the non-citizen's identity or the exercise of fundamental human rights.³⁰ This terminology has been further described as:

- innate characteristic may include sex, race, caste, kinship ties, linguistic background, or sexual orientation;
- unchangeable characteristics may be for example, because it relates to the individual's past history, such as former occupation; or
- a characteristic otherwise fundamental to identity, conscience or the exercise of one's human rights, such that the person should not be expected to change or reject it.³¹

This common characteristic must be something other than a risk of being persecuted and should be perceived as a group by society.³² This means a PSG claim will not be successful if the persecution is the only characteristic defining the group and such a group is not perceived to exist in society. The group must be set apart in some way from others, either because it sees itself as being different, or because it is perceived as such by the persecutor. It does not matter whether the members of the group know each other and associate together and a PSG need not be a particular size, either forming a big or small group in society.

For example 'brunettes who fear the Government' – being a brunette/having brown hair is not fundamental to a non-citizen's identity and fearing the Government appears to be the only element defining the group, which would also probably not be perceived by society.

²⁹ at paragraphs 74-76.

³⁰ UNHCR Handbook at paras x.

³¹ *Canada (Attorney General) v Ward* [1993].

³² UNHCR Handbook at paras x.

The term 'particular social group' should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms. The ground should be applied flexibly and is intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. However, caution should be exercised to ensure PSG is not invoked as a 'catch all' to cover any form of persecution. Determining whether a particular social group exists is not always easy to identify. This Convention ground is being invoked with increasing frequency with States in varying jurisdictions recognising women, families, tribes, occupational groups, and groups based on sexual preference as, in certain circumstances, constituting a PSG for the purposes of the Convention.

Officers are reminded that there must be a causal connection between the fear of being persecuted and the non-citizen's membership of a PSG. This means that a non-citizen may well be a member of a PSG but this is not the reason for the persecution. PSG claims must be considered on a case by case basis. See further UNHCR guidance on PSG.³³

Political opinion

Fearing persecution for reasons of political opinion is not limited to involvement or perceived involvement (imputed grounds) with a particular political party. Political opinion is a broad concept with claims involving matters engaging State apparatus, government or society and can include:

- expressing or being perceived to hold views contrary to the ruling State authority, for example, being critical of policies or methods and expressing this or wanting to express this through protest, education, publication, underground groups or departing the country of origin without permission;
- views or actions relating to gender roles in society, for example, expressed by manner of dress or custom (including rejecting dress or custom), involving education, employment, marriage, reproductive rights or violence
- corruption or knowledge of facts (including whistleblowing) which may be related to criminality
- having or being perceived to have a political profile.

Officers are reminded that a political opinion need not necessarily be held by the non-citizen in order for the non-citizen to have a well-founded fear of being persecuted for reasons of political opinion, it is consideration of what the motivation of the persecutor is, that will inform an assessment as to why the non-citizen will suffer harm upon return to his or her country of origin (imputed political opinion). This will be further informed by country information. UNHCR suggest:

imputed or perceived grounds, or mere political neutrality, can form the basis of a refugee claim...because it is the perspective of the persecutor which is determinative in this respect.

It is important to note that merely holding a political opinion, will be insufficient to meet the definition of refugee, officers must consider whether the non-citizen is being persecuted for holding that opinion and this must be considered on a case by case basis.

³³ Annex 2: UNCHR 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 the 1967 Protocol relating to the Status of Refugees at <http://www.unhcr.org/3d58de2da.html>

Punishment for expressing a political opinion, or action/conduct by the non-citizen that is considered political and is the subject of criminal sanction in the country of origin, may not necessarily constitute being persecuted for a Convention ground. If the punishment is a law of general application and the non-citizen breached that law, then it is likely that such a claim would be considered a fear of prosecution rather than persecution. However, if the law or the punishment is applied in a discriminatory way, it may amount to being persecuted for reasons of political opinion. Where a question of prosecution versus persecution arises, it may be useful for officers to consider:

- the non-citizen's personality and fundamental beliefs
- the non-citizen's claimed political opinion
- the motive behind an act committed by the non-citizen
- the nature of the act committed
- the nature and motives of the prosecution
- the application of the law and the punishment following prosecution; and
- the political environment of the non-citizen's country of origin.

EXCLUSION FROM REFUGEE DETERMINATION

Section 14(2) of the Regulation provides eight circumstances whereby a non-citizen will be excluded from recognition as a refugee. These circumstances will be considered in turn.

Rights and obligations of residence in a third country – Article 1E exclusion – section 14(2)(a) of the Regulation

Section 14(2)(a) of the Regulation excludes a non-citizen from recognition as a refugee if he or she has been recognised by the competent authorities of a country in which he or she has taken residence or held residence as having the rights and obligations which are attached to possession of the nationality of that country. This incorporates the wording of Article 1E of the Convention and can be guided by UNHCR:³⁴

- *has taken residence* implies continued residence and not a mere visit. Exclusion is not intended to apply to individuals who *could* take up residence in that country, but who have not done so, rather, it means that a temporary or short stay, or visit, is not sufficient and the stay must be intended as permanent.
- *rights and obligations* is a reference to rights and obligations generally, not just to fundamental rights and obligations such as those mentioned, for instance, in a national Constitution. The rights and obligations need not be identical in every respect to those enjoyed by nationals of the country in question, but divergences should be few in number and only minor in character. For example, being barred from certain public positions of high office might be acceptable for purposes of the application of Article 1E, but being barred from public positions generally would not. Similarly, an exemption from the obligation to perform military service would also be admissible. However, persons to whom Article 1E applies, must, like nationals, be protected against deportation and expulsion.
- there is no requirement that the person acquire the nationality of the country of residence, it is sufficient that they have the rights and obligations of a national.

Article 1F exclusion – sections 14(2)(b)-(d) of the Regulation

Overview

Subsections 14(2)(b), (c) and (d) incorporate the exclusion clauses under Article 1F of the Convention. The rationale for the exclusion clauses in Article 1F, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. The primary purpose of Article 1F exclusion is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. At the same time, given the possible serious consequences of exclusion, it is important to apply Article 1F with great caution, in a restrictive manner and only after a full assessment of the individual circumstances of the case.

Article 1F exclusion is not to be confused with Articles 32 and 33(2) of the Convention which deal respectively with the expulsion of, and the withdrawal of protection of refoulement from, recognised refugees who pose a danger to the host State (for example, because of serious crimes

³⁴See further: *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, UNHCR, March 2009.

they have committed there). Article 33(2) concerns the future risk that a recognised refugee may pose to the host State.

Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. Only Article 1F(b) provides that the crime in question must have been committed outside the country of refuge prior to the admission to that country. This means Articles 1F(a) and 1F(c) contain no temporal or territorial reference and so are applicable at any time, whether the act in question took place in the country of refuge, country of origin or in a third country.

To exclude a non-citizen from refugee determination under s14(2)(b)-(d), an officer must have serious reasons for considering exclusion.

Serious reasons for considering

Article 1F applies if there are “serious reasons for considering” that the Applicant has committed, or participated in the commission of, an excludable crime. Clear and credible information is needed to meet the “serious reasons” requirement. While it is not necessary to meet the standard of proof in criminal cases (e.g. “beyond reasonable doubt” in common law systems), the “balance of probabilities” threshold is too low. Likewise, a simple suspicion would not be a sufficient basis for a decision to exclude. The burden of proof lies, in principle, on the RSDO. In other words, the Nauruan RSDO must show that there are indeed “serious reasons” for considering that the person concerned comes within the scope of Article 1F.

Crimes against peace, war crimes or crimes against humanity – Article 1F(a) exclusion – section 14(2)(b) of the Regulation

Section 14(2)(b) of the Regulation excludes a non-citizen from recognition as a refugee if he or she has committed a crime against peace, a war crime or a crime against humanity. This incorporates the wording of Article 1F(a) of the Convention and can be guided by UNHCR.³⁵

Crimes against peace

According to the 1945 Charter of the International Military Tribunal (“London Charter”), a crime against peace involves the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing.” Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity, and only in the context of an international armed conflict. A “crime against peace” according to the definition cannot be committed in the context of a civil war, it must be an international conflict. There is currently no international consensus on what constitutes a crime against peace, and there has been only one international case where ‘crimes against peace’ has been applied.³⁶ See further UNHCR’s Background Note on Exclusion, at paragraphs 26–29.

³⁵ See further: *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/05, UNHCR, September 2003; *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, September 2003; and *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, February 2006.

³⁶ *CPRR No. 99-1280/W7769*, 6 August 2002

War Crimes

Certain serious breaches of international humanitarian law constitute war crimes. Officers need to consider whether the act in question was committed during a time of armed conflict and whether the armed conflict is international or non-international in nature. This is because different legal provisions are applicable to acts committed in the two situations.

War crimes may be committed by, and against, civilians as well as military persons. When determining whether a particular act constitutes a war crime, officers should examine the acts in light of the definitions contained in the four 1949 Geneva Conventions and 1977 Additional Protocols, as well as Article 8 of the 1998 Statute of the International Criminal Court (referred to as the Rome Statute). Article 8 of the Rome Statute defines a war crime as including:

- grave breaches of the 1949 Geneva Conventions;
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;
- in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions, committed against persons taking no active part in the hostilities;
- other serious violations of the law and customs applicable in armed conflicts not of an international character, within the established framework of international law.

Such crimes are generally committed in violation of the laws and customs of war as set out in the 1949 Geneva Conventions and may include any of the following acts:

- wilful killing, torture or inhuman treatment including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly;
- wilfully depriving a prisoner of war or a civilian of the right of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian and taking civilians as hostages.

See further: UNHCR's *Background Note on Exclusion*, at paragraphs 30–32.

Crimes against humanity

Crimes against humanity are inhumane, when committed as part of a systematic or widespread attack against a civilian population. Such acts include genocide, murder, rape and torture and may take place during an armed conflict or in peacetime. What constitutes crimes against humanity is provided for in a number of international instruments, including, the 1945 London Charter, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTRY) and for Rwanda (ICTR), and the 1998 Rome Statute. See further: UNHCR's *Background Note on Exclusion*, at paragraphs 33–36.

Elements of the crime and defences

In considering exclusion under Article 1F(a), officers need to consider whether the elements of the crime, as provided in the international instruments, have been met. This includes the mental

element requiring knowledge of the non-citizen in committing the crime – see Article 30 of the Rome Statute. Officer should note that there is no requirement for conviction of such a crime.

There are a range of possible defences to acts committed under Article 1F(a), and these should be considered where there are serious reasons for considering that the person has committed a crime for the purposes of Article 1F(a). Article 31 of the Rome Statute provides a number of grounds for excluding criminal responsibility. Article 31 defences include mental disease or defect, intoxication, self-defence or in the defence of another and duress. Articles 32 and 33 of the Rome Statute provide for the defences of mistake of fact and superior orders respectively.

Serious non-political crimes – Article 1F(b) exclusion – section 14(2)(c) of the Regulation

Section 14(2)(c) of the Regulation excludes a non-citizen from recognition as a refugee if he or she has committed a serious non-political crime. This incorporates the wording of Article 1F(b) of the Convention and can be guided by UNHCR.

Article 1F(b) seeks to exclude persons who have committed a serious crime before gaining admission to the country of refuge. Article 1F(b) is primarily designed to protect the order and safety of the receiving State; it is not designed to be punitive on the non-citizen seeking refugee determination.

Officers need to determine whether:

- there are serious reasons for considering that the non-citizen committed a crime before entering PNG;
- the crime was a serious crime;
- the crime was a non-political crime.

UNHCR lists examples of crimes which might be considered ‘serious’ in relation to Article 1F(b). These include offences such as homicide, rape and other serious sexual offences including child molestation and causing grievous harm. Other offences such as burglary, stealing, embezzlement and assault may also be considered serious if factors such as the use of weapons or injury to persons and property damage were present.

Factors that may affect the ‘seriousness’ of a crime include the age of the offender, parole, a lapse of five years since the conviction or completion of sentence, generally good character, the offender being merely an accomplice and other circumstances such as provocation and self-defence. If available, reference should be made to any sentencing comments made by judges or parole reports to assess the severity of the crime and the degree of rehabilitation.

Whether or not a crime is *non-political* within the meaning of Article 1F(b) will depend on a number of factors, including, the motivation, context and methods, as well as the proportionality of the crime in relation to its objectives. See further: UNHCR’s *Background Note on Exclusion*, at paragraphs 37–45.

Unlike Article 1F(a) and (c), this exclusion clause is limited in its geographical and temporal scope. Crimes committed in PNG do not give rise to exclusion from international refugee protection under Article 1F(b). This means a non-citizen cannot be excluded from refugee determination under section 14(2)(c) for crimes committed in PNG. Rather, such acts would need to be dealt with in

accordance with PNG's criminal law processes and may warrant exclusion from refugee determination under section 14(2)(h) if the act meets the intention of that exclusion provision (see below).

Guilty of acts contrary to the purpose and principles of the United Nations – Article 1F(c) exclusion – section 14(2)(d) of the Regulation

Section 14(2)(d) of the Regulation excludes a non-citizen from recognition as a refugee if he or she has been found guilty of acts contrary to the purpose and principles of the United Nations. This incorporates the wording of Article 1F(c) of the Convention and can be guided by UNHCR.

The purposes and principles of the United Nations are outlined in Articles 1 and 2 of the United Nations Charter. This exclusion ground would apply to acts which, on account of their gravity and impact, are capable of affecting international peace, security and peaceful relations between States, or serious and sustained human rights violations. In principle, only persons in positions of authority in a State or State-like entity could commit such acts. The meaning and scope of Article 1F(c) is uncertain and it is seldom used as a basis of exclusion. Article 1F(c) may have application to the following persons:

- members or organisations or individuals who have denied or restricted the human rights of others
- people who are engaged in the drug trade, who displace or obstruct democratic and representative governments, or who are opposed to certain liberation movements
- members of terrorist groups seeking to overthrow democratic regimes.

See further: UNHCR Handbook at paragraph 162 and UNHCR's *Background Note on Exclusion*, at paragraphs 46–49.

Threats to national security or defence – section 14(2)(e) of the Regulation

Section 14(2)(e) of the Regulation excludes a non-citizen from recognition as a refugee where he or she poses a threat to national security or defence of Papua New Guinea, if he or she were to remain in Papua New Guinea.

Terrorist acts – section 14(2)(f) and (g) of the Regulation

Sub-sections 14(2)(f) and (g) of the Regulation excludes a non-citizen from recognition as a refugee where he or she has engaged in, or is a member of, or adheres to, any organisation or group of persons that has engaged in, or has claimed responsibility for, a terrorist act in or outside Papua New Guinea and his or her continued presence in Papua New Guinea constitutes a threat to public safety.

Engaged in personally, member of a group, claimed responsibility

Terrorist act

Threat to public safety

Demeanor incompatible with good character – section 14(2)(h) of the Regulation

Section 14(2)(h) of the Regulation excludes a non-citizen from recognition as a refugee if during the period of his or her stay in the regional processing centre, he or she has exhibited a demeanor incompatible with a person of good character and standing.

The clear intention of the PNG Government in introducing section 14(2)(h) of the Regulation was to ensure transferees are made aware that misbehaviour may impact their refugee determination. This provision is intended to be restricted in its application. Section 14(2)(h) may be invoked where a transferee has been convicted of an offence resulting from misbehaviour during the transferee's time in the Regional Processing Centre. Section 14(2)(h) cannot be invoked where a transferee is merely charged with such an offence. Officers will be required to obtain reliable information to show this.

Given the grave consequences for excluding a non-citizen from refugee determination, which is not encompassed by the exclusion provisions in the Convention, officers will need to carefully consider whether s14(2)(h) applies.



IMMIGRATION AND CITIZENSHIP SERVICE

AUTHORITY

REFUGEE DETERMINATION GUIDELINES

PART 2: PROCEDURES MANUAL

Version 1
July~~June~~ 2013

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Introduction

This Manual outlines detailed step-by-step guidelines on *the procedures and process* to follow in order to determine whether or not a person's claim for refugee status is genuine.

This Manual is primarily aimed for use by officers involved in the Refugee Status Determination process (Protection Officers) to provide guidance in their assessment. It is also applicable to all those involved in the Refugee Determination procedure in Papua New Guinea (including representatives engaged under the Claims Assistance Provider Scheme (**CAPS**)).

This Manual provides detailed guidance on the procedure to gather information to enhance the Protection Officer's assessment and decision making on the refugee status of a person's application for refugee status.

This Manual draws heavily from the UNHCR Procedural Standards for Refugee Status Determination, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, as well as other UNHCR documents and guidance. It is expected that this Manual will be regularly updated and supplemented as RSD experiences in Papua New Guinea develops over a given period of time.

The ***Migration (Amendment) Regulation 2013***, being a Regulation to amend ***Migration Regulation 1979***, gives effect to *The 1951 Convention relating to the Status of Refugees* ("the Convention") as amended by *The 1967 Protocol relating to the Status of Refugees* ("the Protocol"). Based on the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, *Section 14 of the Migration Regulation 1979* concerns the *Determination of Non-citizen as Refugee* wherein *sub-section 1(a)* binds the Independent State of Papua New Guinea to its obligation towards determining a non-citizen as a refugee;-

14 (1)(a) *the non-citizen has been transferred to Papua New Guinea under the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related Issues.*

The Independent State of Papua New Guinea may determine a non-citizen to be a refugee on conditions stipulated in *sub-sections 1 (b) and (c) (i, ii)*;

14 (1)(b) *the non-citizen holds a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and*

14(1) (c) *the non-citizen –*

- (i) *is outside of the country of his or her nationality and is unable or owing to such fear, is unwilling to avail himself or herself of the protection of that country; or*
- (ii) *does not have a nationality and being outside his or her country of former habitual residence is unable, or, owing to such fear, is unwilling to return to it.*

Where the *Migration (Amended) Regulation 2013* makes reference to issues of the 'determination of non-citizen as refugee' and the 'notice of refugee determination', the issue of 'protection obligation' by Papua New Guinea is embedded in *Part 18, (a), (b) and (c)* of the Memorandum of Understanding

signed by the Government of the Independent State of Papua New Guinea and the Government of Australia on 8 September 2012, stipulating;

18. The Government of Papua New Guinea assures the Government of Australia that it will:
- a. Not expel or return a transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
 - b. Make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of refugee in *Article 1A* of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*; and
 - c. Not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

In embracing these commitments, the Government of the Independent State of Papua New Guinea is vigilant and in adherence to the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*, the international law and international obligations that Papua New Guinea is a signatory to.

Refugee Determination Application

A person may be considered for refugee determination under s14(1) of the Migration Regulation 1979 if the Minister is satisfied that:

- (a) The non-citizen has been transferred to Papua New Guinea under the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related to Issues.

The Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related to Issues was signed on 8 September 2012. This memorandum indicates common understanding regarding a transfer arrangement, whereby Australia would transfer persons to Papua New Guinea for processing of any asylum claims that transferees may raise.

Persons eligible for refugee determination in Papua New Guinea under the Memorandum of Understanding are persons who, in accordance with Part 11:

- (a) have travelled irregularly by sea to Australia; or
- (b) have been intercepted at sea by the Australian authorities in the course of trying to reach Australia by irregular means; and
- (c) are required by Australian law to be transferred to Papua New Guinea.

For application forms received from non-citizens who are not transferees and therefore do not meet section 14(1)(a) of the Regulation **[options for DJAG to clear]:**

- the non-citizen will be advised to complete a separate application form AND/OR
- as there is no enabling legislation providing a process for determining refugee status for a non-transferee, the non-citizen will be further advised on the process for consideration, pursuant to s15A of the Act.

Forms

Claims Assistance Providers (CAPs) will be required to use the approved Application for Refugee Determination form (**insert link to form here**). Clients will have access to an interpreter to ensure that they understand and can complete the Application Form.

It will be important to note to clients when completing the form that there are penalties under the Migration Act 1978 to providing false or misleading statements.

Prior to completing the Application for Refugee Determination form, clients will be briefed by CAPs on the refugee criteria and definition, and the procedures for applying for Refugee Determination in Papua New Guinea, including the various stages of the procedure, the avenues for appeal, and the

assistance they can receive. Clients will also be briefed on their rights and responsibilities in the Refugee Determination process, the confidentiality of the information collected in the process and any limits on that confidentiality.

DRAFT

Identity

In Papua New Guinea there is no statutory provision allowing Protection Officers to draw adverse inferences about a client's credibility if they fail to provide evidence of their identity. It is likely that clients who have been transferred to Manus Island under the Australian Migration Act 1958 will not be in possession of travel documents or identity documents.

When a person applies for refugee determination, Protection Officers will be required to be satisfied as to the client's identity. The Protection Officer must consider all available evidence, including that provided by the client, in reaching the requisite state of satisfaction regarding these matters.

The possession of a valid passport/s from their country or countries of nationality is the primary method of confirmation of a person's identity and nationality. In the absence of a passport, however, other documentation such as documents of identity, certificates of identity, identity cards and/or birth certificates may also assist with establishing identity and nationality. Supporting documentation such as credit cards, bank statements, driver's licences, educational certificates and health care cards can also assist in establishing the applicant's identity and background.

Being satisfied

It is accepted that it will not be possible, in some cases, for a client's stated identity to be fully established. It is also accepted that a client whose stated identity is not fully established might still receive the same outcome that they would have received if their identity had been fully established.

The following considerations may assist Protection Officers in determining a client's credibility with regards to identity:

- are there allegations from reliable sources that the client is making fraudulent claims about their nationality and/or other personal data or claims (for example, name, family composition, or travel history);
- does the applicant display a lack of knowledge about local conditions in the country of their claimed nationality, for which there is no reasonable explanation (for example, left the country of nationality as an infant); or
- according to reputable sources, does the applicant display any linguistic patterns, difficulties or inconsistencies that give rise to serious credibility concerns about their identity or nationality?

If the applicant claims to have had contact with UNHCR in any country of residence or transit:

- would advice from UNHCR confirming or providing details of such contact, substantially impact on the credibility of the applicant in relation to the application for refugee determination in Papua New Guinea?
- would the advice or indicate the applicant has effective protection somewhere else or is a national of another country?

Researching the case

While researching a case, Protection Officers should develop a clear understanding of the nature of the case, its key features and the main issues requiring resolution. To assist in identifying further research needs, the following will need to be taken into account:

- the client's personal particulars
- composition of the family unit
- chronology of the client's personal history and claims and
- the circumstances in the country from which the client is seeking protection.

Principal sources

Principal sources of information that should be considered when researching the case include:

- evidence provided by the client
- information before the authority and
- country of origin information.

Evidence provided by the client may include:

- statements from the client, written and oral (for example, statements in their application form, written submissions/declarations, statements made at interview)
- supporting documentary evidence from official sources (for example, identity papers, certificates and arrest warrants) and
- supporting documentary evidence (for example, letters/statements from relatives, acquaintances and employers, photographs, media clips and non-government organisations).

Authority-sourced evidence can include:

- Immigration Citizenship Services Authority files relating to the client
- The Authority's database records (for example visa records) and
- relevant case law (if applicable).

Country of origin information can include reports from:

- global or international media;
- local media (media and press agencies from within a country);
- non-government organisations (for example, Amnesty International and Human Rights Watch);
- inter-governmental organisations (for example, UNHCR and IOM);
- special interest groups (for example, women's rights or religious organisations)
- academic sources, and
- Government sources such as reporting from foreign government agencies (for example, DFAT or the US State Department).

In assessing the reliability of country information, or other sources of information, Protection Officers should consider the credibility, reliability, currency and relevance of the source.

Country of Origin Information (COI)

A good knowledge of the country of origin or claimed persecution of the Client is also essential when preparing for the interviews. Country of origin information (COI) refers to information on human rights, political, cultural, social and economic conditions in countries where asylum seekers claim to fear harm. Protection Officers are expected to be familiar with the basic facts about the country from which the Client has come.

Information gathered prior to the interview could include, but is not limited to the following:

- the basic political and administrative organisation of the country of origin. For example, does the country have an elected democratic government, political parties, an independent legal system, a civilian police force, autonomous or semi-autonomous local or regional governments, restrictions on freedom of movement;
- respect for and adherence to fundamental human rights in the country of origin, and any reports of harassment or persecution of any individual or groups of individuals on grounds related to the definition of a refugee;
- the basic geography (maps) of the country of origin, and the economic and social characteristics of the country including: the major population centres, distances between cities, ethnic or tribal groups, the main sources of employment, the system for the distribution of goods, economic or population dislocations affecting particular groups or areas;
- the culture of the country with respect to such issues that may be relevant to particular social groups;
- In some cases it may be necessary to have more detailed information concerning such matters as the operational methods of the police, military or security services, the criminal and military justice systems, and terms of punishment for criminal, military or political offences.

Checklist

The following checklist can be used to assist Protection Officers in preparing for an interview.

- ✓ Carefully read the transfer interview, the RD Application Form, including the Client's written statement, to highlight the relevant facts and determine the sequence of relevant events.
- ✓ Review the information provided in travel and other documents, and note information which supports or is inconsistent with the facts presented in the RD Application Form.
- ✓ Consult relevant COI, including maps of the regions referred to in the claim, and ensure that relevant maps are available for the interview
- ✓ Identify preliminary issues that will be relevant to the determination of the claim.
- ✓ Make a list of any missing information that the Client should be asked to provide at the RD Interview, as well as unclear or inconsistent facts or statements that the Client should be asked to explain.

Interviewing

Although there is no legislative requirement that a client be interviewed by a Protection Officer, unless there are substantial grounds for not doing so, it is the policy of the Immigration and Citizenship Service Authority that clients requesting refugee determination be offered an interview. The procedures outlined in this part should be followed when conducting an interview.

Protection Officers should be clear as to the purpose of the interview. They should focus their questions on specific issues pertaining to the client's claims, particularly those issues that are critical to the decision. Questions posed to the client should be succinct and to the point. The interview should:

- explore claims/information raised
- focus on specific issues that require clarification, and
- provide an avenue for natural justice by enabling the client to respond to any adverse information and by giving them an opportunity for their claims to be heard.

Interview Preamble

It is recommended that Protection Officers address introductory issues at the beginning of each interview. These issues include, but are not limited to:

- Introductions
- Interpreters
- Interview process
- Obligation to tell the truth
- Natural Justice

The interview preamble is available for all officers to use at the beginning of each interview (insert link to preamble).

Who can be present at interview?

All persons attending the interview are to be introduced to each other prior to commencement of the interview, and a record of their presence at the interview recorded and noted on file.

Claims Assistance Providers

A Claims Assistance Provider (CAP) will be allocated to all clients unless assistance is specifically refused. The client may also choose to engage their own legal representative or other advocate. Normally, a representative will be assisting the applicant at the interview.

The Protection Officer conducting the interview should remind the CAP they:

- will have the opportunity to make brief submissions at the end of the Refugee Determination interview;
- should refrain from interrupting the client or the Protection Officer during the interview, and should limit interventions during the interview to those relating to breaches of procedural fairness that cannot wait until the end of the interview to be heard;
- must act consistently with the non-adversarial character of the procedure, and should promote complete and reliable disclosure of the client's claim.

In exceptional cases, where the involvement of CAPs or a representative obstructs the interview, they can be asked to withdraw from the interview. The reasons should be explained to the client and recorded on the client's file. The interview can be suspended at the client's request to enable an alternate CAP to be arranged.

Interpreters

Effective communication is essential to the integrity of the interview process. All clients' applying for Refugee Determination in Papua New Guinea will have access to the services of trained and qualified interpreters at all stages of the process.

Interpreters will be assigned based on gender, age or other vulnerabilities as identified in previous communications with the client.

Role

It may be necessary to remind the interpreter of their role in the interview. They must be impartial and neither add to nor omit from the questions and answers provided at interview. Interpreters are not to provide assistance or their personal views on the case.

It may be necessary for the interpreter to be briefed on the general features of a case, particularly if they have little experience in refugee determination interviews, or if the interview is likely to involve difficult, unusual or specific vocabulary, or difficult/sensitive subject matter. However, there should be no discussion between the Protection Officer and the interpreter as to the merits or the likely outcome of the case.

Prior to the interview, the interpreter should be asked how they wish to be identified in the introduction to the client and the audio recording. Interpreters who do not wish to use their names should be identified only by their interpreting agency identity card numbers.

Client and Interpreter

Protection Officers should establish at the beginning of the interview process whether the client and interpreter know each other. If they do, Protection Officers will need to assess the nature of the relationship and the risk of any potential conflict of interest. If there is such a risk, a substitute interpreter should be sought or, if necessary, the interview rescheduled with a new interpreter.

During the course of the interview, clients and interpreters should be instructed to raise their hands when there is any difficulty in understanding each other or a need to clarify their understanding of a word or phrase.

If the client objects to the interpreter

The client may object to the interpreter's ethnicity, nationality, religion, gender or dialect. If the client disagrees with the use of a particular interpreter, Protection Officers should try to resolve the situation or make alternative interpreter arrangements if these can reasonably be made. Ultimately it is for the Protection Officer to be satisfied as to the effectiveness and appropriateness of the interpreter.

Other persons present at interview (other than mentors)

As a general rule, the participation of third parties in Refugee Determination procedures should be limited. In the case of children or clients who are suffering from mental illness or disability, the designated representative from the appropriate service should attend interview. Where the attendance of a third party other than a legal representative or a designated representative is specifically requested by a client, the Protection Officer conducting the interview should exercise discretion in determining the request. In assessing the appropriateness of the participation of a third party, any special needs or vulnerabilities of the client, the nature of the relationship between the client and the third party, as well as any factors indicating that the attendance of the third party would be likely to promote or undermine the objectives of the interview should be considered.

It should be noted in the Assessment that a third party attended the interview, and should record any relevant substantive statements or submissions made by the third party. Any conflicts or incidents involving the third party should also be noted.

Another officer from Immigration and Citizenship Service Authority may also be present at the interview in the capacity of observer. However, the consent of the client must be sought for the presence of any observers prior to interview. The observer does not have any formal role in the interview and should not be actively involved in the process.

Questioning the Client

The interview process is non-adversarial and Protection Officers are to explore claims to satisfy themselves as to whether the client is a person to whom refugee determination should be granted. Protection Officers should be careful to consider cultural issues/differences in dealing directly with clients.

Questioning by the Protection Officer during the Refugee Determination interview should facilitate the most complete and accurate disclosure of the facts that are relevant to the refugee claim. Wherever possible, Protection Officers should use open questions to permit the client to use their own words to describe their claim.

Protection Officers should use the interview to clarify incomplete or contradictory facts or statements. Inconsistencies in evidence provided by the client, or between the evidence provided by the client and other sources of relevant information should be put to the client during the interview. As a general principle, unless the client has had the opportunity to explain inconsistencies or evidence that is otherwise not credible; the Protection Officer may not make a negative credibility finding in the assessment on facts that are material to the refugee claim. For further information regarding credibility, please refer to [Chapter XX – Credibility](#).

Recording the interview

Following consent received from the applicant, all interviews must be audio-recorded. Protection Officers should explain the requirements for recording to the client and resolve any difficulties. The quality of the recording should be checked at the beginning of the interview before proceeding, and following the interview before the applicant leaves the interview room. If the recording is inaudible, the applicant should be interviewed again if possible.

If the client declines to be recorded, decision makers are not permitted to record the interview and will need to take comprehensive notes of the interview. Protection Officers must ensure that the quality of note taking is of a high standard, with legible notes that record the progression of the interview in a way that can be easily discerned by a subsequent reviewer of the file.

Interviewing survivors of torture and trauma

Cases where the client claims to be a survivor of torture or trauma need to be handled with particular sensitivity. The degree of trust and confidence Protection Officers can develop with the applicant is a key factor in handling torture/trauma cases; and in so doing, providing the client with a real opportunity to put evidence and submissions in support of their case.

Survivors of torture/trauma may experience a wide range of responses. These may range from anger to fear and shame, or showing no emotion at all, and may affect their ability to discuss the situation. Therefore, Protection Officers should be patient and understanding when discussing traumatic incidents with clients. If a client becomes distressed, it is important to give them a sense of control by (for instance) asking whether they would like to take a break in the proceedings.

Credibility

In dealing with credibility issues during the interview, it may not be necessary to probe into the detail of a traumatic experience. Carefully considered questions about the peripheral circumstances will often be enough to demonstrate the veracity of the claims. Protection Officers should also bear in mind that traumatic experiences including torture may impact on a number of aspects of a client's case, including the consistency of their statements as to what occurred. Protection Officers should not come to adverse credibility findings based solely on the demeanour of the client.

For further information relating to credibility, please refer to [Chapter XX – Credibility](#).

Assessing the case

In making an assessment, a Protection Officer must first be satisfied they have all necessary information needed to make a fair and lawful assessment of whether the client is a person to whom Papua New Guinea owes a refugee determination, and second, that this information has been carefully considered and referred to in their assessment record.

Protection Officers must consider whether the harm feared is for a Refugees Convention ground/s set out in Article 1A and section 14 of the Regulation and whether the harm feared amounts to persecution.

The five Convention grounds are race, religion, nationality, membership of a particular social group and political opinion.

Protection Officers also need to determine which Convention grounds relate to fundamental human rights abuse and reasons for the. For further information on persecution, well-founded fear and the Convention Grounds, please refer to the Legal Policy Guidelines ([insert link here](#)).

All refugee determination assessments should include:

- A summary of the claim;
- A credibility assessment, which should identify evidence that was or was not accepted or was regarded to be insufficient and an explanation provided for this finding;
- A statement of the established facts;
- An analysis of whether the accepted facts bring the client within the refugee determination criteria;
- An assessment of whether exclusion clauses (under section 14(2) of the Regulation) may apply and an examination of the relevant clauses if they are identified as relevant to the client; and
- An assessment on whether or not the client should be determined to be a refugee.

It is a general legal principle that the burden of proof lies on the person submitting a claim. However, while the burden of proof rests on the client, the duty to ascertain and evaluate all the relevant facts is shared between the Protection Officer and the client.

It is important to note that independent research may not always be successful and there may also be statements that are not susceptible of proof. In this instance, if the clients account appears credible, they should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Sur Place Claims

A client who is not seen to be a refugee on departure from their country may, due to events and incidents subsequent to their departure, be eligible for refugee determination.

A client may also submit a combination of claims based on events and incidents that occurred both prior to and after departure from their country of reference. A client making such claims in relation to the Refugees Convention are said to be making "sur place" (in place) claims. Sur place claims may give rise to a claim for refugee determination.

A person may also invoke a sur place claim because, for example, of their activities outside their country of origin or by the action taken by their country of origin, the Papua New Guinean government or third parties.

For further guidance on sur place claims, please refer to the legal policy guidelines ([insert link here](#)).

Statelessness

In order to make an informed assessment of the client's claims, the Protection Officer first needs to establish the client's country of citizenship (nationality) or former habitual residence and whether the client is outside that country.

If the client does not have a country of nationality and is therefore stateless, they must be assessed as to whether they have a country of former habitual residence. If the client is stateless but has more than one country of former habitual residence, the Protection Officer must assess whether the client has effective protection in a third country.

For further guidance on statelessness, please refer to the legal policy guidelines ([insert link here](#)).

Exclusion and cessation clauses in the Refugees Convention

Subject to the facts of the case under consideration, a Protection Officer may be required to consider whether the client is affected by the Article 1C cessation clause, or the exclusion clauses, being Articles 1D, 1E and or 1F of the Refugees Convention. Section 14(2) of the Regulation provides eight circumstances whereby a non-citizen will be excluded from recognition as a refugee.

Cessation clause: Article 1C

The cessation clause is at Article 1C of the Refugees Convention. Article 1C of the Refugees Convention lists the circumstances in which a person, after being declared a refugee, ceases to be a refugee. Generally, this will not be relevant to Protection Officers in determining whether to recommend the client meets the criteria for refugee determination.

Exclusion clauses: Articles 1D, 1E and 1F

The exclusion clauses are found in Articles 1D, 1E and 1F of the Refugees Convention. These Articles set out the conditions under which persons are excluded from the benefits of the Convention, even if they would otherwise satisfy the requirements for inclusion under Article 1A(2).

There are 3 exclusions provided under the Convention, namely:

- Article 1D - person's already receiving United Nations (other than UNHCR) protection or assistance
- Article 1E - persons who are not considered to be in need of international protection and/or
- Article 1F - persons who are excluded from protection, being persons for whom there are serious reasons for considering they have committed specified crimes.

The question of whether the client comes within the exclusion clauses is to be applied after all the other matters concerning the possible existence of refugee criteria have been considered. If the assessment indicates that the client would otherwise be a refugee, consideration is then to be given to the operation of Articles 1D-F. No assessment is required under Articles 1D-F if the client is not a refugee. Exclusion clauses are to be applied after a client has been assessed as meeting Article 1A of the Refugees Convention.

For further guidance on exclusion and cessation clauses contained within the Regulations, please refer to the legal policy guidelines ([insert link here](#)).

Credibility

The process of determining whether a client has a well-founded fear of persecution under the Convention involves assessing the client's subjective fear in an objective context. This requires Protection Officers to assess the client's credibility and the supporting evidence as to whether the subjective fear of persecution is held, and whether the subjective fear should be accepted as being well-founded for a Convention reason.

Often a client may not be able to support his or her statements by documentary or other proof, and cases in which a client can provide evidence of all of his or her statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents.

The Protection Officer must provide the client with a real opportunity to provide evidence and in some cases it may be for the Protection Officer to use all possible means to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. **In such cases, if the client's account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt.**

Protection Officers must keep in mind that they should have good reasons to question evidence and that the assessment of the credibility of a piece of evidence should be clearly documented and reflected in the Assessment Record.

If there are specific aspects of a client's account that may be important to the decision and may be open to doubt, Protection Officers should ask the client to expand on those aspects of the account.

Protection Officers should be mindful of the issues covered in these guidelines when assessing the credibility of a client's claims. Recognition of the diverse range of factors that influence a person's behaviour and the information they provide and the assessment of that information will assist in ensuring a robust refugee determination process.

Establishing the facts

Why we need evidence

A decision as to whether an client's claims are credible or not should **NOT** be based on the Protection Officer's subjective belief about whether an client is telling the truth or not. Instead, the Protection Officer must consider what is reasonably believable in the circumstances. Evidence assists the Protection Officer in making objective findings based on *fact* regarding the credibility of a client's claims.

What evidence is available?

Protection Officers need to take care to collect all available evidence before assessing a client's claims. This may come from the client or from independent sources. Evidence from a client, other

than the information in their application form, may be oral statements made at interview, documentary evidence such as proof of identity, or third person (including expert) testimony they have submitted that supports their claims.

Other independent evidence may also be available to Protection Officers could include information about conditions and laws in a client's country of origin, or documentary evidence or expert reports available to the Protection Officer.

Oral Statements

Statements may be collected directly from a client through an interview.

The interview should:

- explore claims/information raised
- focus on specific issues that require clarification, and
- Ensure procedural fairness by putting adverse information to the client for comment.

Documentary Evidence

Documentary evidence provided by a client might include identity documents, news articles, reports from academics, educational qualifications, employment files, documents reflecting their religious affiliation (such as baptismal certificates), documents relating to their membership of a political or social organisation, UNHCR documents and military service documents.

Protection Officers should examine all documents submitted by a client and, if relevant to the case, determine why or why not they accept that evidence as credible.

Passports should be checked for entry/exit stamps, visas, or other evidence of countries visited, or evidence of return to country of origin. This is in order to confirm the client's immigration history, and to compare this with the client's account of events.

Considering the facts

Materiality – Relevance

Material facts are those that go to establishing whether or not the client is a refugee. It is for the client to provide the details of their claims. The Protection Officer's role is to identify which facts are material to their claims - what is important to the client may not necessarily be material to the assessment of the claim and what is material to the assessment of the claim may not seem important to the client.

Examples of material facts include a client's membership of a political party, religion or membership of a group that may constitute a particular social group, instances of arrests and periods of detention, or episodes of violence at the hands of state or non-state agents.

Credibility findings should be based on relevant and material facts only. Therefore, Protection Officers should first make a determination on the relevance of each piece of evidence before them. Issues concerning the credibility of immaterial facts, such as inconsistency, misrepresentation or concealment should not lead to an automatic rejection of a client's claims. Instead, such facts may be discounted.

Once the material evidence has been identified, the Protection Officer should consider whether there are factors evident which may bring into question the overall credibility of the client's claims and which require further investigation.

Assessing the credibility of the claims

Clients often rely on claims that cannot be verified or are lacking in supporting evidence. There is no requirement that evidence provided by clients must be independently corroborated before it can be accepted by Protection Officers. It is the role of the Protection Officer to consider whether the client's claims are credible and if the claims should be accepted.

Protection Officers must reach a conclusion about whether past events have taken place and about the likelihood of future events occurring. In doing so, they must weigh the available evidence and make findings on the credibility of claims based on that evidence.

The following sections concern situations in which credibility concerns may arise and behaviour that may lead to doubts about the credibility of a client's claims. However, in assessing the credibility of the person's claims in these situations, the Protection Officer will also need to be mindful of any mitigating circumstances and of the impact that those circumstances may have on the client's behaviour or their capacity to present their claims.

Inconsistencies, contradictions or omissions

Contradictions, inconsistencies and omissions might appear in the information presented by a client. For example, irregularities might appear within a client's account of events or between their claims and independent evidence, such as travel movement records, identity documents and third party statements. Protection Officers should determine whether such contradictions or inconsistencies are so serious that they give rise to doubts about the credibility of the client's claims.

An inability to give a precisely accurate or consistent account of past events should not lead to an automatic rejection of a particular claim. A person may forget specific dates, locations, distances, events and personal experiences due to a range of factors such as trauma or a substantial lapse of time. This includes past residential addresses or employment over the past 10 years. Therefore, discrepancies in a client's claims would have to be quite serious for a Protection Officer to find that the claims are not credible. Care should also be taken not to join a series of minor inconsistencies together to reject a client's claims.

For consideration:

1. Does the identified inconsistency, contradiction or omission concern information that is material to the case?
2. Are there any mitigating circumstances that could explain the presence of the inconsistency, contradiction or omission?
3. Is the identified inconsistency, contradiction or omission sufficiently serious so as to bring into question the full body of evidence supporting the client's claims?
4. Has the Protection Officer provided a real opportunity for the client to respond to, inconsistencies, contradictions or omissions which raise issues concerning credibility?
5. Has the Protection Officer provided sufficient reasoning to explain why they do not accept some or all aspects of the client's claims?

Implausible, vague or incoherent claims

Claims put forward by clients may include implausible, vague or incoherent information. Protection Officers need to consider whether this information affects the credibility of the client's claims. Protection Officers may reject claims of a client on the basis that the claims are implausible, irrational or lacking in common sense only if these findings are supported by current country information or other known facts that clearly bring into question the plausibility of the claims.

Protection Officers might also have doubts if the client's testimony is incoherent or vague or lacks the detail or knowledge that might be expected of a person in their claimed position or from their social or cultural background.

However, Protection Officers:

- should be mindful not to set too high a standard when assessing a person's level of knowledge;
- should also not require the person to provide an unrealistic degree of precision and detail in statements if this knowledge would not ordinarily be expected of a person in a similar position.

Protection Officers must explain why some or all aspects of the client's story are not believable, and must ensure that their findings are supported by cogent reasoning, including references to any relevant country information or documentary evidence. It is not sufficient simply to find that the client's story is "implausible" or "vague" without explaining the reasoning behind that finding.

For consideration:

1. Is there independent evidence (country information or other known facts) that brings into question the plausibility of the client's claims?
2. Is the client's testimony sufficiently incoherent, vague or lacking in knowledge that might be expected of a person in their claimed situation or position, so as to bring into question the credibility of the claims?
3. Are there any mitigating circumstances that could explain why the client's testimony is incoherent, vague or lacking in detail?

4. Has the Protection Officer provided a real opportunity for the client to respond regarding implausible vague or incoherent claims which raise issues concerning credibility?
5. Has the Protection Officer provided sufficient reasoning to explain why they believe some or all aspects of the client's story are not credible?

Demeanour

The use of demeanour of a client when presenting or discussing claims during an interview is generally discounted as a reliable measure of credibility. Protection Officers must not form impressions based merely on the client's physical appearance or general mannerisms.

Protection Officers should avoid relying on a client's demeanour when making a finding on credibility and should always be mindful of the following factors:

- the difficulties of providing oral evidence through an interpreter;
- the anxiety, nervousness or bewilderment of the client due to the environment of an interview and the significance of the outcome;
- embarrassment on the part of the client in discussing matters of a particularly personal nature such as their sexual orientation;
- feelings of shame on the part of clients who have been victims of gender based violence such as rape;
- special considerations if the client is a minor;
- the possible effect transfer may have on the mental and emotional state of the client and the impact this may have on their ability to give evidence during an interview;
- the possible effect of any past torture or other trauma on the client's mental and emotional state;
- the client's educational, social and cultural background, which may affect the manner in which they provide evidence and their depth of understanding of particular concepts;
- cultural factors (eg, not looking someone directly in the eye when speaking); and
- other factors covered below under the section on Mitigating Circumstances.

In light of these factors, demeanour must never be used as the sole basis for an adverse credibility finding and, at best, it should either not count toward the overall assessment of the credibility of the evidence and claims or only be a minor factor in the assessment.

If demeanour is taken into account in making a credibility finding, the Protection Officer should clearly explain the evidence on which this finding is based and the other factors they have taken into consideration.

For consideration by the Protection Officer:

1. Has the client's demeanour sufficiently raised concerns as to the credibility of their claims?
2. Are there any mitigating circumstances or other factors that could affect or explain the client's demeanour?

3. Has the Protection Officer provided the client with a real opportunity to respond to concerns regarding the client's demeanour?

In assessing the credibility of a client's claims, the Protection Officer should be aware that there may be mitigating circumstances relating to the client that should be taken into account.

Mental or emotional trauma

Traumatic experiences including torture may impact upon a client's behaviour in several ways. Such experiences may also impact adversely on their capacity to provide testimony of these events or the consistency of statements. Consideration should be given to the effect of trauma upon a person's ability to focus and concentrate and to recall distressing events. It may be, for example, that the person is so traumatised that at interview they will say anything that they think will advance their case. Doing so does not automatically undermine their credibility.

Protection Officers should be mindful of how trauma may impact a client's engagement at interview and recollection of events.

Forgetfulness

A person:

- may not be able to remember all the details of their personal history or reconstruct the chronology of particular events; or
- may remember events that affected them most in emotional or physical terms but not the time sequence.

Such confusion and forgetfulness do not necessarily imply that they are not telling the truth.

Differences in perception

There may be differences in details of the same event if accounts of it provided by two or more persons. Such differences may be due to each person's perspective and the emphasis they place on particular issues, together with their capacity to recall particular elements of an event.

Feelings of shame, fear or mistrust of authorities

A client may be unwilling to reveal the whole of their story because of feelings of shame, or for fear of endangering relatives or friends in their home country or due to mistrust of persons in positions of authority.

Claims involving gender-based persecution, especially those of a sexual nature, may give rise to particularly painful memories, as well as shame or embarrassment. In any consideration of credibility, the Protection Officer should take into account the effects of such trauma on the client's demeanour and emotional state and on their capacity to recall events.

Special considerations for minors

Special consideration in assessing the credibility of claims should be given if the client is a minor, particularly an unaccompanied minor. Allowances should be made regarding the level of understanding and the minor's ability to recall details and articulate claims to ensure that expectations are appropriate to the client's age. Allowances should also be made for possible embarrassment or shyness in the minor's interactions with authority figures.

Procedural fairness

Under procedural fairness principles, if credibility issues arise during the assessment of a client's claims, the client should be given the opportunity to respond to those issues.

General procedural fairness principles are that:

- the person should have an opportunity to put their case;
- the person should be informed of any matters that are adverse to their claims, including any doubts or concerns on the Protection Officers' part in relation to the person's claims or credibility; and
- the person should be able to respond to those matters.

Failure to provide procedural fairness in relation to any credibility concerns may result in a client not being given the opportunity to explain their case properly which raises the risk that a person with genuine claims to asylum will be refouled.

Benefit of the doubt

A Protection Officer is not required to accept uncritically a client's claims and the client is not entitled to have their claims accepted simply because there is a possibility that they might be true. However, Protection Officers should be sensitive to the difficulties often faced by clients and must give the benefit of the doubt if the client is generally credible but is unable to substantiate their claims.

Making credibility findings

After considering the client's claims together with all available information and evidence in light of the factors covered in this guidance and the legal policy guidelines, the Protection Officer will need to determine the weight to attribute to each matter and the significance that matter should play in relation to the client's overall credibility. The Protection Officer's findings should be clear and unambiguous and state the information or claims they find credible, or not credible, and the reasons for these findings.

The rejection of some of a client's evidence or claims on account of a lack of credibility may not necessarily lead to a complete rejection of their claims. Even if some or all of a client's claims are found not to be credible, the Protection Officer must still consider if a well-founded fear of persecution exists for a Convention reason.

After assessing a client's claims in light of all of the evidence before them, a Protection Officer may come to one of the following conclusions:

1. The client's claims are credible and consistent with all the available evidence and raise no doubts during assessment, so that the Protection Officer is satisfied as to the client's overall credibility; or
2. the Protection Officer has doubts concerning some of the client's claims, but finds that those claims are either immaterial to the case, or are not significant enough to outweigh the other evidence or information in support of the client's claims (in this instance the client's claims would be found to be credible or benefit of the doubt would be given); or
3. there are deficiencies or doubts in relation to some or all of the client's claims that are so serious that the Protection Officer cannot be satisfied as to the credibility of those claims.

Recording credibility findings in the Assessment Form

When recording credibility findings in the Assessment Form the Protection Officer should:

- summarise all of the client's claims and demonstrate that genuine consideration has been given to them, especially if the Protection Officer has doubts about some of the claims or does not believe them;
- include details of the evidence on which the findings are based - for example, relevant country information;
- summarise any response by the client to adverse information;
- provide details of any conflicting information and explain why they prefer one piece of evidence over another;
- reflect consideration of any submissions on material questions of fact or independent expert reports in reaching the findings;
- include the reasons explaining why the findings have been made;
- include the reasons for giving or not giving benefit of the doubt.

Finally, the Protection Officer should clearly link the reasoning behind their credibility findings to their assessment as to whether the client fulfils the refugee definition.

Procedural Fairness

The concept of procedural fairness is integral to a robust Refugee Determination (RD) process. Procedural fairness is about giving people a “fair go” when making decisions about them. It is about giving a person who will be affected by a decision an opportunity to put their case and to respond to any information known to a decision maker which has an adverse bearing on their case.

The rules of procedural fairness

The right to a fair hearing is a procedural principle. It is important to note that it does not refer to the 'fairness' of the administrative action itself. The basic principles of a fair hearing are that a person has the right to:

1. be heard in accordance with natural justice or procedural fairness (the **Fair Hearing Rule**); and
2. an unbiased decision (the **Bias Rule**).

The fair hearing rule

Fairness demands that a person be given a reasonable opportunity to present their case before a government agency (or Officer) makes an evaluation that negatively impacts on the person. Procedural fairness also requires that those claims be properly addressed by the Protection Officer.

A Protection Officer must also provide a client with the opportunity to comment on adverse information which is credible, relevant and significant to the decision to be made, and the client must be given a reasonable opportunity to respond to that information before the assessment is finalised.

The bias rule

The 'bias rule' or 'rule against bias' is a principle of procedural fairness which requires Protection Officers to:

- not have an interest in the matter being determined and
- not appear to bring a biased or prejudiced mind to the determination.

What information or matters must be put to the client?

As noted above, adverse information which is credible, relevant and significant to their claim for protection must be put to the client. In this context, adverse information is any information known to the Protection Officer that may be used to arrive at a negative refugee determination.

Adverse information may be significant even if the evaluation does not turn on the information and the Protection Officer considers it possible to base their negative evaluation on other information. Importantly, adverse information includes general country information that may bear negatively on the client's claims.

The obligation to put matters to the client extends to country information that is equivocal or apparently neutral if the Protection Officer intends to use it in a way the client could not reasonably expect it to be used.

The hearing rule requires the Protection Officer to draw the substance of the adverse information to the attention of the client or his or her agent, at the Protection interview or subsequently in writing, and explains the bearing that information has upon the claims being made.

The Protection Officer is also required to advise the client of adverse conclusions arrived at that are based on information not available or known to the client. The client ought not to be taken by surprise.

Procedural requirements

The principles of procedural fairness focus on procedures rather than outcomes. In other words, they are principles that govern the procedure that the Protection Officer should follow in the course of making their assessment. They do not govern what the ultimate assessment should be.

The requirements of common law procedural fairness will be met provided the following procedures and principles are adhered to:

Before the interview commences:

- The Protection Officer must disclose any potential conflict of interest or other factor that may impinge on their ability to make an unbiased evaluation of the case, and if these are not able to be resolved, must remove themselves from the process.
- A description of the process and the purpose of the refugee determination interview is to be given to the claimant at the commencement of the interview. The Protection officer should ensure the client is aware of the importance of providing as much information as possible about their claims, and that providing misleading or false information may bring their credibility into question and impact on whether their claims are.

During the interview:

- Any adverse information that the Protection officer considers may bear negatively upon the claims made, and which is credible, relevant and significant, must be put to the client for comment at the refugee determination interview.
- The client must be given an opportunity to respond to that information in the interview. If it would be unreasonable to expect the client to respond at the interview, after the interview may be more appropriate. This is to be determined on a case by case basis.

After the interview:

- If adverse information (or an adverse conclusions that would not obviously be open on the known material) becomes known to the Protection officer after the refugee determination

interview, that information or conclusion must be put to the client in writing after the interview and a copy provided to the CAPS provider.

- The client must then be given the opportunity to respond to that adverse information or conclusion (usually in writing - though arrangements can be made for a different Protection officer to take this information orally, on the original Protection officer's behalf) within a reasonable timeframe.
- The Protection officer must put further adverse information and issues to a client, and request further information from a client, in order to be satisfied of all critical issues. A Protection officer is not obligated to provide a claimant an opportunity to comment on adverse information if they reach a positive evaluation.

Before handing down the assessment:

- The Protection officer must properly consider all claims made by the client and all other relevant information, including the client's response to any adverse information, prior to the preparation of their assessment and
- The Protection officer must ensure the assessment clearly outlines what information was presented to the client, the client's response and the Protection officer's final assessment.

Notification of Assessment

All notifications must be in writing. All positive and negative notification letters should be reviewed and approved by the Chief Migration Officer before they are issued to the client.

Counselling on refugee determination assessments will be provided by CAPS.

Notification of Negative Refugee Determination

Notification letters for negative refugee determination assessments from the Protection Officer should be completed using the template letter Notification of Negative Protection Officer Assessment ([insert link here](#)).

The completed Notification of Negative Protection Officer Assessment should include sufficient details to permit the client to know the following:

- Evidence submitted by the client that was considered to be insufficient or was not accepted by the Protection Officer, and a summary explanation of why evidence was rejected;
- The reason why the accepted facts do not make the client eligible for refugee status.

Notification letters for negative refugee determination assessments by the Protection Officer should contain information about the automatic referral to the Review Officer.

Notification letters for negative refugee determination assessments by the Independent Reviewer should include information as to whether the client will be excluded from refugee determination under Section 14(2) of the Migration Regulations 1979.

Notification of Positive Refugee Determination

Notification letters for positive refugee determination assessment from the Protection Officer should be completed using the template letter Notification of Positive Protection Officer Assessment or Notification of Positive Review Assessment ([insert link here](#)).

This notification letter should explain to the client that:

- the assessment could be withdrawn and reviewed in the event that new information obtained about the client indicates that they have provided misleading information of any sort during the assessment process;
- the recommendation will be referred to the Minister for Foreign Affairs and Immigration (the Minister) for final decision;
- in accordance with Section 15 of the Migration Regulation 1979, the Minister will give notice of his decision which will provide reasons for his decision; and
- under Section 15(4) of the Regulation, the Minister must not re-open a decision for further consideration after his decision has been made.

Minister's Determination

Following the assessment of the Protection Officer and the independent reviewer, the assessment will be referred to the Minister for final decision. In accordance with Section 15 of the Migration Regulation 1979, the Minister will give notice of his decision and in that notice, provide the reasons for the decision.

All notifications from the Minister will note that, in accordance with Section 15(4) of the Migration Regulation 1979, the Minister must not re-open a decision for further consideration after his decision has been made.

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