

(Re-branded December 2008)

## ASSESSING THE ASYLUM CLAIM

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## ASSESSING THE ASYLUM CLAIM

### 1. INTRODUCTION

This instruction gives guidance to asylum case owners and caseworkers (hereafter 'decision makers') on how to apply the 1951 United Nations' Convention relating to the Status of Refugees. It takes account of relevant primary legislation, the Immigration Rules, the provisions implementing the European Council Directive (2004/83/EC) of 29 April 2004 on the Minimum Standards for the Qualification of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (The 'Qualification Directive') and UK caselaw. It also takes account of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. Every decision maker should be familiar with the [UNHCR Handbook](#).

This instruction must be read in conjunction with separate APIs on 'Assessing Credibility' [to be published shortly], 'Assessing Gender Issues in the Asylum Claim', 'Internal Relocation', and 'Articles 1F and 33(2) of the 1951 Refugee Convention'. Decision makers should not attempt to decide an asylum application until they have read and understood these instructions.

***This instruction deals only with assessing asylum claims. Separate guidance on assessing eligibility for a grant of humanitarian protection and human rights claims can be found in the APIs on Humanitarian Protection and Discretionary Leave and in the API on the European Convention on Human Rights. Guidance on Article 8 claims is provided in the API on Article 8 of the ECHR***

### 2. REFUGEE STATUS AND GRANTING OF ASYLUM

#### 2.1 General Considerations

All asylum claims should be considered without prejudice on their individual merits in accordance with the UK's obligations under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol. The 1967 Protocol updated the Convention by removing certain time and geographical restrictions.

A person who fulfils the criteria set out in the 1951 Convention or 1967 Protocol is a refugee. The UK in granting asylum is recognising the refugee's status and extending the protection required under its international obligations.

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The Qualification Directive lays down provisions and criteria for interpreting the Refugee Convention to be adopted across the European Union. It has been transposed into UK law through The Refugee or Person in Need of International Protection (Qualification) Regulations, 2006 and the Immigration Rules. The Rules and Regulations can be viewed on the UK Border Agency's website at: [www.ukba.homeoffice.gov.uk](http://www.ukba.homeoffice.gov.uk).

Unless the applicant can be returned to a safe third country, including to an EU Member State, Iceland or Norway under the Dublin arrangements (**see paragraph 3.2 below**) asylum should be granted when the applicant meets the requirements of paragraph 334 of the Immigration Rules.

Paragraph 334 states that:

"An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

- I. he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and
- II. he is a refugee, as defined in regulation 2 of the Refugee or Person in need of International Protection (Qualification) Regulations 2006; and

*[Note: Regulation 2 defines a refugee as a person who falls within Article 1A of the 1951 Refugee Convention (**see paragraph 4 below**) but who does not fall within the exclusion clauses (**see paragraph 10 below**)]*

- III. there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom (**see the API on Articles 1F and 33(2) of the 1951 Refugee Convention**); and
- IV. if he has been convicted by a final judgment of a particularly serious crime, he does not constitute a danger to the community of the United Kingdom (**see the API on Articles 1F and 33(2) of the 1951 Refugee Convention**); and
- V. refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

In order to assess whether an applicant is a refugee, as defined in the Article 1A of the 1951 Refugee Convention, decision-makers should follow the checklist of points to consider at paragraph 2.2 below.

If it is decided to refuse an asylum claim, consideration must be given to eligibility for a grant of Humanitarian Protection status under the Immigration Rules or Discretionary Leave. **For further guidance see paragraph 11 below and the APIs on Humanitarian Protection and Discretionary Leave.**

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**If guidance is needed on how to handle the dependants of an asylum seeker, decision-makers should contact the Children and Family Asylum Policy Team (CFAPT), via a senior caseworker.**

## **2.2 Checklist of Points to Consider When Assessing an Asylum Claim**

Decision makers should read the *whole* of this instruction and the APIs on 'Assessing Credibility' [to be published shortly], 'Assessing Gender Issues', 'Internal Relocation' and 'Articles 1F and 33(2) of the 1951 Refugee Convention' *before* starting to decide asylum claims, but the following is a checklist of important points to be considered and advice on where to get further information.

In order to assess whether an asylum applicant is a refugee the decision maker needs to consider:

**a) What is the applicant's basis of claim?**

**b) Which of the applicant's claims about past events can be accepted?**

- Are the applicant's claims as to his/her past experiences consistent with objective country of origin information relating to the relevant period, including generally known facts?

**See the relevant Country of Origin Report produced by the Country of Origin Information Service (COIS) and any relevant Operational Guidance Note (OGN) produced by the Country Specific Asylum Policy Team (CSAPT).**

- Are the applicant's claims consistent with other evidence submitted (e.g. the evidence of other witnesses, family members or documents specifically referring to the applicant)?
- Are any of the applicant's claims about his/her past experiences not able to be corroborated by reference to country of origin information or other evidence? If so, can the benefit of the doubt be given to any of these claims? If not, why not?
- After due consideration of the principle of the benefit of the doubt, which of the applicant's material claims can be accepted, and which can be rejected?

**See paragraphs 6.1 and 6.2 below for further guidance on considering applications and establishing the facts of a claim. See also the API on Credibility [to be published shortly].**

**c) Taking into account the applicant's statements and behaviour, does the applicant have a subjective fear of persecution?**

- Decision makers should note that asylum seekers might not be familiar with the terms 'asylum' or 'refugee'. As long as they have expressed a fear of return to their home country, this is sufficient to constitute an asylum claim – **see also the API on Handling Claims**

**d) Objectively, are there reasonable grounds for believing that the harm feared might in fact occur in the applicant's country of origin?**

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- Who are the actors of persecution? Do the authorities of the home country conduct the persecution or support persecution committed by others? **See paragraph 7.3 below.**
- How far is the State or organisations controlling the State (including international organisations) able to provide protection from persecution caused by others? What laws are in place and are they enforced effectively? **See paragraph 7.4 below.**
- Has the applicant sought the protection of the authorities? If so, what was the outcome? If not, why not?
- Considering the objective country of origin information, the past experiences of the applicant and the attitude of the State authorities, is there a reasonable likelihood that the applicant would experience harm if returned? **See paragraph 6.4 below.**

**e) Can the applicant return to a part of the country in which he/she would not be subject to the harm feared?**

- Is it **reasonable** to expect the applicant to live in that part of the country, taking into account the personal circumstances of the applicant and the general conditions prevailing in that part of the country?

**See paragraph 7.5 below and the API on Internal Relocation for further guidance**

**f) Is the harm feared a form of persecution?**

- Is the harm of sufficient gravity to constitute persecution or is it something less serious? **See paragraph 7.1 below**
- Does the cumulative effect of lesser prejudicial actions or threats amount to persecution?
- If the applicant has a fear of prosecution or punishment for an offence, is the punishment discriminatory or disproportionate? Does this give rise to a fear of persecution? **See paragraph 7.2 below**
- If the fear of prosecution is due to draft evasion or desertion special considerations may apply. **See the API on Military Service and Conscientious Objection**

**g) If the harm feared is serious enough to constitute persecution, would it be inflicted for one or more of the reasons set out in the Refugee Convention (i.e race, religion, nationality, membership of a particular social group or political opinion)? - See paragraph 8 below**

**h) In the light of (a) – (g) above, does the the applicant meet the inclusion criteria of the 1951 Convention?**

**i) Should the applicant be excluded from international protection by operation of the exclusion clauses of the Convention?**

- Is there any indication that the applicant may have been involved in acts that could bring him within the application of the exclusion clauses in Articles 1F(a), (b) or (c) of the 1951 Convention?

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**See paragraph 10 below and for more detailed guidance see the API on Articles 1F and 33(2) of the 1951 Refugee Convention**

The aim is to identify the genuine refugee as quickly as possible. If, after a full and careful assessment, an applicant fails to qualify for asylum, decision makers should consider whether to grant Humanitarian Protection or Discretionary Leave. **See paragraph 11 below and the APIs on Humanitarian Protection and Discretionary Leave.**

### **3. REFOULEMENT AND THIRD COUNTRY CASES**

#### **3.1 Refoulement**

'Refoulement' is a term used to describe the return of a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Article 33(1) of the Convention prohibits refoulement and is one of the fundamental principles of refugee protection. However, Article 33(2) states that this provision will not apply to a refugee who is regarded as a danger to the security of the country where they have sought protection, or a danger to the community as a result of having been convicted of a particularly serious crime. The definition of 'a particularly serious crime' for the purposes of Article 33(2) has been set out in domestic legislation.

**For further guidance on Article 33(2) see the API on Articles 1F and 33(2) of the 1951 Refugee Convention.**

#### **3.2 Third country cases**

In certain circumstances, it may be possible to transfer an asylum seeker to a third country without giving full (or substantive) consideration to his or her claim. In particular, responsibility for the claim may fall to another Member State of the European Union or Norway / Iceland under the Dublin arrangements.

Third country considerations must **always** be carried out by the Third Country Unit (TCU).

**Further advice on operational issues in third country cases can be sought from TCU and on policy issues from the European Asylum Policy Unit (EAPU) via a senior caseworker.**

### **4. INCLUSION IN THE CONVENTION**

Article 1A of the 1951 Refugee Convention provides that a person will [subject to the exclusion clauses covered later] qualify for refugee status if he/she:

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*".... 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....., is unable, or owing to such fear, is unwilling to return to it."*

Therefore, unless an applicant is stateless (**see paragraph 5.2**), they will qualify for refugee status under the terms of the 1951 Convention if they meet all the following criteria:

- he is outside his country of nationality ... and
- he is unable or unwilling to avail himself of the protection of that country owing to ...
- a well-founded fear of ...
- persecution for reasons of ...
- race, religion, nationality, social group, or political opinion.

Guidance is given below on the terms:

- country of nationality (**paragraph 5**);
- well-founded fear (**paragraph 6**);
- persecution (**paragraph 7**); and
- the Convention reasons (**paragraph 8**) of:
  - race (**paragraph 8.4**);
  - religion (**paragraph 8.5**),
  - nationality (**paragraph 8.6**),
  - membership of a particular social group (**paragraph 8.7**), and
  - political opinion (**paragraph 8.8**).

## **5. COUNTRY OF NATIONALITY**

Under the 1951 Convention, a person must be outside their country of nationality (or country of former habitual residence if they are stateless) and be unable or, owing to a fear persecution, unwilling to return to it before they can qualify for international protection as a refugee.

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## 5.1 Dual nationality

A person who has more than one nationality and who has a well-founded fear of persecution in one of their countries of nationality will not be a refugee if they are able to seek protection of another one of their countries of nationality. In this case the application should be refused under paragraph 336 of the Immigration Rules on the ground that the applicant would not be required to return to a country in which they face a danger of persecution and does not, therefore, meet the criteria set out in paragraph 334. If the applicant has a well-founded fear of persecution in both countries of which he is a national, then he/she may qualify for asylum.

## 5.2 Stateless persons

If an asylum seeker has no nationality he must be outside the country of his former habitual residence before he can be recognised as a refugee and his fears must be in that country, not in the country of which he was once a national.

Sometimes asylum seekers who are stateless might claim that they will not be re-admitted to their previous country of residence and therefore should be granted asylum in the UK. However, issues of statelessness and whether or not an individual is returnable should not affect the decision maker's decision on whether to grant asylum, as they are not relevant factors in the refugee determination process.

## 5.3 Refugees sur place

Paragraph 339P of the Immigration Rules states:

“A person may have a well founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or the country of return.”

Hence, a "*refugee sur place*" is someone who falls within the Convention definition of a refugee some time after they left their home country. This means, for instance, a person already outside their country of origin when a change of circumstances occurs in their home country which gives rise to a well-founded fear of persecution for a Convention reason.

People may also become refugees "sur place" as a result of activities they have engaged in since leaving their country of origin, such as associating with people who have already been recognised as refugees or expressing their political views in their new country of residence. Decision makers should carefully examine the circumstances and decide whether their actions give rise to valid claims to refugee status. Applications from people already in the UK should be considered in the usual way in accordance with these instructions (**see also paragraphs 94-100 of the UNHCR Handbook**).

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## **6. WELL-FOUNDED FEAR**

In order to qualify as a refugee an applicant must demonstrate that they have a "well-founded fear" of persecution. In assessing whether an applicant's fear is well-founded, the decision maker must be satisfied both that:

- a) the applicant has manifested a subjective fear of persecution or an apprehension of some future harm, and
- b) objectively there are reasonable grounds for believing that the persecution feared may in fact occur in the applicant's country of origin.

### **6.1 Consideration of applications**

Paragraph 339I of the Immigration Rules states that:

"When the Secretary of State considers a person's asylum claim...it is the duty of the person to submit to the Secretary of State as soon as possible all material factors needed to substantiate the asylum claim...which the Secretary of State shall assess in cooperation with the person. The material factors include:

- i) the person's statement on the reasons for making an asylum claim...;
- ii) all documentation at the person's disposal regarding the person's age, background (including background details of relevant relatives, identity, nationality(ies), country(ies), and place(s) of previous residence, previous asylum applications, travel routes; and
- iii) identity and travel documents.

When assessing whether an asylum claim is well founded, decision-makers will need to consider the following points, as set out in Paragraph 339J of the Immigration Rules:

- i) all relevant facts as they relate to the country of origin or country of return at the time of taking a decision on the grant; including laws and regulations of the country of origin or country of return and the manner in which they are applied;
- ii) relevant statements and documentation presented by the person including information on whether the person has been or may be subject to persecution or serious harm;
- iii) the individual position and personal circumstances of the person, including factors such as background, gender and age, so as to assess whether, on the basis of the person's personal circumstances, the acts to which the person has been or could be exposed would amount to persecution or serious harm;
- iv) whether the person's activities since leaving the country of origin or country of return were engaged in for the sole or main purpose of creating the necessary conditions for making an asylum claim or establishing that he is a person eligible for humanitarian protection or a human rights claim, so as to assess whether these activities will expose the person to persecution or serious harm if he returned to that country; and

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v) whether the person could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

## 6.2 Establishing the Facts

If an applicant has already been subjected to persecution or serious harm, or to direct threats of such persecution or such harm, paragraph 339K of the Immigration Rules makes it clear that decision makers should regard this as “a serious indication of the person’s well founded fear of persecution or real risk of suffering serious harm, unless there are good reasons, to suggest that such ill-treatment will not be repeated”. Such reasons might include, for example, a significant and enduring improvement in country conditions. Considering past events is therefore an important aspect of assessing any asylum claim.

The Court of Appeal held in Karanakaran I (2000) ImmAR271 that the proper approach when assessing an applicant’s account of past and present events is not to look at the matter in terms of standard of proof (unlike the test for a future fear of persecution, where decision-makers must consider if there is a ‘reasonable degree of likelihood’ of persecution – **see paragraph 6.4 below**). It is to assess whether a past or present event occurred, taking into account all available evidence, and come to a conclusion based on a balance of probabilities.

The Court held that decision-makers should not exclude any past events from consideration when assessing future risk *unless* those events can safely be discarded – i.e. because the decision maker is satisfied that they did not happen. Hence, a past event cannot be completely excluded from the balancing process simply because decision makers *believe* or have a suspicion it did not occur - they must be in no real doubt.

Decision makers should consider each material fact of an applicant’s account. If the application falls to be refused, they should state in the Reasons for Refusal Letter (RFRL) which elements are accepted or not accepted and why, and what the overall effect of this is on the assessment of a future risk of persecution.

There might be some instances – for example, where there is a lack of objective country information - where the decision maker cannot be certain if a past or present event described by the applicant occurred as claimed. In such cases the uncertainty should be stated in the RFRL to show that this aspect of the applicant’s account has been considered. If the applicant has made a genuine effort to substantiate the claim and their statements are coherent and plausible and do not run counter to other evidence, decision-makers should accept that the event *may* have happened and include this in the balance when assessing the likelihood of future risk.

***Decision makers should refer to the API on Assessing Credibility [to be published shortly] for further guidance on the Karanakaran judgment.***

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As stated above, in determining whether an applicant is a refugee decision-makers are required to consider which aspects of the applicant's account they accept and which they reject. By doing this, decision-makers are assessing the *credibility* of an applicant's claim about past events.

It is for the applicant to furnish the details of his claim and for the decision-maker to draw out and assess this evidence, establishing which facts are material to the claim. Material facts are those that go to the core of the claim and will be central to the decision. The applicant does not have to 'prove' each material fact with documentary or other evidence – applicants often rely on evidence that cannot be verified and the absence of proof in itself is no reason to refuse an application. Nor do they have to convince the decision-maker that they are telling the truth. It is possible to establish a credible claim even where the applicant is unable to provide any independent, corroborative evidence to support his claims about past and present events *as long as* he can provide a coherent, consistent and plausible account of his past and present experiences.

Decision-makers should consider the credibility of a claim in the light of all the available evidence relating to the claim. They should consider whether the account is internally coherent, and consistent with claims made by witnesses/dependants and any documentary evidence. Where there is reason to doubt the claim's credibility, applicants should be told of this and given an opportunity to explain the reasons behind their actions. There may be a number of reasons why an applicant is incoherent or inconsistent, for example mental or emotional trauma, or fear/distrust of authority.

Decision-makers should also consider if a claim is consistent with background objective evidence. Where objective country information supports the applicant's account of a past or present event, the claimed fact may be accepted. Where objective country information contradicts the evidence provided by the applicant it is likely to result in a negative credibility finding. However where there is no objective information available decision-makers will need to consider whether to give the benefit of the doubt to the applicant.

Paragraph 339L of the Immigration Rules states that "Where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

- the person has made a genuine effort to substantiate his asylum claim...;
- all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of material has been given;
- the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;
- the person has made an asylum claim... at the earliest possible time, unless the person can demonstrate good reason for not having done so; and
- the general credibility of the person has been established"

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In accordance with Paragraph 339N of the Immigration Rules, decision-makers should note that in determining whether the general credibility of an applicant has been established they must have regard to the provisions covered by Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Section 8 of the 2004 Act came into force on 1 January 2005. It provides a framework for the consideration of credibility issues in asylum and human rights claims and imposes an obligation on all deciding authorities to regard certain behaviours on the part of an applicant adversely when they assess the claimant's general credibility. However the fact that section 8 considerations have the force of law does not mean they are to be given more weight than other factors which impact on credibility. The Act does not relieve decision-makers of their obligation to give due weight to *all* the facts of the case, including any background information that is available and relevant.

**Decision makers should refer to the API on Credibility for more detailed guidance on assessing credibility**

### 6.3 Objectivity

Once the decision-maker has established the facts of the claim, he/she needs to assess objectively whether there are reasonable grounds for believing that the applicant would, if returned to the country from which they seek refuge, face persecution for a Convention reason (i.e. due to their race, religion, nationality, membership of a particular social group or political opinion).

In making this assessment decision makers should not be influenced by subjective factors, for example if the applicant appears nervous or fearful at the interview, or entirely calm and rational, but they should, however, be sensitive to the gender and cultural norms which may affect a applicant's demeanour. **See the API on Gender Issues in the Asylum Claim for further guidance.**

### 6.4 "Reasonable likelihood"

The decision maker will seldom be able to say with certainty whether or not an applicant will be persecuted if returned to their country of origin. The appropriate test for a decision maker to apply is to consider whether, at the date when they are making their decision, there is a *reasonable degree of likelihood* of the applicant being persecuted in their country of origin. The courts have said that a 'reasonable degree of likelihood' has the same meaning as the term 'real risk', which is the test used by decision makers when assessing whether an applicant will be subjected on return to treatment which violates Article 3 of the European Convention on Human Rights. **See the API on the European Convention on Human Rights for further guidance.**

This does not require the decision maker to be satisfied on the balance of probabilities that the applicant is more likely than not to suffer persecution for a Convention reason in their country of origin. Where the objective country evidence, applied to the applicant's case, suggests that there is a *continuing reasonable likelihood* that the applicant would face persecution in their country of origin, the applicant should normally be granted refugee status.

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Decision makers should bear in mind that however well-founded an applicant's original/historic reasons for fleeing their country of origin, they are only entitled to a grant of asylum where at the date of decision they continue to have a well-founded fear of persecution for a Convention reason.

However, as stated in 6.2 above, if an applicant has already been subjected to, or threatened with, persecution or serious harm, this could be a serious indication that persecution or harm might happen again.

## **7. PERSECUTION**

### **7.1 Definition of persecution**

The decision maker must always assess whether the harm an asylum seeker claims to fear would amount to persecution. Regulation 5(1) of the Qualification Regulations states that:

"In deciding whether a person is a refugee an act of persecution must be:

- a) sufficiently serious by its nature and repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms [the ECHR];
- b) or an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a)."

The basic human rights from which derogation cannot be made under the ECHR include Article 3 (prohibition of torture, inhuman or degrading treatment or punishment), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law). Article 2 (right to life) also falls within this category, except that derogation is permitted in one limited area - deaths resulting from lawful acts of war. Nor is any derogation permitted from Protocol 13 (abolition of the death penalty). **See the API on the European Convention on Human Rights for further guidance.**

Regulation 5(2) of the Qualification Regulations states that an act of persecution may, for example, take the form of:

- a) an act of physical or mental violence, including an act of sexual violence;
- b) a legal, administrative, police, and/or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;
- c) prosecution or punishment, which is disproportionate or discriminatory;
- d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses. **See the API on Military Service.**

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This is not an exhaustive list and other forms of mistreatment which on their own or in accumulation with lesser prejudicial actions, severely violate the basic human rights listed above will also constitute persecution.

Decision makers should bear in mind that the official authorities of a country may need to take measures that restrict the exercise of certain freedoms (e.g. restrictions placed on citizens of a country during a time of war). Such restrictions may not in themselves constitute persecution. However, if they are applied in a discriminatory manner and have sufficiently serious consequences, they may amount to persecution.

Measures may be directed against a certain section of the population that includes the applicant. Such measures can be relied upon by an applicant in advancing their claim – they need not have personally suffered the persecution to have a well founded fear of it.

If an applicant demonstrates there is a reasonable likelihood of persecution, this does not *necessarily* mean that the asylum applicant will qualify for a grant of asylum under the 1951 Refugee Convention. The applicant would still need to show persecution would be committed for one of the Convention reasons of race, religion, nationality, membership of a particular social group or political opinion (**see section 8 below**), and that their own State authorities or the organisation controlling the State would be unable or unwilling to provide effective protection (**see 7.4 below**). If no Convention reason can be identified but there is a reasonable likelihood of persecution, decision-makers should consider granting Humanitarian Protection – **see the API on Humanitarian Protection for further guidance.**

## **7.2 Prosecution**

Persons fleeing from prosecution or punishment for an offence are not normally refugees. “A refugee is a victim - or potential victim - of injustice, not a fugitive from justice” (UNHCR Handbook paragraph 56). Prosecution, however, can be considered persecution if it involves victimisation in its application by the authorities, e.g. if it is the vehicle for the persecution of an individual or if only certain ethnic groups are prosecuted for a particular offence, and the consequences are sufficiently severe. Punishment which is cruel, inhuman or degrading (including punishment which is out of all proportion to the offence committed) may also constitute persecution. (**See also paragraphs 56-61 of the UNHCR Handbook.**)

## **7.3 Actors (previously known as ‘agents’) of persecution**

Regulation 3 of the Qualification Regulations states that persecution or serious harm can be committed by

- a) the State [or by rogue state officials abusing their position of authority - Although the Regulations do not refer to rogue state officials, as a matter of policy decision makers may regard them as potential actors of persecution]. **See 7.3.1 and 7.3.2 below for further guidance.**
- b) any party or organisation controlling the State or a substantial part of the territory of the State. **See 7.3.3 below for further guidance.**

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- c) any non-State actor, if it can be demonstrated that the State authorities, or the organisation (including international organisations) controlling the State, are unable or unwilling to provide protection against persecution or serious harm. **See 7.3.4 below for further guidance.**

### 7.3.1 State persecution

In this context, the word 'State' refers to the apparatus of governance or the means by which the government gives effect to its will. The State apparatus includes central government (the executive, legislature, and judiciary), but also the machinery of central government (e.g. the civil service, armed forces and security and police forces).

State persecution can occur where the State legislates to discriminate or persecute a certain group (e.g. laws are passed which discriminate against women or homosexuals) or where State actors (e.g. the police or the army) act in accordance with a sanctioned persecutory scheme. For example, members of the armed forces or security forces which obey orders to persecute a certain group would be carrying out state persecution as 'actors of the state'.

### 7.3.2 Rogue State Actors

There is a distinction between abuse which is authorised or tolerated by the State and abuse by rogue officials which has not been sanctioned by the authorities. For example, a policeman who rapes a woman for his own sexual gratification may not be acting in accordance with government policy. Nevertheless, the State must take responsibility for the behaviour of its officials. A failure or reluctance to protect citizens from rogue officials or to punish misdemeanours may in itself amount to State persecution.

In the case of Svazas [2002] the Court of Appeal found that "while the State cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own actors do unless it acts promptly and effectively to stop them."

The Court found that the standard of sufficiency of protection will be higher where the actors of the state wear official uniforms. For example, the more senior the police officers who are involved in the persecution, the more it is necessary for the State to demonstrate that their disciplinary procedures are adequate and enforced as possible. The more serious the ill treatment in terms of duration, repetition and brutality the more incumbent it is on the state to demonstrate it can provide adequate protection.

### 7.3.3 Persecution by clans, parties or organisations controlling the State

Not every country will have an effective central government and in some countries powerful clans, tribes or other organisations might control large parts of the country. These dominant groups can inflict persecution on minority groups or individuals living within the same area, often through the use of armed militia or private armies.

### 7.3.4 Non-State actors

(Re-branded December 2008)

Persecution is often related to action by the authorities or dominant organisations running a country. However, it may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. An example of non-state persecution may be religious intolerance that amounts to persecution in a country that is otherwise secular, but where sizeable sections of the population do not respect the religious beliefs of their neighbours.

Decision makers must therefore assess the extent to which the State authorities can provide protection against their actions. It is generally accepted that no Government can offer a guarantee of absolute protection. No country is perfect and certain levels of ill treatment may still occur even if Government has taken steps to prevent it.

However where seriously discriminatory or other offensive acts are committed by the local populace they may constitute persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

#### **7.4 Sufficiency of protection**

To qualify for asylum, an individual not only needs to have a fear of persecution for a Convention reason, they must also be able to demonstrate that their fear of persecution is well founded and that they are unable, or unwilling because of their fear, to avail themselves of the protection of their home country.

Regulation 4(1) of the Qualification Regulations states that:

“In deciding whether a person is a refugee, protection from persecution or serious harm can be provided by:

- a) the State; or
- b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.”

**[Note:** for the purposes of 4(1)(b) “a substantial part” of the territory of the State means a *region* or a larger area within the territory of the State].

Regulation 4(2) provides that:

“Protection shall be regarded as generally provided when the actors mentioned [above] take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and [the applicant] has access to such protection.”

The standard of protection to be applied is not therefore one that eliminates all risk to its citizens because no Government or organisation controlling all or a substantial part of the State could guarantee to provide that level of protection. It is sufficient that a country has a system of criminal law which makes attacks by non-State actors punishable and that there is a reasonable willingness to enforce the law.

(Re-branded December 2008)

A country which relies for its law and order functions on drug barons or armed militias may be less able to provide effective protection than one which can rely on those functions being performed by properly trained, properly resourced and accountable police or army personnel whose standards of human conduct are exemplary. But variations of this type simply go to the factual question, "*Is protection afforded?*"

Decision makers should consider whether protection afforded by the authorities or organisations controlling all or a substantial part of the State is available to an individual regardless of their race, ethnicity, sexual orientation, disability, religion, class, age, gender, occupation or any other aspect of their identity. They should also take into account whether or not the applicant has sought the protection of the authorities or the organisation controlling all or a substantial part of the State, any outcome of doing so or the reason for not doing so.

The concept of 'sufficiency of protection' does not apply where the state or an organisation controlling the state is the actor of persecution. In these circumstances, the applicant cannot be expected to go to the state authorities for protection.

## 7.5 Internal Relocation

Paragraph 339O of the Immigration Rules provides that:

"the Secretary of State will not make a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country... When making his decision [the Secretary of State] will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person... [This] applies notwithstanding technical obstacles to return to the country of origin..."

Decision-makers should note that internal relocation can be relevant in both cases of State and non-State actors of persecution, but in the main it is likely to be most relevant in the context of acts of persecution by localised non-State actors.

Decision-makers should consider two main points when assessing the possibility of internal relocation:

- Is there a part of the country in which the applicant would not have a well founded fear of persecution?
- Is it *reasonable* to expect the applicant to stay in that part of the country?

***Decision-makers should refer to the API on 'Internal Relocation' for further guidance on the circumstances in which internal relocation would be a 'reasonable' option.***

(Re-branded December 2008)

## 8. CONVENTION REASONS

Only a person with a well-founded fear of persecution on account of one of the five Convention reasons (i.e. race, religion, nationality, membership of a particular social group or political opinion) should be recognised as a refugee. It is well established that the Refugee Convention is not concerned with all cases of danger or harm arising out of civil war, famine or other natural disaster. Nor is it concerned with all cases of human rights breaches or of a need for humanitarian protection. *It affords protection in limited circumstances where a person faces a real risk of serious ill treatment on a discriminatory basis.*

Hence, a state of civil war where law and order has broken down does not of itself give rise to a well-founded fear of persecution for a Convention reason unless the applicant is at risk of adverse treatment over and above the risk to life and liberty which occurs during civil war.

Merely belonging to a particular race, religion, nationality, or social group, or holding certain political opinions is not usually enough to substantiate a claim to refugee status, as the applicant must also show a well founded fear of persecution on account of that Convention reason.

### 8.1 Gender

When considering an asylum application, the decision maker should consider whether issues arising from an applicant's gender may be relevant to the assessment of the claim.

The decision maker should be aware that the experiences of women in their countries of origin may sometimes differ from those of men, and that protest, activism and resistance may manifest themselves in different ways. Certain types of persecution and ill-treatment will be specific to and more commonly affect women. Social and cultural norms may affect the ability of an applicant to obtain effective protection and could also result in a reluctance to disclose relevant information. This may be particularly relevant when considering applications from women

Even where gender does not appear to be a central issue, giving consideration to gender related aspects will ensure that all aspects of an asylum claim are fully and fairly considered.

***Decision makers should refer to the APIs on Interviewing and Gender Issues in the Asylum Claim for further guidance.***

*(Re-branded December 2008)*

## **8.2 Economic motives**

An applicant may have economic motives for coming to the UK - and may well be economically better off if removed from persecution. This does not affect the claim for asylum, which should be considered solely on whether the applicant would be persecuted for a Convention reason if returned to their home country. If the decision maker is satisfied that the applicant does have a well-founded fear of persecution the fact that they may also be better off economically by travelling to the UK is not relevant to the assessment of the claim.

## **8.3 Imputed Convention grounds**

It is also important to recognise that an individual may face persecution because of a Convention ground which is imputed to them by actors of persecution. Regulation 6(2) of the Qualification Regulations states:

“When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.”

## **8.4 Race**

Decision-makers should understand the term ‘race’ in its broadest sense to include all kinds of ethnic groups that are referred to as ‘races’. Regulation 6(1)(a) of the Qualification Regulations states that

“The concept of race shall include, for example, considerations of colour, descent or membership of a particular ethnic group”

Discrimination on racial grounds will amount to persecution if a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights.

The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.

## **8.5 Religion**

Regulation 6(1)(b) of the Qualification Regulations states that:

“The concept of ‘religion’ shall include, for example, the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in public or private, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.”

(Re-branded December 2008)

Persecution for reasons of religion may take various forms e.g. prohibition of membership of a religious community, prohibition of worship in private or public, prohibition of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. Exceptions to this do occur and decision makers should consider the individual circumstances of each case in the context of the country information.

#### 8.5.1 Religious conversion

Some asylum applicants base their claim on an alleged conversion to a different religion. While the Country of Origin Reports recognise there are countries where conversion from one religion to another is viewed with disapproval, this will not lead to persecution of the convert in every case. Whether or not a convert will be persecuted is entirely dependent on the individual circumstances of the case and the attitude of society/authorities in the country concerned.

If decision makers consider they need to test whether the conversion is genuine, they *must* ensure that any questions asked during the asylum interview are carefully prepared, are tailored to the individual case and do not expect an unrealistic level of specialist knowledge. For instance, just because somebody claims to have recently converted to Christianity, this does not mean they will be able to remember how many books there are in the Bible or to list Jesus' twelve disciples. If somebody claims to have attended a Pentecostal or Evangelical Church, this does not mean they will be familiar with Catholic traditions and ceremonies. Decision makers should also be aware that some Biblical terms (e.g. 'Trinity', 'Pentecost', 'disciple') which have been translated into English from Greek will not always have a direct translation in the languages of some Muslim countries. Decision makers should check with interpreters *before* the start of the interview that questions they have prepared can be translated accurately.

***If decision makers are in any doubt about the appropriateness of certain questions for testing the genuineness of religious conversion, they should consult a senior caseworker. In addition, the API on Interviewing provides further guidance on good interviewing technique.***

#### **8.6 Nationality**

Regulation 6(1)(c) of the Qualification Regulations states that:

“The concept of nationality shall not be confined to citizenship but shall include, for example, membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins, or its relationship with the population of another state.”

As a result the term 'nationality' may occasionally overlap with the term 'race'.

(Re-branded December 2008)

Persecution for reasons of nationality may consist of adverse actions and measures against a national (ethnic or linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to a 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. Decision makers might not always find it 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'. However, in such a situation a grant of asylum might be appropriate on one or both Convention grounds.

A persecuted nationality does not necessarily have to be a minority. There might be cases where a person belonging to a majority group fears persecution by a dominant minority.

## **8.7 Membership of a particular social group**

A claim for asylum based on membership of a particular social group (PSG) may overlap with a claim based on other grounds. The question of whether a particular social group exists and the extent to which members of the group are discriminated against depends on the factual situation in the country in question. What constitutes a particular social group in one country may not in another and therefore it is essential that decision makers refer to the relevant Operational Guidance Note (OGN) and Country of Origin Reports published by the Country of Origin Information Service. If there is any doubt as to whether the group in question constitutes a particular social group then a senior caseworker should be consulted.

### 8.7.1 Definition of a particular social group

Regulation 6(1)(d) of the Qualification Regulations states that:

“A group shall be considered to form a particular social group where in particular:

- a) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- b) that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.”

The Regulations set out an approach to identifying the existence of a social group which is similar (but not identical) to the one taken by the UK courts over the years, most significantly in the House of Lords' judgment in the case of Shah and Islam [1999] UKHL 20. Since then it has commonly been accepted that members of a particular social group share an immutable (or innate) characteristic and that recognition of the group by the surrounding society might *help* to identify it as a distinct entity.

(Re-branded December 2008)

Although the Qualification Regulations require decision makers to look for evidence of a common immutable characteristic *and* recognition of the group by surrounding society, in general this will not mean it is harder for an applicant to establish he/she is a member of a particular social group. Groups which have a common immutable characteristic which is externally obvious (e.g. being male/female) will often have a distinct identity within their home societies. Even if an immutable characteristic shared by a group is not externally obvious (e.g. being gay), the group will quickly become recognised as a distinct group within society if, for example, the State authorities take steps to ban homosexual activity. **See also the example of left-handed men in 8.7.4 below.**

Decision makers should consider the following principles, which emerge from the House of Lords judgment in Shah and Islam [1999] UKHL 20, subsequent court judgments in the Court of Appeal (including Ivanuskiene [2001] EWCA Civ 1271, Skenderaj [2002] EWCA Civ 567 and Montoya [2002] EWCA Civ 620) and the Qualification Regulations, 2006 when deciding whether a particular social group exists in a particular country:

- a) Members of the group must possess a common immutable/innate characteristic that cannot be changed or a characteristic that is so fundamental to human identity that they should not be required to change it (see 8.7.2 below for further guidance);
- b) Cohesiveness is not a requirement for the existence of the group. Members of the group do not have to know each other, work or live together or have anything in common other than an immutable characteristic which distinguishes them from the rest of society. Social groups can therefore be fairly broad, e.g. women or gay men/lesbians in a particular country;
- c) It is not necessary to show that *all* members of the PSG are persecuted. That would be the same as saying, for instance, that every Christian in a particular country would have to be persecuted before asylum could be granted on grounds of religion - which of course is not the case;
- d) The group must have a distinct identity within the relevant country because it is perceived as being different by the surrounding society (see 8.7.3 for further guidance);
- e) The group must exist independently of the persecution it suffers – i.e. persecution cannot be the *only* factor which defines the group (see 8.7.4 for further guidance).

#### 8.7.2 Innate/Immutable Characteristics

In Shah and Islam the House of Lords approved the definition of an “immutable characteristic” as:

*“A characteristic that is either beyond the power of the individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”.*

(Re-branded December 2008)

Characteristics which are beyond the power of an individual to change could include, for instance, gender, sexual orientation, family membership, linguistic background or association with a particular group in the past (e.g. membership of a previous government). However, decision makers should note that Regulation 6(1)(e) of the Qualification Regulations explicitly states that “sexual orientation cannot be understood to include acts which are considered to be criminal in accordance with national law of the UK” [e.g. paedophilia].

Characteristics that are so fundamental to individual identity or conscience that they ought not be required to be changed are less easy to define. Each case will need to be considered on its individual merits and will be dependent on the nature of the group and the context in which it is based. Membership of a religious order has been recognised as sufficient to constitute an immutable characteristic, but a person’s employment or financial status is less likely to be considered immutable.

### 8.7.3 Societal Recognition

In addition to a common immutable characteristic, the Qualification Regulations require a particular social group to have a distinct entity in the relevant country because it is perceived as being different by surrounding society.

Whether or not a group is perceived as being different by the surrounding society will require judgement in every case and decision makers should refer to the relevant Country of Origin Report and Operational Guidance Note. The case of Shah and Islam illuminated the extent to which women were discriminated against by male-dominated society. Women in that society were viewed as a very distinct and inferior group. These attitudes were so entrenched that even when husbands beat or threatened to kill their wives, the state authorities were unwilling to intervene.

If decision makers are in doubt about whether a particular group has a distinct identity with a particular society, they should consult a senior caseworker.

### 8.7.4 Does the social group exist independently of the persecution?

A particular social group must exist independently of the persecution some of its members suffer. If the only thing that united a random collection of individuals was a shared experience of persecution, then everybody who was persecuted could qualify for asylum on grounds of their membership of a particular social group.

Decision makers must consider whether a particular group of people would have a distinct identity within their home societies if the threat of persecution was taken out of the equation. In some cases they might, but the answer will depend on the individual circumstances of the case and the specific conditions in the country concerned.

(Re-branded December 2008)

Although a particular social group cannot be defined solely by persecution, persecution may help to identify the group and may even result in the creation of a particular social group. An example cited by the House of Lords in Shah and Islam is as follows:

“Left-handed men are not a social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”

#### 8.7.5 Persecution ‘for reasons of’ an applicant’s membership of a PSG

Decision makers should accept that asylum seekers who fit the criteria outlined in 8.7.1 above are members of particular social groups. Often the more crucial question for decision makers to consider is not whether a particular social group exists, but whether members of the group who are persecuted are truly targeted *for reasons of* their membership of that group (i.e. are persecuted on a discriminatory basis)

If the State singles out a particular group for persecution, (for instance, banning homosexuality and rounding up and flogging anyone who is suspected of being gay) there can be little doubt that persecution is ‘for reasons of’ membership of a particular social group.

Where non-State actors are concerned, persecution would still be ‘for reasons of’ membership of a particular social group if it could be shown that the actors of persecution were targeting a specific group of people because they were perceived as somehow being different from surrounding society and thus deserving of ill treatment. For instance, in a society where traditional, male attitudes are deeply entrenched, there might be social ‘rules’ governing the behaviour of women but not men (e.g. the clothes they wear, where they go, the jobs they do and who they associate with, etc.). If women in such a society were beaten up or killed every time they ‘broke the rules’, and State protection was unavailable, the underlying reason for the persecution would be the *gender* of the victims and a grant of asylum would be appropriate. **See also the API on Gender Issues in the Asylum Claim**

Persecution by non-state actors will not always be discriminatory. A gang of yobs might attack anybody who lives in their neighbourhood, i.e the attacks are indiscriminate. In these circumstances, the victims of such attacks would have difficulty in showing they were persecuted *for reasons of* their membership of a social group, unless they could demonstrate that the State authorities discriminated against them in the protection they afforded – i.e. they refused to protect certain groups within the neighbourhood from yobs, but were prepared to intervene to assist other more favoured groups.

(Re-branded December 2008)

In *Shah and Islam* the House of Lords recognised that the appellants, both women from Pakistan who were at risk of ill-treatment at the hands of violent husbands, were refugees for reasons of their membership of a particular social group (i.e. they were persecuted *because* they were 'women in Pakistan'). The Lords held that women in Pakistan shared a common immutable characteristic of gender, they were discriminated against in matters of fundamental human rights (thus marking them out as a distinct group within society) and the State refused to protect them because they were perceived as not being entitled to the same human rights as men. The Lords pointed out that "the *distinctive feature* of this case is that women in Pakistan are unprotected by the State..."

## 8.8 Political opinion

Regulation 6(1)(f) of the Qualification Regulations 2006 states that:

"The concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon [by the applicant]".

A mere expression of a political opinion which is contrary to that of the Government will not usually be enough to engage the protection of the Convention. A person must be able to establish that they have a well-founded fear of persecution "for reasons of" their political opinion. This will often involve an openly expressed opinion which is directed against and is not tolerated by the authorities of the country in question. However, it is not necessary for a political opinion to be openly expressed.

It is possible that a person with no real interest in politics could be considered to hold a political opinion which is imputed or attributed to them by the persecutor, perhaps because of their racial origin, social background or associations. Also a person's actions may imply that they hold a political opinion even if they do not openly express one.

### 8.8.1 Imputed Political Opinion

An example of this would be in a totalitarian or one party state where any individual or group, which is perceived by the State as a threat, may be imputed a political agenda. For instance, Falun Gong in China is not a political group, but the authorities consider Falun Gong to be a threat and have imputed a political agenda to them. President Jiang Zemin announced that the campaign against the Falun Gong was one of the "three major political struggles" of 1999. (Decision makers should note that this does NOT mean that all Falun Gong members are at risk of persecution today due to an imputed political opinion – this is simply an example of how a political opinion can be imputed to someone who does not necessarily hold one.)

(Re-branded December 2008)

Persecution from non-state actors can also involve an imputed political opinion. An example would be a rebel group which opposes the government in a particular country and imputes a political opinion to individuals who work for the government. In some circumstances a person's neutrality might even lead to them having a political opinion imputed to them. For example, the rebel group might perceive anyone who does not support them to be against them.

A rebel group's motives for targeting certain individuals might be political, but there might be other non-political motives as well. For example, a rebel group might attack individuals who do not support them because they perceive them to be supporters of the Government, but if during the attack they extort money from their victim to buy weapons, then there is clearly also an economic motive. Just because motives are mixed, this does not mean the Convention cannot be engaged. As long as there is some evidence to suggest that the persecutors have imputed a political opinion to their victim and this is one of the reasons for attacking them, asylum should still be granted if the State authorities are unable or unwilling to offer effective protection.

Decision makers must consider each case on its individual merits. Even if a rebel group has a broad political aim (e.g. overthrowing the Government), individual attacks on particular individuals might simply be retaliatory or criminal and not necessarily linked to an overriding political aim. In the case of Gomez v SSHD [2000] TH02257, the appellant, a law student from Colombia, provided legal advice to a local farmer who was the victim of extortion by a group of armed men (believed to be members of FARC). As a result of her actions, the appellant received threatening phone calls and was chased by armed men. The appellant claimed this was because the rebel group perceived her to be an opponent of its political aims.

In dismissing the appeal, the Tribunal found that it was highly unlikely that the rebel group would impute a political opinion to the actions of the appellant because they knew she was only a law student who had become involved in the investigations into the extortion racket on an *ad hoc* basis. By the appellant's own admission those who threatened her never at any stage said anything to her to convey that they viewed her as a political threat. The IAT concluded that the attacks were motivated by a desire by the rebels to protect the control they exerted over local farmers and were nothing more than criminal or retaliatory.

### 8.8.2 Actions which imply a political opinion

Even if a person does not openly voice a political opinion, their actions can sometimes suggest that they hold one. The person concerned might have strongly held political opinions and the action can be the manifestation of these beliefs. However, it can equally apply where a person has not formulated a specific political opinion in their own mind but their actions suggest that they hold one. In these cases the nature of the act and the impression it gives to the persecutor are often more important than the true motivation of the individual.

*(Re-branded December 2008)*

Decision makers must consider *the context* in which the act was committed. If a person commits an act which implies a political opinion but which is illegal in the country in question and is then prosecuted in accordance with the law, then it is unlikely that they would be able to establish a well-founded fear of persecution unless the punishment is arbitrary or excessive or the law itself discriminates against the person due to a Convention reason.

Furthermore, although a person who commits a violent terrorist act may claim to have done so for political reasons, he is unlikely to qualify for the protection extended by Article 1A of the Convention. This is because he might face exclusion from the Convention under Article 1F. ***For further guidance on the 'exclusion clauses', see paragraph 10 of this API and the API on 'Articles 1F and 33(2) of the 1951 Refugee Convention'.***

### 8.8.3 Expression of political opinion in the UK

An applicant who claims to fear persecution because of a political opinion does not need to show that the authorities of his country of origin knew of his opinions *before* he left the country. He might have concealed his political opinion in his home country because he was aware of the dangers of expressing it openly. If he fled to the safety of the UK, where he expressed previously concealed political opinions, the decision maker would have to assess the consequences the applicant would have to face if he were returned home. If the consequences of an applicant's actions in the UK give rise to a well-founded fear of persecution for a Convention reason, then asylum should be granted. ***For further guidance see paragraph 5.3 on 'Refugees sur place'.***

Each case, however, must be assessed on its individual merits and consideration given to whether the actors of persecution in the country of origin are likely to find out or take an adverse interest in the applicant's political activities in the UK. A person who attends a demonstration in London, for example, which is attended by thousands of other protesters, may not necessarily come to the attention of the actors of persecution in the applicant's country of origin. Alternatively, the actors of persecution may be aware of the protests but may not be concerned about such low-level protests in a foreign country.

### 8.8.4 Future expression of opinion

Where it can reasonably be assumed that due to the strength of his/her conviction a person's opinions will sooner or later find expression, or they may carry out political acts which are likely to bring them into conflict with the state and where there is a reasonable likelihood that this will result in persecution then the individual may be able to establish a claim to refugee status. For such a claim to succeed the applicant would need to display a high degree of credibility.

(Re-branded December 2008)

## 9. PERSECUTION FOR NON-CONVENTION REASONS

Decision makers should bear in mind that, even where the harm feared appears to amount to persecution, an individual cannot be recognised as a refugee unless they demonstrate a reasonable likelihood that the fear of harm is well-founded and relates to a *Convention reason*. Where there is a well-founded fear of persecution for a non-Convention reason, decision makers should consider granting Humanitarian Protection. **For further guidance, see section 11 of this API and the API on Humanitarian Protection.**

## 10. THE EXCLUSION CLAUSES

Regulation 7(1) of the Qualification Regulations states that “a person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the [1951] Geneva Convention”:

D: Those persons already receiving protection or assistance from United Nations bodies other than UNHCR.

**See the API on UNRWA-assisted Palestinians for more information on Article 1D**

E: Those persons considered not to be in need of international protection because they have taken residence in a country in which the authorities recognise them as having the rights and obligations of nationals of that country

F: Those persons considered not to be deserving of international protection because there are serious reasons for considering that they:

- a) have committed a crime against peace, a war crime or a crime against humanity;
- b) have committed a serious non-political crime outside the country of refuge prior to admission into that country;
- c) are guilty of acts contrary to the purposes and principles of the United Nations.

Regulation 7(2) of the Qualification Regulations interprets the meaning of Article 1F(b) of the 1951 Convention. Regulation 7(2)(a) provides that:

“The reference to ‘serious non-political crime’ includes a particularly cruel action, even if it is committed with an allegedly political objective”

And 7(2)(b) provides that:

“The reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall mean the time up to and including the day on which a residence permit is issued.”

Section 54 of the Immigration Asylum and Nationality Act 2006 interprets the meaning of Article 1F(c). It provides that acts of committing, preparing or instigating terrorism, or encouraging or inducing others to do so, are included within the meaning of what constitute “acts contrary to the purposes and principles of the United Nations.”

(Re-branded December 2008)

Where an individual is excluded from refugee status under Article 1F he is also likely to fall under the criteria which excludes him from Humanitarian Protection - **see API on Humanitarian Protection for further details.**

**Any decision to refuse asylum on grounds of the exclusion clauses should only be taken after consulting a senior caseworker.**

**Decision makers should refer to the API on Article 1F and 33(2) of the Refugee Convention for more detailed guidance on the interpretation and application of these exclusion clauses.**

## 11. HUMANITARIAN PROTECTION/DISCRETIONARY LEAVE

If an applicant does not qualify for asylum, the decision maker must consider whether they should be granted Humanitarian Protection.

**For further guidance on the circumstances in which Humanitarian Protection should be granted see the API on Humanitarian Protection**

If an applicant does not qualify for asylum or Humanitarian Protection, the decision-maker must consider whether they should be granted Discretionary Leave. Discretionary Leave should only be granted where the case falls within the limited categories set out in the **API on Discretionary Leave.**

All Reasons for Refusal Letters must include a reference to the decision to grant/refuse leave to remain on grounds of human rights. **For further guidance on Human Rights issues and for examples of stock paragraphs that can be used to explain ECHR decisions see the API on the European Convention on Human Rights. Further guidance on Article 8 can be found in the API on Article 8 of the ECHR.**

## 12. TYPES OF DECISION

One of these decisions will always be taken on each application for asylum:

- a) Grant of asylum: asylum will be granted for a period of five years in the first instance. See the **Asylum Process Manual** for guidance on how to implement the decision. Although an applicant is not formally notified of the reasons they were recognised as a refugee the file consideration minute should set out clearly the decision maker's reasons for granting asylum.
- b) Refusal of asylum, grant of Humanitarian Protection: leave will be granted for a period of five years in the first instance. A Reasons for Refusal Letter (RFRL) must be drafted to explain why asylum was not granted. **(See the API on Humanitarian Protection and the Asylum Process Manual for guidance on how to implement the decision and draft an RFRL).**

(Re-branded December 2008)

- c) Refusal of asylum, refusal of Humanitarian Protection, grant of Discretionary Leave: leave will be granted for a period of no longer than three years in the first instance outside the Immigration Rules. An RFRL must be drafted to explain why neither asylum nor HP was granted. **(See the API on Discretionary Leave and the Asylum Process Manual for guidance on how to implement the decision and draft an RFRL).**
- d) Refusal of asylum, HP/DL not granted: a RFRL should be drafted detailing the reasons for refusal of asylum and explaining why the applicant's return to his home country will not violate his human rights under the European Convention on Human Rights. For guidance on how to draft an RFRL **see the section of the Asylum Process Manual on the RFRL and the API on the ECHR (which includes ECHR stock paragraphs for RFRLs).**

### 13. CONCURRENT ASYLUM AND NON-ASYLUM APPLICATIONS

If an asylum seeker has an application for leave to remain under another category outstanding at the same time as an asylum application is under consideration both applications will have to be considered.

The asylum and non-asylum application should normally be considered together, and an immigration decision taken simultaneously. If it is decided to refuse both applications, both should be refused at the same time. **See the section of the Asylum Process Manual on 'Processing Hybrid Applications' for further guidance.**

All asylum applications remain outstanding until finally determined or withdrawn. It is normally appropriate to invite the applicant to withdraw any outstanding asylum applications if they have been granted a period of leave in a category leading to settlement, *as long as it is unlikely that the applicant will be required to leave the country in the near future.*

If the applicant does *not* wish to withdraw his asylum application it should be considered and determined.

***Enquiries to: Further enquiries on assessing the asylum claim should normally be made in writing via a senior caseworker to Group F, APU.***