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No. 55 2001–02

Migration Legislation Amendment Bill (No 6) 2001

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Migration Legislation Amendment Bill (No 6) 2001

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18 September 2001

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Migration Legislation Amendment Bill (No 6) 2001

Date Introduced: 28 August 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: 6 months after Royal Assent or on Proclamation, whichever is the earlier

Purpose

To amend the *Migration Act 1958* to:

- define certain key terms used by the Federal Court and the Refugee Review Tribunal (RRT) in determining refugee status so as to narrow the interpretation given to the definition of 'refugee' (in particular, the elements of 'persecution', 'membership of a particular social group' and 'particularly serious crime'),
- allow adverse inferences to be drawn from an absence of documentation, or from a person's refusal to give sworn statements verifying the truth of information provided, and
- make other miscellaneous amendments.

Background

The issue of Australia's obligations to refugees and asylum-seekers, particularly those arriving by boat, has been politically sensitive for some time. This Bill contains measures to address two separate and unrelated issues of concern, verifying the identity and claims made by unauthorised arrivals, and the interpretation given to the Refugees Convention¹ by the courts. It also addresses some unrelated matters.

Unauthorised arrivals

The continuing influx of unauthorised arrivals is particularly topical at present, given the situation involving the potential asylum-seekers rescued from their sinking boat by the

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Norwegian ship the MV *Tampa*, and those intercepted on the *Aceng* and diverted to Nauru. It is not the purpose of this digest to recount the history of unauthorised arrivals. A background covering people smuggling issues may be found in the Bills Digest No 41 of 2001-2002 on the Border Protection Bill 2001,² and in a Parliamentary Library Current Issues Brief entitled 'Boat People, Illegal Migration and Asylum Seekers: in Perspective'.³

In 1999, the Parliament passed laws to combat people smuggling.⁴ These laws contain a variety of offences directed at people smugglers, not the asylum-seekers themselves, as well as expanded powers for Australian customs and immigration officials to board, search and detain ships and to detain persons aboard foreign vessels at sea.

The Border Protection Bill 2001 passed the House of Representatives on 29 August 2001 but was refused a second reading in the Senate that night. It would have given additional separate powers to officers to return ships to sea which have entered Australia's territorial waters, when authorised by the Prime Minister or Minister for Immigration and Multicultural Affairs. It would also have prevented people on board a vessel which was turned around from being eligible to lodge applications for protection visas.

A particular problem which the Government has identified is that:⁵

large numbers of [unauthorised arrivals] have, but disposed of, identifying documentation before arrival in Australia. The smuggling operations which are providing this travel often give highly detailed information and coaching to these arrivals on appropriate claims and country knowledge and on Commonwealth assessment procedures to maximise their chance of successfully gaining a visa.

To address this problem, this Bill will permit adverse inferences to be drawn from the absence of identity documentation, or from a refusal to make a sworn statement affirming the truth of information provided in their application.

Interpretation of the Refugees Convention

A separate but also controversial issue is the effectiveness of Australia's tribunal and court system in assessing claims for refugee protection.

It should be emphasised that Australia's system of assessing refugee claims applies only to a minority of those granted refugee visas. A clear majority of people given residence in Australia on refugee or humanitarian grounds are accepted and processed overseas. There are two main categories in this part of the immigration program:⁶

- *refugee*, covering people who meet the definition of refugee (that is, are outside their country of origin and at risk of persecution if they returned), or are in special need of assistance (such as women at risk)

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- *special humanitarian*, covering people who have fled from war or civil strife and have suffered serious human rights violations but who may not meet the definition of refugee.

A third category, *special assistance visas* for members of certain groups in vulnerable situations overseas with strong family or other connections to Australia, is currently being phased out.

Mary Crock, an expert in migration law at the University of Sydney, states that 'as a sovereign nation, Australia is free to offer protection to whoever it chooses, irrespective of their international legal status as refugees'.⁷ Australia controls its overseas refugee and humanitarian program by means of annual quotas on the number of people allowed to enter on these grounds.

By contrast, Australia is not free to choose those to whom it will offer protection once they arrive in Australia. Once people are in Australian territory (including Christmas Island and Ashmore Reef) and claim asylum, Australia is obliged both under international law and the *Migration Act 1958* to assess their claims for refugee status, as there is an obligation in international law not to return, or 'refoule', refugees to a country where they face persecution. People who are granted refugee status, 'protection visas', are entitled to remain in Australia. Not all of those who apply for refugee status arrive in Australia unlawfully. Many apply while lawfully here on other visas, such as student or visitor visas.

There is a defined procedure for applicants for refugee protection. An application is first determined by the Department of Immigration and Multicultural Affairs. If unsuccessful, an applicant may apply to the RRT for review of the Department's decision. From the RRT, judicial review applications may be made to the Federal Court and thence to the High Court. In some circumstances, judicial review applications are made directly to the High Court.

The overall size of Australia's humanitarian program, both offshore and onshore, has remained relatively stable over the last few years. The Department of Immigration and Multicultural Affairs estimates that it will remain at 12,000 in the year 2001-2002. The number of offshore places is reduced by the number of onshore protection visas granted.⁸ The following table summarises the number of offshore refugee and humanitarian visas granted⁹ compared to onshore protection visas.

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	1997-98	1998-99	1999-2000	2000-01
offshore refugee and humanitarian visas	10,467	9,526	7,502	7,992
onshore protection visas	1,588	1,834	2,458	5,577
TOTAL	12,055	11,360	9,960	13,569

The offshore refugee and humanitarian program has not proved controversial, it is the procedure and appeals process which applies to onshore applications for refugee protection visas which has been the focus of successive governments. There are concerns at the number of unmeritorious applications being made, and the cost of the refugee processing and appeal system. This is so particularly in the light of estimates that the Government will spend \$20 million this financial year on 'barristers, solicitors and bureaucrats contesting claims by asylum seekers for refugee status'.¹⁰ Internationally, it is estimated that developed nations spend \$US10 billion per year assessing refugee claims, most of which are rejected, compared to giving only \$US1 billion to the UNHCR for its work with refugees and displaced persons around the world.¹¹ The Minister for Immigration and Multicultural Affairs has commented that this is:¹²

an absolute distortion of priorities. Ten billion dollars on 500,000 people, most of whom will not sustain refugee claims. It is the needy who are left behind. Saving just one tenth of asylum determination costs could double the UNHCR's budget.

The Parliament has already legislated in an attempt to streamline the procedure for processing claims for refugee protection, by introducing a strict procedural code for review by the Refugee Review Tribunal,¹³ and by limiting the grounds of judicial review before the Federal Court available under Part 8 of the Migration Act.¹⁴ Three Bills which are currently before the Parliament contain further proposed amendments to the review process:

- The Jurisdiction of the Federal Magistrates Service Legislation Amendment Bill 2001 would give the Federal Magistrates Court concurrent jurisdiction with the Federal Court in migration matters, which would enable it to hear less complex appeals from the RRT, and take some of the pressure off the Federal Court's caseload.
- The Migration Legislation Amendment Bill (No. 1) 2001 would restrict access to the courts for judicial review of migration decisions by preventing class actions in migration matters before the Federal and High Courts, by changing the requirements

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for standing in the Federal Court and by introducing time limits for original applications to the High Court in migration matters.

- The Migration Legislation Amendment (Judicial Review) 1998 would introduce a privative clause which would in effect remove all avenues of judicial review of visa decisions by the Federal Court, and leave the High Court's original jurisdiction as the only avenue of appeal from the RRT.

This Bill has a different focus. Whereas recent changes and proposed changes to the review process for migration decisions, including applications for refugee protection visas, have focussed on appeal rights and procedural matters, the present Bill concentrates on the content of the decision-making process. It provides definitions of key terms interpreted by the RRT and the courts when determining whether a person is a 'refugee' and whether Australia is under an obligation not to return a person to a place where he or she is at risk of torture.

This reflects the Government's concern that Australia's acceptance rate for asylum seekers of particular nationalities is claimed to be much higher than that of the UNHCR. For example, a spokesman for the Minister for Immigration and Multicultural Affairs states that the UNHCR accepts 10 to 15 per cent of refugee claims in the Middle East by Iraqis, whereas Australia under the appeals system accepts 90 to 95 per cent.¹⁵

Definition of 'refugee'

Australia is a party to both the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (the *Refugees Convention*) and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (the *Refugees Protocol*).

The Refugees Convention, read together with the Refugees Protocol, defines 'refugee' relevantly as:¹⁶

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

Under the Refugees Convention, a person is not within the definition of 'refugee' in a number of circumstances, including:

- where a person has voluntarily returned to his or her country of nationality or residence, or has acquired a new nationality, or where the circumstances constituting persecution have ceased to exist,¹⁷

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- where a person is currently receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees,¹⁸
- where a person has a right of residence in a third country, which gives him or her rights and obligations equivalent to citizens of that country,¹⁹ or
- where 'there are serious reasons for considering that' the person has either:²⁰
 - (a) committed a crime against peace, a war crime, or a crime against humanity;
 - (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or
 - (c) been guilty of acts contrary to the purposes and principles of the United Nations.

This definition has been incorporated into Australian law. Section 36 of the *Migration Act 1958* creates a class of visas, called 'protection visas', which a person is entitled to if he or she is 'a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.²¹ Thus, it falls to the Department, and on review the RRT and the Federal and High Courts, to consider the definition of 'refugee' given above, together with the exclusions.

Neither the Refugees Convention nor the Refugees Protocol defines key terms, such as 'owing to a well-founded fear', 'persecution', 'membership of a particular social group' or 'political opinion'. These terms are interpreted differently by the courts and tribunals in individual countries which are parties to the Refugees Convention and the Refugees Protocol. A body of case law has been developed by the RRT, the Federal Court and the High Court over the last decade on the meaning of key terms. At one time, perhaps, the courts warned against taking an overly technical approach to the interpretation of key terms.²² However, the effluxion of time, and the volume of litigation, has seemingly eroded that view. It is the Government's view that at least in some respects the interpretations given by the courts are overly broad. The Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, stated in his second reading speech:²³

In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention. These generous interpretations of our obligations encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.

The Bill provides definitions of some of the phrases and concepts used in the definition of refugee, but not the majority. Those defined are 'persecution', the causal link 'by reason of', and one of the five 'Convention grounds' of persecution - 'membership of a particular social group'. It also requires that conduct by a person once in Australia shall in normal

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circumstances be disregarded in considering whether the person has a 'well-founded fear of persecution'.

The Bill also defines one term used in an exclusory provision, namely, 'non-political crime' committed outside the country of refuge.

Obligation of non-refoulement

It is important to realise that the Refugees Convention does not contain a right of asylum for persons who satisfy the definition of 'refugees'. Refugees have no direct right to gain entry to a country of refuge. This has been accepted by the courts in a number of countries.²⁴ The only obligation contained in the Convention is to guarantee *non-refoulement*, that is, non-return of refugees to the place of persecution.

Article 33 of the Refugees Convention provides:

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

The effect of this is that there is no obligation to take persons into Australia if they claim to be refugees. However, once refugees are in Australia, there is an obligation not to return them to the place of persecution. This means in effect that Australia needs to have a system for determining whether a person who claims to be a 'refugee' in fact satisfies the definition. There is an exception to the obligation of non-refoulement, even where a person is a 'refugee' as defined, if the person has committed a 'particularly serious crime' and constitutes a danger to the Australian community. Neither the Refugees Convention nor the Refugees Protocol provides any guidance as to what types of crime will be 'particularly serious' such as to 'constitute a danger to the community'. The Bill proposes to insert a definition of 'particularly serious crime' into the *Migration Act 1958*.

Main Provisions

Definition of 'refugee'

The Bill proposes to spell out the meaning of certain phrases and criteria used in the Convention definition of 'refugee' and list of exclusions. These changes will apply to all applications for a protection visa made after the Bill commences, and to applications

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which have not been determined (either by the Department, or on review by the RRT or AAT) at the time the Bill commences (**item 7**).

Meaning of 'persecution'

New section 91R provides a definition of 'persecution'. It deals with a number of elements of the Refugees Convention definition, namely what conduct amounts to 'persecution', when is the persecution 'by reason of' a Convention ground and the exclusion of conduct after the applicant for refugee protection is in Australia.

'persecution' must demonstrate serious harm

In a number of cases, the High Court and the Federal Court have considered what types of conduct will amount to 'persecution'. In *Applicant A*, Justice Gummow affirmed the formulation given by the Federal Court in *Ram*:²⁵

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

Justice McHugh in *Chan's* case accepted that 'not every threat of harm' amounts to persecution, that there must be some notion of selective harassment. Thus, the High Court has consistently held that victims of epidemics, natural disasters, or famines, war or civil disturbance (such as Somalia) or economic misfortunes do not fall within the meaning of the phrase 'persecution'.²⁶

Systematic harassment may constitute persecution, but persecution may also be a single act of oppression, if it forms part of a systematic course of conduct directed against members of a class of persons.²⁷ Indeed, in *Ibrahim*, Justice McHugh, concerned at the misunderstanding that had arisen from the term 'systematic conduct', considered it was better to avoid the term, but emphasised that it did not require an individual to show a series of coordinated acts directed at him or her. All it required was non-random acts for a Convention reason.²⁸

A wide range of acts and threats are contemplated by the definition of 'persecution', including being shot, or tortured, or raped. However, other forms of harm falling short of threats to life or liberty may also constitute 'persecution'. As Justice McHugh has stated, persecution 'may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society'.²⁹ These may include serious violations of human rights, and various forms of 'social, political and economic discrimination', such as 'the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or

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movement'.³⁰ Justice McHugh also considered that '[d]enial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases'.³¹

On the other hand, discriminatory acts which are 'appropriate and adapted to achieving some legitimate object of the country' will not amount to persecution.³² The High Court has held that the application of a law of general application, such as a law penalising Chinese couples who have more than one child,³³ or imposing sanctions on Armenian conscientious objectors to military service, would not amount to persecution.³⁴ However, in some circumstances such laws could amount to persecution, for example where the law imposed forcible sterilisation as a sanction,³⁵ or where the type of military action to which a conscientious objector was opposed 'is condemned by the international community as contrary to basic rules of human conduct'.³⁶ Thus, in *Chen Shi Hai*, the High Court held that the denial of food, shelter, medical treatment and a right of education to children born outside the parameters of China's one-child policy constituted persecution, even though the denial occurred under laws of general application.³⁷ In two cases involving Sri Lankan nationals, the Full Federal Court has accepted that routine mistreatment of Tamils in detention on the basis of their ethnicity constitutes persecution.³⁸

It needs to be emphasised there needs only to be a 'real chance' of persecution for there to be a 'well-founded fear of persecution'. This may be less, indeed considerably less, than a 50% chance, but must be more than fanciful.³⁹ This test will not be affected by the changes proposed in the Bill.

The Bill contains a definition which stipulates that persecution must involve 'serious harm to the person' that 'involves systematic and discriminatory conduct' (**new paragraphs 91R(1)(b) and (c)**). 'Serious harm' is defined in **new subsection 91R(2)** to include:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;
- denial of access to basic services, which threatens the person's capacity to subsist;
- denial of capacity to earn a livelihood of any kind, which threatens the person's capacity to subsist.

The first point to note is that the serious harm must be to the person who seeks refugee status. It is not enough to fear serious harm to a member of one's family. Thus, in the case of *Giraldo*,⁴⁰ the father would be unable to obtain refugee protection in Australia based on a fear that guerillas would forcibly recruit his teenage daughter. Under the Bill, only the daughter herself would be able to seek refugee status. The treatment of family members is also considered below under the heading 'Other Amendments'.

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Secondly, the Bill does not define what constitutes 'systematic and discriminatory conduct'. Further, the relationship between the 'systematic and discriminatory conduct' criterion and the 'serious harm' criterion is unclear. On the one hand, it is unclear whether, as the courts have accepted, systematic conduct may be against a group of persons or needs to be a course of conduct directed against the individual refugee claimant. On the other hand, while the 'systematic and discriminatory conduct' criterion is general, the 'serious harm' criterion is specific. It must be 'serious harm against the person'. Arguably, the definition reflects the distinction drawn by the courts between the persecution directed at the group and the particular acts or threats feared or suffered by the individual. Thus, serious harm to the individual may constitute persecution even if it is not repeated or sustained provided it is part of a wider context of 'systematic and discriminatory conduct'. Conversely, it is acknowledged that less serious harm to the individual may constitute persecution even if it does not fall within one of the listed forms of 'serious harm' provided it is part of a specific context of 'systematic and discriminatory' against the individual.⁴¹

Thirdly, any economic persecution claimed must be so severe as to threaten a person's capacity to subsist. This would arguably still encompass the level of denial of basic services claimed would be suffered by the child applicant in *Chen Shi Hai*, who on the evidence would be denied medical treatment, education, and other basic services. But other, less extreme economic deprivations may not be covered, even if they were part of a course of systematic and discriminatory conduct.

Causal link – 'for reasons of'

The Refugees Convention stipulates that persecutory conduct must be 'for reasons of' one of the five grounds enumerated in the Convention, namely race, religion, nationality, political opinion, or membership of a particular social group.

It is clear from existing caselaw that there must be a causal nexus between the persecution feared and one of the five 'Convention grounds' for persecution.⁴² The words 'persecution' and the grounds specified in the Refugees Convention, namely, race, religion, nationality, membership of a particular social group or political opinion, are linked by the phrase 'for reasons of'. Thus, all the elements of the definition of 'refugee' are linked by a common thread. As the majority of the High Court observed in *Chen Shi Hai*:⁴³

As was pointed out in *Applicant A*, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of "refugee". It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

It appears that where persons of a particular race, religion or nationality are discriminated against or treated differently, this without more may be presumed to be 'for reasons of' that

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race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently. However, the situation is more complex in relation to membership of a particular social group or political opinion, as there may be reasons to treat some groups differently, for example to protect society from terrorist groups.⁴⁴ The issues associated with membership of a social group are considered below under the heading 'Meaning of "membership of a particular social group"'.

The Federal Court has in a number of cases held that there may be a well-founded fear of persecution even where the persecutors may have more than one reason or motive for persecuting a person. It is not a requirement that the Convention ground be the sole ground for fear of persecution.⁴⁵ In particular, a motive to extort money from a person because of self-interest may coexist with a Convention ground for persecution, if the person was selected as a target for extortion by reason of their race, religion etc.⁴⁶

The Bill tightens this causal connection by requiring that the Convention reason be 'the essential and significant reason' for the persecution (**new paragraphs 91R(1)(a)**).

This means it will in future not be sufficient to demonstrate that a Convention ground was one of a number of motivations for persecution, it must be 'the essential and significant reason'. It seems that although it still may be possible to allege more than one motivation, the Convention ground must be essential, that is, if the Convention ground were not present, there would be no fear of persecution. This would appear to equate roughly with the common law 'but for' test of causation,⁴⁷ and perhaps even the 'true reason' test,⁴⁸ which have been the subject of divergent views in the Federal Court⁴⁹ and elsewhere.⁵⁰

Conduct after arriving in Australia to be disregarded

In some situations applicants who may not otherwise have fallen within the definition of 'refugee' have created claims for refugee status once in Australia by engaging in activities which may result in persecutory conduct if they were returned to their country of origin. Sometimes the suspicion arises that these activities were engaged in for the sole purpose of manufacturing or enhancing a claim for refugee status.

In two relatively early cases, the Federal Court enunciated the proposition that a person who has deliberately created the circumstances which give rise to a fear of persecution is not entitled to recognition as a refugee. In *Somaghi*,⁵¹ the applicants, after their applications for refugee status were rejected, wrote a letter to the Iranian embassy which was highly critical of the Iranian regime. Their claim to fear persecution based on the writing of the letter was rejected by the tribunal and the Federal Court, on the basis that the sole purpose of their action was to create a pretext for invoking fear of persecution.

Similarly, in *Li*, the Federal Court rejected a claim based on a protest in immigration detention.⁵² The applicants in that case were Chinese nationals who arrived by boat and were detained at Port Hedland. After a negative assessment of their claims to refugee status, they became involved in a hunger strike and protest on the roof of the Port Hedland detention centre. They held banners critical of the Chinese government. The applicants

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jumped from the roof and sustained serious injuries, one becoming a paraplegic. The court did not take their actions into consideration, as it found they were not a genuine protest against the Chinese political situation, but rather were designed to put pressure on the Australian immigration authorities.

However, in more recent cases, judges of the Federal Court have declined to follow this principle. They have instead accepted that in some circumstances a person may be a refugee even if the fear of persecution arises out of his or her own deliberate conduct, particularly the voluntary expression of a political opinion. They have limited the rule in *Somaghi's* case to circumstances where the person aims to create a pretext, thus does not have a 'well-founded' fear because the basis of the claim is made in bad faith and is not genuine. They emphasise that the question remains in all cases whether a person holds a genuine and well-founded fear of persecution for a Convention reason. The leading case is *Mohammed*,⁵³ in which a Sudanese national in immigration detention in Australia wrote a letter to his brother detailing his claim for refugee status here, his political activity and his opposition to military service. He claimed the letter had been intercepted by Sudanese censors and would expose him to risk of serious harm were he to return to Sudan. French J stated:⁵⁴

There will be cases in which a deliberate act, expressive of a particular political opinion will give rise to a risk of persecution that supports a well-founded fear for the purposes of the Convention. Good faith will not necessarily have any part to play in such a case. Acts of refugees expressing political opinions outside the country of nationality may be done for a variety of reasons. They may be intended to be supportive of those who remain at risk within their country of origin. They may be designed to bring international pressure to bear upon that country. They may be designed to draw the attention of the country to whom they are applying for refugee status, and of its community, to the situation in the country of nationality. There may be a case in which a person genuinely holds an opinion which would attract persecution if known to the country of origin and who deliberately draws that opinion to the attention of authorities in that country to crystallise or demonstrate the basis for the fear which is asserted. All of these reasons may be consistent with the existence of a well-founded fear of persecution, albeit it is enhanced or even brought into existence by the conduct in the country of residence.

Special leave to appeal in the *Mohammed* case was granted by the High Court on 22 June 2001. The appeal has not yet been heard.

Under the changes proposed in the Bill, in most circumstances conduct engaged in by a person in Australia must be disregarded in considering whether the person has a well-founded fear of persecution (**new subsection 91R(3)**). Conduct in Australia can be taken into consideration only if the applicant satisfies the decision-maker that he or she engaged in the conduct for a purpose other than to strengthen his or her claim to refugee status. This throws the burden of proof squarely onto the applicant.

This change would exclude evidence of protests engaged in by persons once in Australia, such as conduct critical of their home government.

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Meaning of 'membership of a particular social group'

Professor John McMillan of the Australian National University, has noted that the phrase 'membership of a particular social group' has recently become the focus of exceptional judicial attention, more than the other four grounds of persecution mentioned in the definition of 'refugee'. He continues:⁵⁵

Issues that have arisen in recent litigation include whether the phrase 'particular social group' extends to the targets of organised crime, parents in breach of China's one child policy, Chinese children disadvantaged by that policy, members of a family, warring clans, deserters from the police force, young Somali women, wives who have been the subject of domestic violence, homosexuals, and Tamils routinely questioned under Sri Lanka's anti-terrorist strategy.

The Bill does not attempt to provide a comprehensive definition of what constitutes a 'particular social group'. It does not disturb the majority of the jurisprudence which has developed in the High Court and the Federal Court on this issue. The key statements remain those of the High Court in *Applicant A*.

In *Applicant A*,⁵⁶ the High Court held that a 'particular social group' cannot be defined by reference to a common fear of persecution. There must be some other characteristic or 'common unifying element'⁵⁷ which unites a group and sets them apart from society at large. The group must exist independently of, and not be defined by, persecution. Thus, a majority of members of the Court rejected the idea that Chinese nationals opposed to China's 'one child policy' constituted a 'particular social group', since the defining feature of that group was their opposition to government policy, which may expose them to adverse consequences.

Dawson J accepted that a family could constitute a social group, and that groups did not have to be large ones.⁵⁸ However, McHugh J considered that the term was probably intended only to cover reasonably large groups of people, such as landowning classes, not smaller groups such as members of a club.⁵⁹

The amendment proposed in the Bill is confined to when the 'particular social group' is claimed to be a person's family. Recent decisions of the Federal Court have clearly stated that a family can constitute a 'particular social group'.⁶⁰ This is supported by academic writers.⁶¹ The Bill is clearly intended to prevent the results in a few recent Federal Court decisions from being repeated in future. These decisions involved fear of criminal attacks against a person by reason of a family connection.

In *Aliparo*⁶² Justice O'Connor considered whether Mrs Aliparo had a well-founded fear of being persecuted by reason of her membership of a 'particular social group', namely her family. In that case, her husband witnessed and then decided to expose the kidnapping of innocent citizens by high-ranking officials in the Philippines. Her husband had himself been kidnapped and tortured and threatened in order to prevent him from informing, and Mrs Aliparo had also been attacked by officials. Justice O'Connor concluded that Mrs Aliparo's fear of persecution stemmed not from her membership of her family, but because

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of her husband's act in reporting a possible crime. She therefore concluded that the retaliation feared was feared on an individual basis rather than because Mrs Aliparo's family could be seen as a 'particular social group'.

This decision was not followed in two later decisions involving Colombian nationals. In *Sarrazola*,⁶³ the Full Federal Court accepted that Mrs Sarrazola could be a refugee by reason of her membership of the 'particular social group' comprised of her family. In that case, Mrs Sarrazola's brother had been involved in criminal activities, and had been murdered, apparently for failure to pay his debts. She feared persecution by the criminals who were responsible for the death of her brother, and who had made threats and financial demands against her to pay her brother's debt. The Full Federal Court rejected the view that a family can only be a 'particular social group' if it is linked to a broader group identified by one of the grounds of persecution mentioned in the Refugees Convention. Peter Nygh, the former Principal Member of the RRT, has said that:⁶⁴

This decision has considerable potential to expand the ambit of the Convention. Although the person who is the particular focus of the pressure may not qualify as a refugee (and may even be regarded as unworthy of protection), members of his or her family may qualify.

Similarly, in *C and S*, Wilcox J considered an application for refugee status made by the wife and mother of a Colombian man who feared retribution because of his actions in informing on illegal activities involving local political figures and law enforcement officials at the nightclubs where he worked. He held that the wife and mother were capable of falling within the particular social group constituted by C's family. A family exists as a social group unified by relationships of blood and marriage which are independent of a fear of persecution. The RRT should therefore have considered whether the persecution feared by C's wife and mother arose because of their membership of his family.⁶⁵ It is noteworthy, however, that in that case, there was a possibility that the persecution feared by C may itself be for a Convention reason, namely his political opinion. Acts informing on or exposing systemic corruption and criminality by government officers might be a manifestation of a 'political opinion', depending on the facts of the case.⁶⁶

The Bill provides that in determining whether a person has a well-founded fear of persecution by reason of membership of a particular social group consisting of his or her family, any persecution or fear of persecution that the person or any family member (including deceased family members) has experienced which is not attributable to a Convention ground is to be disregarded (**new section 91S**).

Thus, on the facts of *Sarrazola*, the death of Mrs Sarrazola's brother was attributable to his criminal activities and failure to pay his debts, so could not be relevant in considering Mrs Sarrazola's fear of retribution for her failure to pay her brother's debts.

In contrast, the fear of persecution which arose in *Giraldo*⁶⁷ (fear that guerillas would forcibly recruit his teenage daughter) would not need to be disregarded under the Bill. This

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is because the applicant claimed his fear arose by reason of his own and his wife's uncle's political associations with the Liberal Party of Colombia, hence maybe by reason of his 'political opinion'.

Meaning of 'non-political crime'

As noted above, pursuant to Article 1F, a person is not recognised as a refugee by the Refugees Convention if he or she has committed 'a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. This exclusion was inserted to ensure that persons considered not worthy of international protection were not able to avail themselves of that protection.⁶⁸ This exclusion applies only to crimes committed outside the country of refuge - in this case, outside Australia. For crimes committed within Australia, Article 33, discussed below, is applicable.

The UNHCR *Handbook* states that in considering whether a crime is 'non-political' or 'political':⁶⁹

regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

Interpretations along these lines have been given in courts in a number of countries,⁷⁰ including Australia.⁷¹

Further, although what constitutes a 'serious' crime is difficult to define, it should be not every crime, but only 'a capital crime or very grave punishable act'.⁷² The *Handbook* considers that the seriousness of the offence should be balanced against the degree of the persecution feared. Special mention is made of hijacking of aircraft, and the *Handbook* states that it is a question to be carefully examined on the facts of each individual case whether the hijacker should be granted refugee status.⁷³

The Minister has observed that:⁷⁴

In recent times the courts have determined that applicants are owed protection obligations if they have committed a serious crime with mixed personal and political motivations, even where the political motivation is a minor element of their motivation.

New section 91T provides a definition of a 'non-political crime', as a crime 'where the person's motives for committing the crime were wholly or mainly non-political in nature'. This is consistent with, although not as detailed as, the statement in the UNHCR's *Handbook*.

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In addition, the Bill prescribes that certain offences are deemed to be non-political, whatever the circumstances or motivations. These offences include:⁷⁵

- hijacking or endangering the safety of an aircraft in flight, a ship, or a fixed offshore platform (such as an oilrig)
- genocide and associated crimes such as conspiracy to commit genocide
- hostage taking
- torture
- extraditable offences as declared in regulations made pursuant to a multilateral extradition treaty, and
- murder, kidnapping or other attack (or attempted attack) on a foreign head of state, foreign official or official of an international organisation, or a member of their family.

Thus, even if these crimes are committed with a political motivation, the person will not be considered a 'refugee' under the Bill and Australia will have no obligation to grant a protection visa, but may return the person to their country of origin.

Meaning of 'particularly serious crime'

As noted above, Article 33 of the Refugees Convention provides an exemption from the obligation of non-refoulement of refugees where a refugee has committed a 'particularly serious crime' in the country of refuge. That is, Australia is entitled to expel a person who has been granted refugee protection if that person commits a 'particularly serious crime' in Australia, even if expelling the person would expose him or her to a risk of persecution.

Mary Crock has noted that the AAT has struggled with the meaning of 'particularly serious crime', and complained that the UNHCR Handbook is not particularly helpful in explaining it.⁷⁶ The Federal Court in *Todea* held that a conviction of supplying heroin, which resulted in a sentence of four years, was a particularly serious crime.⁷⁷ In *Betkhoshabeh*, an Iranian national developed a psychiatric illness involving severe paranoid delusions during time spent in immigration detention. After he was granted a visa, he was convicted of aggravated burglary and threats to kill, which arose in the context of a delusional obsession he developed over a female interpreter. He was sentenced to three and a half years imprisonment. The Federal Court held that his psychiatric condition should be considered as a mitigating factor, but nevertheless his crimes were capable of being considered 'particularly serious'.⁷⁸

New section 91U defines 'particularly serious crime' to mean an offence punishable by a maximum term of imprisonment for life or at least 3 years, which is:

- a crime involving violence against a person

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- a serious drug offence
- a crime involving serious damage to property, or
- an offence of either escaping from immigration detention or manufacturing, possessing, using or distributing a weapon while in immigration detention.⁷⁹

What constitutes a 'serious' drug offence or an offence involving 'serious' damage to property is not defined, but will be left to the courts to interpret. Thus, in some respects **new section 91U** does little to clarify the meaning of 'particularly serious crime', merely substituting a different phrase requiring judicial interpretation.

The Bill premises its definition of 'particularly serious crime' on the maximum sentence applicable to the category of offence in general, rather than the sentence given to the specific convicted person. Thus, the category of offence may attract a substantial sentence, but the actual offence may not have. For example, assault occasioning actual bodily harm in the ACT attracts a maximum sentence of 5 years imprisonment, and thus falls within the definition of 'particularly serious crime'.⁸⁰ However, a person may in fact have been sentenced to only one year or possibly even less, given the circumstances of the actual assault.

After applying this expanded definition, a decision-maker will still be required to consider the separate requirement under Article 33 that the person convicted of such a crime represents a risk to the community. A decision-maker retains a discretion whether or not to expel a person convicted of these crimes.

Verification of information – dealing with unauthorised arrivals

The Minister for Immigration and Multicultural Affairs is deeply concerned 'about the number of unauthorised arrivals entering Australia without documentation establishing their identity and nationality'.⁸¹ A recent, high profile case, was that of the Somali asylum-seeker SE who arrived on a flight without proper immigration documents, and was refused immigration clearance. He then applied for a refugee protection visa, which was refused. The case went to the High Court, which upheld the right of the Minister to deport him from Australia.⁸²

Oath or affirmation

New section 91V permits the Minister or an officer to request certain persons to make a sworn statement, on oath or affirmation, that the information provided to the Department is true. This power applies to:

- an applicant for a protection visa, in relation to information contained in the visa application (**new subsection 91V(1)**), and

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- a non-citizen refused immigration clearance, in relation to relevant information given either during immigration clearance or after being refused immigration clearance (**new subsection 91V(4)**).

If the person refuses to make a sworn declaration of truth, the Minister will be entitled to 'draw any reasonable inference unfavourable to the [person's] credibility'. The person must have first been warned of this consequence when he or she was requested to make the sworn statement (**new subsections 91V(2) and (5)**).

Even if the person does swear to the truth of his or her application, the Minister can 'draw any reasonable inference unfavourable to the [person's] credibility' if he or she believes that the person was not sincere, either because of the person's demeanour or something in his or her manner (**new subsections 91V(3) and (6)**).

Documentary evidence

New section 91W permits the Minister or an officer to request an applicant for a protection visa to produce documentary evidence of his or her identity, nationality or citizenship. If the applicant refuses, the Minister may draw any reasonable inference unfavourable to the applicant's identity, nationality or citizenship. The person must have first been warned of this consequence when he or she was requested to produce the document or documents (**new subsection 91W(2)**).

Other amendments

The Bill also makes a small number of miscellaneous amendments, which appear unrelated to the two major themes discussed above.

Spouse can get a 'protection visa'

Currently, a person applying for a protection visa must be a non-citizen in Australia who meets the definition of 'refugee' in the Refugees Convention.⁸³ **Item 2** proposes that, in addition, a non-citizen in Australia who is the spouse or a dependant of a person who has been granted a refugee protection visa will also be eligible for a protection visa.

The *Explanatory Memorandum* clarifies that this is not expressly required under the Refugees Convention, but that 'it has been longstanding practice in Australia' to allow the spouse and dependants of a person granted a protection visa to also be granted a visa to remain in Australia.⁸⁴ This amendment will formalise the longstanding practice.

A difficulty with this may arise in relation to parents. Under the amendments to the definition of 'persecution', the harm feared must be that of the person himself or herself, it is not sufficient to fear harm to one's children. However, if a child is recognised as a refugee, the 'spouse or dependant' extension will not apply to the child's parents. Clearly, child refugees will need the ongoing support and presence of one or both parents. It is not

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impossible to imagine cases where a child satisfies the 'refugee' test but a parent does not. This was the case in *Chen Shi Hai*, and would be a possible outcome of circumstances similar to *Giraldo*.

Multiple applications for 'protection visa' prohibited

Currently, a person who was in the migration zone (that is, on Australian soil) and has applied for a protection visa but the visa has been refused may not lodge a further application for a protection visa while still in the migration zone.⁸⁵ **Item 3** extends this bar on lodging further applications to situations where a protection visa has been granted but is subsequently cancelled (**new subsection 48A(1A)**). A visa may be cancelled for a number of reasons, including where:

- incorrect information was provided on a visa application
- a condition of the visa has not been complied with
- any circumstances which permitted the grant of the visa no longer exist, or
- the person's presence in Australia is 'a risk to the health, safety or good order of the Australian community'.⁸⁶

The extension to cancelled visas is consistent with the prohibition applicable to visas other than protection visas which have been refused or cancelled.⁸⁷

The Minister will continue to have the power to waive the application of this prohibition to a specific person where it is in the public interest to do so.⁸⁸

Item 4 ensures that a person who has applied for a protection visa on the basis of being a spouse or dependant of a non-citizen in Australia is also prohibited from making a subsequent application while in the migration zone. The *Explanatory Memorandum* notes that:⁸⁹

This change is necessary to prevent misuse of the protection visa process by family groups wishing to prolong their stay in Australia by lodging protection applications serially, each member taking turns to advance claims for protection while the others apply as family members.

Confidentiality of applicants' names

The Federal Court and the High Court will be prohibited from publishing the name of a person who has applied for a protection visa or a protection-related bridging visa, or whose protection visa or protection-related bridging visa has been cancelled (**new section 91X**). This will apply to any proceeding which is begun after the new section commences (**item 8**). The apparent reason is to prevent a person so named, their family and colleagues, etc. from being subject to discrimination or persecution as a result.⁹⁰

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A broader confidentiality protection will apply to the Administrative Appeals Tribunal. Pursuant to **new section 501K**, the AAT must not publish any information which may identify the person or any relative or other dependant of the person. It is not clear what the rationale is for the broader protection given to applicants before the AAT than before the Federal Court or High Court. This will apply to any application for review which is made after the new section commences (**item 10**).⁹¹

No restriction on the publication of names or other identifying information is imposed on the RRT. This may be explained by the fact that, although RRT decisions are freely available on the Internet, they are identified by application number rather than by the name of the applicant.

Minister's discretion to substitute more favourable decision

New section 501J gives the Minister a power to substitute a more favourable decision for a decision of the AAT to refuse or cancel a protection visa, if he or she 'thinks that it is in the public interest to do so'.⁹² This provision complements the Minister's existing powers to substitute a more favourable decision for that of the RRT⁹³ or of the AAT when the RRT refers a decision to it.⁹⁴ The Minister must table a statement in each House of Parliament setting out the reasons for his or her decisions, but not naming or identifying the applicant.

This power applies to any decision of the AAT, whether made before or after the commencement of the Bill (**item 9**).

Concluding Comments

The Government justifies the amendments proposed in the Bill by reference to other ways in which the money saved on the determination process could be better spent. The Minister for Immigration and Multicultural Affairs in his second reading speech made the following statement:⁹⁵

Significantly, every protection place in Australia which is obtained through deception and every protection place which is provided to a person who would not be covered by the proper interpretations of the refugees convention because of the way domestic law has developed, represents a place taken from the neediest refugees languishing in refugee camps around the world—those, I might say, who cannot safely return home, those who are unsafe where they are and are in dire need of our support. ...

The challenges to the integrity of our onshore determination processes and the broadening out of our Convention obligations in domestic law directly undermine the capacity of Australia to contribute effectively to protecting refugees both in Australia and who are in refugee camps and in most need of resettlement.

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This Bill may come as part of a broader agenda to tighten the definition contained in the Refugees Convention itself, a proposal which is reputed to be being considered by Australia, Britain and other Western European countries in the lead-up to talks to be held by the UNHCR later this year to mark the fiftieth anniversary of the Convention.⁹⁶

The Democrats have criticised the proposal while Labor has reserved its position until it has the chance to examine the Bill in detail. Refugee advocates have also criticised the proposals. Martin Clutterbuck, coordinator of the Refugee and Immigration Legal Centre in Melbourne, is concerned about attempts to fix the meaning of the terms used in the Refugees Convention as they were understood in 1951, when one of the strengths of the Convention has been its ability to adapt to changing international conditions over its fifty year history. This could result in genuine victims of new forms of persecution being excluded from Australia in future.⁹⁷ Amnesty International has also expressed concerns about the proposal, accepting the need for judicial decisions to expand the scope of the Refugees Convention.⁹⁸

Liz Curran, a Lecturer in Law and Legal Studies at Latrobe University, has noted that in the migration area, Governments have a history of pushing through legislation to overturn court decisions or to legalise positions which are currently under review by appellate courts. After giving examples, she concludes that:⁹⁹

Legislative changes can seriously reduce a court's capacity to exercise judicial review in an effective and real sense. ... Politicians in recent times have often seen the approach of the courts as 'problematic' and 'uncertain'. But to neglect liberty and to finesse the protection of human life may also prove problematic. For courts to be effective, and to retain public confidence, they must be armed with the capacity to be flexible enough to deliver justice, particularly in cases which are so distinct and various in their circumstances.

This may be pertinent in view of the fact that the High Court has not yet heard the appeal in *Mohammed's* case, which should clarify the law in relation to whether conduct engaged in within Australia can be relied on to found a claim to refugee status or should be disregarded.

It has been reported that the Government was awaiting comment from the UNHCR on the proposals to restrict the definition.¹⁰⁰ It is not clear whether the UNHCR has yet provided any comments, and if so, whether it supports the amendments.

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Endnotes

- 1 *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1951.
- 2 <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd041.pdf> (12 September 2001).
- 3 *Current Issues Brief*, No. 13 1999–2000:
<http://www.aph.gov.au/library/pubs/cib/1999-2000/2000cib13.htm>
- 4 *The Migration Legislation Amendment Act (No. 1) 1999 and the Border Protection Legislation Amendment Act 1999*.
- 5 Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 6 See generally Mary Crock, *Immigration and Refugee Law in Australia* (1998), pp. 124–125.
- 7 *ibid*, pp. 124–125.
- 8 See Department of Immigration and Multicultural Affairs, Fact Sheet No 40, *Australia's Refugee and Humanitarian Program* (6 September 2001).
- 9 Refugee, special humanitarian and special assistance visas. See Department of Immigration and Multicultural Affairs, Fact Sheet No 40, *Australia's Refugee and Humanitarian Program* (6 September 2001).
- 10 Darren Gray, '\$20m to fight claims for asylum', *The Age*, 7 September 2001.
- 11 Paul Kelly, 'No shelter from the storm', *Weekend Australian*, 16 June 2001.
- 12 *ibid*.
- 13 *Migration Legislation Amendment Act 1998*.
- 14 Inserted by *Migration Reform Act 1992*.
- 15 Darren Gray, 'Amnesty slams refugee court crackdown', *The Age*, 8 May 2001. Other figures put the UNHCR acceptance rate for Iraqis in Syria and Jordan at 15 to 25 per cent: Paul Kelly, 'No shelter from the storm', *Weekend Australian*, 16 June 2001. See also Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 16 Article 1A(2) of the Refugees Convention. The text of the Convention may be found at <http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/1951eng.pdf> (accessed 6 September 2001). The words 'As a result of events occurring before 1 January 1951' were omitted from Article 1A(2) by Article 1.2 of the Refugees Protocol.
- 17 Article 1C of the Refugees Convention.
- 18 Article 1D of the Refugees Convention.
- 19 Article 1E of the Refugees Convention.
- 20 Article 1F of the Refugees Convention.

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- 21 If asylum seekers make valid applications for protection visas, and satisfy any health criteria or other criteria prescribed under Australian law, the Minister must grant the visas: section 65 of the *Migration Act 1958*.
22. *Re: Gunaleela; And: the Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543 per Sweeney, Lockhart and Gummow JJ.
- 23 Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 24 See *Applicant A* (1997) 190 CLR 225 at 273–274 per Gummow J, *Sale v Haitian Centers Council* (1993) 125 Law Ed 2d 128 (Supreme Court of the United States), *T v Home Secretary* [1996] AC 742 (United Kingdom House of Lords).
- 25 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 284 per Gummow J, quoting *Ram v Minister for Immigration* (1995) 57 FCR 565 at 568.
- 26 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 per Dawson J, 283 per Gummow J; *Re Minister for Immigration and Multicultural Affairs; Ex parte SE* (1999) 73 ALJR 123; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 74 ALJR 1556.
- 27 *Chan v Minister for Immigration and Ethnic Affairs*(1989) 169 CLR 379 at 429–430.
- 28 *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 ALR 585 at 609 per McHugh J.
- 29 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 per McHugh J.
- 30 *Chan v Minister for Immigration and Ethnic Affairs*(1989) 169 CLR 379 at 430–431 per McHugh J.
- 31 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 per McHugh J.
- 32 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258 per McHugh J.
- 33 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.
- 34 *Minister for Immigration and Multicultural Affairs v Yusuf and Israelian*(2001) 180 ALR 1.
- 35 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.
- 36 *Minister for Immigration and Multicultural Affairs v Yusuf and Israelian*(2001) 180 ALR 1 at 44 per Kirby J.
- 37 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19.
- 38 *Paramanathan v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 24; *Nagaratnam v Minister for Immigration & Multicultural Affairs* (1999) 89 FCR 569.

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- 39 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ, 429 per McHugh J. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576.
- 40 *Giraldo v Minister for Immigration & Multicultural Affairs* [2001] FCA 113 (23 February 2001). The applicant was unsuccessful in that case because his claims were not supported by country evidence.
- 41 The Explanatory Memorandum for the Bill states at p. 9 that 'serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual'.
- 42 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 per Dawson J, *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19 at [24] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
- 43 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19 at [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
- 44 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19 at [26]-[27] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also *Ram v Minister for Immigration & Ethnic Affairs* (1995) 57 FCR 565 at 568.
- 45 See *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105 at 112.
- 46 *Sarrazola v Minister for Immigration and Multicultural Affairs* [1999] FCA 101 (Hely J); *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517; *Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823; *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274, [1999] FCA 165; *Kanagasbai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205.
- 47 In *Okere v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 112, Branson J at 117–118 referred to a need to apply 'common sense to the facts of each case', citing *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 per Mason CJ at 515.
- 48 In *Okere* Branson J equated the common law test with a test which sought to identify the 'true reason for the persecution which is feared' (at 118). This approach was reiterated by Branson J in *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 and cited with approval by Einfeld Moore and Branson JJ in *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517 at 522.
- 49 *Peiris v Minister for Immigration and Multicultural Affairs* [1999] FCA 1134 per Hill J; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [1998] FCA 622 per French J; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [1999] FCA 381 per O'Loughlin, Carr and R D Nicholson JJ.
- 50 *R v IAT; Ex parte Shah* [1999] 2 WLR 1015 per Hoffmann LJ at 1036.
- 51 (1991) 31 FCR 100.
- 52 *Li Shi Ping and Liu Xiu Ling v MILGEA* (1994) 35 ALD 557.

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- 53 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405. Other cases in which *Mohammed* has been followed include: *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599; *Omar v Minister for Immigration and Multicultural Affairs* [2000] FCA 1430; *Minister for Immigration and Multicultural Affairs v Farahanipour* [2001] FCA 82. This approach has also been adopted by the United Kingdom Court of Appeal in *Danian v Secretary of State for the Home Department* [2000] Imm A.R 96 and by the United States Court of Appeals, Seventh Circuit, in *Bastanipour v Immigration & Naturalization Service* (1992) 980 F 2d 1129.
- 54 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405 at [45].
- 55 John McMillan, 'Commentary: Recent Developments in Refugee Law' (September 2000) 26 *Australian Institute of Administrative Law Forum* 26 at pp. 26–27 (footnotes omitted).
- 56 (1997) 190 CLR 225 at 241–242 per Dawson J, 263 per McHugh J, 285–286 per Gummow J.
- 57 Affirming the language used in *Ram v Minister for Immigration* (1995) 57 FCR 565 at 569.
- 58 (1997) 190 CLR 225 at 241 per Dawson J.
- 59 (1997) 190 CLR 225 at 266 per McHugh J.
- 60 *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517, affirmed in the subsequent decision in *Minister for Immigration and Multicultural Affairs v Sarrazola* [2001] FCA 263 (21 March 2001). See also *Minister for Immigration, Multicultural Affairs v Khawar* (2001) 178 ALR 120, (on appeal before the High Court).
- 61 Professor Hathaway states "[a]s a rule, therefore, whenever there is an indication that the status or activity of a claimant's relative is the basis for a risk of persecution, a claim grounded in family background is properly receivable under the social group category": J. Hathaway, *The Law of Refugee Status*, 166. See also G. Goodwin-Gill, *The Refugee in International Law*, 30.
- 62 *Aliparo v Minister for Immigration and Multicultural Affairs* [1999] FCA 79 (12 February 1999).
- 63 *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517.
- 64 Peter Nygh, 'Recent Developments in Refugee Law' (September 2000) 26 *Australian Institute of Administrative Law Forum* 1 at p. 17.
- 65 *C and S v Minister for Immigration and Ethnic Affairs* (1999) 94 FCR 366.
- 66 *C and S v Minister for Immigration and Ethnic Affairs* (1999) 94 FCR 366; *Voitenko v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 355; *Minister for Immigration & Multicultural Affairs v Y* (unreported, Federal Court, Davies J, 15 May 1998).
- 67 *Giraldo v Minister for Immigration & Multicultural Affairs* [2001] FCA 113 (23 February 2001). The applicant was unsuccessful in that case because his claims were not supported by country evidence.

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- 68 UNHCR Handbook, *Criteria for the Determination of Refugee Status*, at [147]. The Handbook may be found at <http://www.unhcr.ch/refworld/legal/handbook/handeng/hbtoc.htm> (accessed 11 September 2001).
- 69 UNHCR Handbook, *Criteria for the Determination of Refugee Status* at [152].
- 70 See House of Lords in *T v Home Secretary* [1996] AC 742, Canadian Federal Court of Appeal in *Re Gil and Minister of Employment and Immigration* (1994) 119 DLR (4d) 497, *Immigration and Naturalization Service v Aguirre-Aguirre* (Supreme Court of the United States, 3 May 1999), *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301.
- 71 *Singh v Minister for Immigration & Multicultural Affairs* [1999] FCA 1599 (19 November 1999).
- 72 UNHCR Handbook, *Criteria for the Determination of Refugee Status* at [155].
- 73 UNHCR Handbook, *Criteria for the Determination of Refugee Status* at [156], [159]–[161].
- 74 Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 75 Offences excluded from the definition of 'political offence' under section 5 of the *Extradition Act 1988*.
- 76 Mary Crock, *Immigration and Refugee Law in Australia* (1998), p. 158.
- 77 *Todea v Minister for Immigration and Ethnic Affairs* (1994) 35 ALD 735.
- 78 *Minister for Immigration & Multicultural Affairs v Betkhoshabeh* [1999] FCA 980 (20 July 1999).
- 79 Sections 197A and 197B of the *Migration Act 1958*.
- 80 Section 24 of the *Crimes Act 1900* (ACT).
- 81 Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 82 *Re MIMA; Ex parte SE* (1999) 73 ALJR 123.
- 83 Subsection 36(2) of the *Migration Act 1958*.
- 84 *Explanatory Memorandum*, p. 6.
- 85 Section 48A of the *Migration Act 1958*.
- 86 Sections 109, 116 of the *Migration Act 1958*.
- 87 Section 48 of the *Migration Act 1958*.
- 88 Section 48B of the *Migration Act 1958*.
- 89 *Explanatory Memorandum*, p. 7.

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- 90 The Explanatory Memorandum states that 'publication can create a need for protection for the litigants and also place their family and colleagues overseas at risk': at p. 15.
- 91 Although **item 10** is incomplete in the copy of the Bill before Parliament, an amendment to the effect noted will be tabled during the second reading debate in the House of Representatives.
- 92 The AAT has power to review a decision of a delegate to refuse to grant or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, section 500 of the *Migration Act 1958*.
- 93 Section 417 of the *Migration Act 1958*.
- 94 Section 454 of the *Migration Act 1958*.
- 95 Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, second reading speech on the Migration Legislation Amendment Bill (No 6) 2001, House of Representatives, *Hansard*, p. 30198.
- 96 Darrin Farrant, 'If they are not refugees, what are they?', *The Age*, 29 August 2001.
- 97 See Darrin Farrant, 'If they are not refugees, what are they?', *The Age*, 29 August 2001; Chloe Saltau and Kerry Taylor, 'Revealed: new plan to screen asylum seekers', *The Age*, 13 August 2001; Liz Curran, 'Refuge in the law?' (2001) 11(7) *Eureka Street* 17.
- 98 Darren Gray, 'Amnesty slams refugee court crackdown', *The Age*, 8 May 2001.
- 99 Liz Curran, 'Refuge in the law?' (2001) 11(7) *Eureka Street* 17 at 18.
- 100 Chloe Saltau and Kerry Taylor, 'Revealed: new plan to screen asylum seekers', *The Age*, 13 August 2001; Sophie Douez, 'New wave of boat people to come', *The Age*, 18 August 2001.

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