A Guide to Refugee Law in Australia

Legal Services

Refugee Review Tribunal

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STATELESSNESS AND COUNTRY OF FORMER HABITUAL RESIDENCE

Under Article 1A(2) of the Refugees Convention, a person without a nationality (ie who is stateless) must be assessed against his or her "country of former habitual residence".

For the purposes of the Convention definition, it is not correct to use the terminology of "country of former habitual residence" in relation to an applicant who has a nationality, and is therefore not stateless. The position of an applicant who has a nationality but has resided in a third country may give rise to the separate issue of exclusion under s.36(3) of the Act[25] or Article 1E of the Convention definition[26], but this should not be confused with the concept of "country of former habitual residence" as that expression is used in Article 1A(2) in relation to stateless applicants only.

Identifying the Country of Former Habitual Residence

The drafters of the Convention defined "country of former habitual residence" as "the country in which [the claimant] had resided and where he had suffered or fears he would suffer persecution if he returned".[27]

As with country of nationality, identifying the relevant country will often not be an issue. The stateless applicant's own assertion as to country of former habitual residence can often be relied on as the country against which his or her substantive claims should be assessed. In other cases, particularly where there may be more than one relevant country, further consideration may be called for.

Factors Relevant to Identifying a Country of Former Habitual Residence

There is presently no Australian authority on the requirements necessary for the identification of a country of former habitual residence. However, in *Tjhe Kwet Koe v MIMA* the Federal Court found that the Tribunal had made no error of law in considering the following factors adequate to establish Hong Kong as a country of former habitual residence:

- the applicant had acquired permanent residence;
- he had resided in Hong Kong for 8 years before coming to Australia;

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whether, on the other hand, if effective protection was available it could be obtained only in Portugal; if the latter, whether Mr Koe was reasonably able to travel to Portugal to obtain protection there and whether, if he were to travel there, he would be admitted; and whether, having been admitted, he would satisfy the Portuguese authorities that he was a Portuguese national entitled to Portuguese protection. In *Lay Kon Tji v MIEA,* (1998) 158 ALR 681 at 692, Finkelstein J went somewhat further in identifying the requirements of effectiveness, stating that "'effective nationality' is a nationality that provides all of the protection and rights to which a national is entitled under customary or conventional international law".

25 See Chapter 9 of this Guide.

26 See Chapter 7 of this Guide.

27 Report of the First Ad Hoc Committee on Statelessness and Related Problems, 17 February 1950, UN Doc. E/1618, Annex II.

- he was employed in Hong Kong;
- the applicant was not ordered to leave and no indication was given that he was only to remain for a limited period;
- he had received a permanent identity card permitting permanent residence and work in Hong Kong with permission to travel overseas and re-enter Hong Kong.[28]

The above factors do not represent a checklist of minimum features required to constitute former habitual residence, rather they were simply found to be sufficient in that case. It may be that something less will suffice in other circumstances.

In the absence of clear authority, it is useful to consider international jurisprudence and academic commentary on what the minimum degree of connection may be. In *Maarouf v Canada (MEI)* Justice Cullen of the Trial Division of the Federal Court of Canada stated:

> In my view, the concept of "former habitual residence" seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his or her country of nationality. Thus the term implies a situation where a stateless person was admitted to a given country with a view to continuing residence of some duration, without necessitating a minimum period of residence.
>
> ... the claimant does not have to be legally able to return to a country of former habitual residence as denial of a right of return may in itself constitute an act of persecution by the state. The claimant must, however, have established a significant period of *de facto* residence in the country in question.[29]

Professor Hathaway similarly takes the view that the notion of "former habitual residence" is intended to establish a point of reference that is the functional equivalent of a country of nationality, and thus implies a degree of formal responsibility for protection of the putative refugee.[30] As for the period of residence, Hathaway notes that Canadian practice suggests one year as a reasonable threshold standard before a country can be found to be a country of former habitual residence. De facto abode rather than a mere transitory presence is also required.[31] Similarly, Grahl-Madsen states:

> It cannot be required that he shall have stayed there for any specific period of time, but he should be able to show that he has made it his abode or the centre of his interests. There is, however, no need to prove any *animus manendi* [intention to remain], because 'habitual residence' does not mean domicile [place of permanent residence], but merely residence of some standing or duration.[32]

Professor Goodwin-Gill suggests that habitual residence for a stateless person "would necessarily seem to imply some degree of security, of status, of entitlement to remain and to return".[33] He notes that elsewhere in the Convention the term "habitual residence" was used

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28 (1997) 78 FCR 289 at 299.

29 [1994] 1 F.C 723 (TD) at 739 – 740. *Maarouf* was considered with approval in *Thabet* v. *Canada (Minister of Citizenship and Immigration)* (CA) [1998] 4 F.C. 21 and *Elastal v M.C.I* (FCTD no. IMM – 3425-97) Muldoon, March 10, 1999.

30 JC Hathaway, *The Law of Refugee Status*, Butterworths, Canada 1991, at p.61.

31 *ibid*, at p.63.

32 A Grahl-Madsen, *The Status of Refugees in International Law*, A.W. Sitjhoff-Leyden, 1966, Vol. 1, at p.160.

33 G Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Clarendon Press, Oxford 1996, at p.309.

to signify more than a stay of short duration, but not necessarily permanent residence or domicile.[34]

Whilst length of residence may be a relevant factor in determining whether a country is a country of former habitual residence, it seems that it is the *nature* of the residence, rather than the duration, that is of primary importance.

Must a Country of Former Habitual Residence be a 'State'?

While a State is clearly a "country" within the meaning of the Refugees Convention, a "country of former habitual residence" does not have to be a State.[35] In determining whether a territory that is not a State is a "country of former habitual residence" for the purposes of the Refugees Convention the Tribunal must determine whether its geographic territory and population is sufficiently defined to come within the notion of "country".[36] In *Tjhe Kwet Koe v MIEA*, the Court considered the position of a permanent resident of Hong Kong. The Court held that the Tribunal was correct in considering Hong Kong as the applicant's country of former habitual residence. In reaching this conclusion the Court noted that, at the time of the Tribunal's decision,[37] Hong Kong:

- had a distinct area with identifiable borders;
- enjoyed a degree of autonomy in relation to its administration, including its own immigration law and policy;
- was considered a "country" as a matter of every day usage, ie it was appropriate to refer to a person as coming from, belonging to, or returning to Hong Kong.[38]

Is a Right of Return Necessary for a Country of Former Habitual Residence?

There is only limited authority on the preliminary question of whether a legal right to return to a country is a necessary condition which must be satisfied before that country can be regarded as a country of "former habitual residence".[39] The prevailing view is that it is not a prerequisite.

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34 *ibid*, at p.310.

35 *Tjhe Kwet Koe v MIEA* (1997) 78 FCR 289.

36 *ibid*, at 299.

37 The position in relation to Hong Kong was different at the time of the Court's decision, Hong Kong having returned to Chinese rule on 1 July 1997.

38 *ibid*, at 299.

39 A claimant's right to return to a country may be relevant to whether a country can be regarded as a country of former habitual residence, and also to whether the claimant is a refugee. It may also be relevant to the question whether the claimant is able to access protection in a safe third country. The issue of right of return in relation to *identifying* a country of former habitual residence should not be confused with the issue of ability to return to that country for the purposes of the second limb of the first paragraph of Article 1A(2) ("and is unable...to return") or the issue of the right to enter and reside in a third country under s.36(3) of the Act.

Professor Hathaway argues that as "country of former habitual residence" is intended to establish a reference point for stateless applicants and is intended as an equivalent of a country of nationality, it implies a degree of responsibility for the protection of the applicant on the part of the relevant country. On his view, a right of return is necessary for a country to be considered as a country of former habitual residence, as the aim of the Convention is to prevent sending a person back to a country where a risk of persecution exists and if there is no possibility of returning to a country, there can be no risk of being returned to a country where there is a risk of persecution.[40] In other words, a claimant does not have a country of former habitual residence unless he or she has a legal right to return to that country. Absent a country of former habitual residence a stateless person cannot satisfy the second limb of the definition in the first paragraph of Article 1A(2).

The test put forward by Hathaway has been rejected by Professor Goodwin-Gill and by the Federal Court of Canada.[41] The issue was briefly considered in *Taiem v MIMA* where Carr J suggested that the Tribunal would have been in error if it had found that a country was not considered as a country of former habitual residence simply because the applicant had no right to re-enter that country.[42]

Thus, the better view appears to be that a legal right to return to a country is *not* a necessary condition that must be satisfied before that country can be regarded as a country of "former habitual residence".

More than one Country of Former Habitual Residence?

It is generally accepted that a stateless person may have more than one country of former habitual residence. Such a view has been adopted by Australian courts which have held that there is no obvious reason why a claimant could not have more than one country of former habitual residence.[43] This view is also supported by the UNHCR,[44] and by Professor Hathaway.

The question which therefore arises is whether a claimant with more than one country of

40 JC Hathaway, *op cit*, p.59-63.

41 G Goodwin-Gill, *op cit*; *Desai v Canada* [1994] FCJ No 2032.

42 (2002) 186 ALR 361 at [14]. In *Rishmawi v MIMA* (1997) 77 FCR 421, the Tribunal had found that the applicant, who was stateless, had no right of return to any country. Following Hathaway's view, it decided that as there was no possibility of being returned to any country where there was a risk of persecution, the applicant did not have a well-founded fear of persecution. Both parties agreed that the Tribunal had erred in adopting Hathaway's test and the Court remitted the matter on this basis without considering the issue.

43 *Al-Anezi v MIMA* (1999) 92 FCR 283 at [22]. In *Taiem v MIMA* (2002) 186 ALR 361, Carr J stated that he agreed with the view expressed by Lehane J in *Al-Anezi* that there is no reason why a person may not have more than one country of former habitual residence.

44 *Handbook on Procedures and Criteria for Determining Refugee Status*, at [104]. The alternate argument for having only one country of former habitual residence comes from applying the principle of statutory interpretation of *expressio unius est exlusio alterius*. The express reference to the occurrence of more than one nationality in conjunction with a definition which only refers to 'country of former habitual residence' in the singular, may operate to limit the possibility of having more than one country of former habitual residence.

former habitual residence must satisfy the Convention definition in relation to each such country. Grahl-Madsen is of the view that in circumstances where a person has more than one country of former habitual residence, the second paragraph of Article 1A(2) should be applied *mutatis mutandis*, such that to qualify as a refugee the person needs to show well-founded fear of persecution in both.[45] Hathaway shares this view, stating that the applicant's claims "should be assessed in relation to any and all countries to which she is formally returnable". In his opinion, this respects the need for symmetrical treatment of persons with and without nationality, since in the case of the former group the Convention requires proof of lack of protection in all states of nationality.[46] Such a view however, is not supported by Australian jurisprudence. In *Al-Anezi v MIMA* Lehane J held that

> ... a stateless person may have more than one country of former habitual residence ... but it does not follow that a stateless person who has had more than one country of former habitual residence is necessarily to be assessed, in relation to a claim for recognition as a refugee, by reference to each of those countries. ... A person who has a nationality, who has left the country of nationality owing to persecution for a Convention reason and is, as a result of a fear of such persecution, unwilling to return or is unable to avail himself or herself of the protection of that country, remains a refugee no matter in how many intermediate countries he or she may have resided and however many of them may correctly be described as countries of former habitual residence. It would be surprising if a stateless person who, owing to a well-founded fear of persecution for a Convention reason, had left (was outside) a country of former habitual residence and was unable or, due to such a fear, unwilling to return to that country, ceased to be a refugee merely because of subsequent habitual residence in another country in which he or she had no fear of persecution.[47]

This view accords with that held by the UNHCR, which is that an applicant can have more than one country of former habitual residence, and does not have to have a well founded fear of persecution in relation to all of them.[48]

Whilst it is not necessary to show a well-founded fear in respect of each country of former habitual residence, this does not necessarily mean that Australia owes protection obligations in circumstances where a person has been found to have a well founded fear in relation to one country only. In relation to protection visa applications lodged on or after 16 December 1999 it will be necessary to consider whether the claimant has access to protection in another country in which he or she does not have a well-founded fear of persecution, including other countries of former habitual residence as well as third countries that are not countries of former habitual residence.[49]

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45 A Grahl-Madsen, *op cit*, at pp.160-161. Grahl-Madsen considered, however, that as a rule a person will only have one country of former habitual residence, and the country from which a stateless person had to flee in the first instance remains the country of former habitual residence irrespective of any subsequent changes of factual residence: *id.* In *Maarouf v Canada (MEI)*, [1994] 1 F.C 723 (TD) the Federal Court of Canada rejected this view as unduly restrictive.

46 JC Hathaway, *op cit*, at p.62. Note that the right to legally return to a country is a critical component of the definition of country of former habitual residence for the purposes of Hathaway's approach. In *Re SA*, Appeal No.1/92, 30 April 1992, the New Zealand Refugee Status Appeals Authority considered the question. The Authority appears to have accepted firstly, that more than one country of former habitual residence is possible and, secondly, adopting Hathaway's reasoning, that the applicant must demonstrate a well-founded fear of persecution in relation to each country to which he has the right to legally return.

47 (1999) 92 FCR 283 at [22].

48 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, at [104]-[5].

49 Section 36(3)-(5) of the Act. For a discussion of these provisions see Chapter 9 of this Guide.

Statelessness Alone is Not Sufficient to Attract Refugee Status

Refugee status will not be accorded to persons merely because they are stateless. Although it has been argued that stateless persons who are unable to return to their country of former habitual residence do not need to establish a well founded fear for a Convention reason,[50] the Full Federal Court has confirmed that statelessness is not of itself sufficient to establish refugee status.[51]

The interpretation of Article 1A(2) with regard to stateless applicants first arose for consideration in *Rishmawi v MIMA*.[52] In *Rishmawi* the applicant argued that the wording of the Convention definition meant that a stateless applicant who was unable to return to his or her country of former habitual residence satisfied Article 1A(2) of the Convention and did not need to establish a well-founded fear of persecution. The Court resoundingly rejected this argument holding that it was the intention of the drafters that all applicants must establish a well-founded fear of persecution for a Convention reason. In considering the *travaux préparatoires* to the Convention and other commentaries, Cooper J found it was the object of the Convention to "treat uniformly persons seeking refugee status, so far as was possible, whether or not those persons had a nationality".[53]

In *MIMA v Savvin and Ors*[54] the Full Federal Court held that Article 1A(2) of the Convention is to be construed as including the requirement that a stateless person, being outside the country of his or her former habitual residence, have a well-founded fear of being persecuted for a Convention reason.

In *QAAE v MIMIA*[55] the applicant sought to rely on the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness* in support of his claim for a protection visa. The Court held that as those Conventions had not been incorporated into Australian municipal law and the applicant had not identified any particular provision which might have created an expectation as to how his application would be treated, there was no basis for invoking them in support of the applicant's refugee claim.[56]

Whilst statelessness of itself is not sufficient to establish refugee status, it is sufficient if the claimant is outside their country of habitual residence owing to a well-founded fear of persecution and unable to return for any reason. Inability to return need not be linked to the reason for the fear.

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50 *Savvin v MIMA* (1999) 166 ALR 348.

51 *MIMA v Savvin & Ors* (2000) 98 FCR 168.

52 (1997) 77 FCR 421.

53 *ibid*, at 427.

54 (2000) 98 FCR 168. Although the members of the Court arrived at this conclusion by slightly different paths, their ultimate position regarding Article 1A(2) was the same.

55 [2003] FCAFC 46 (Spender, Finn & Dowsett JJ, 17 March 2003).

56 *ibid*, at [12].

Is a Past Fear of Persecution Sufficient?

Although there is some authority for the view that where an applicant is *unable* to return, a past fear of persecution is enough, the preferable view appears to be that a past fear is not sufficient for the purposes of the Convention.

Cooper J in *Rishmawi v MIMA* expressed the opinion that a past fear as the reason for being outside the former country of nationality or former habitual residence is sufficient.[57] In *Al-Anezi v MIMA*, Lehane J expressed a similar opinion.[58]

However, other cases have not supported this view. In *Savvin v MIMA*[59], Dowsett J suggested that such an approach was inconsistent with the approach adopted by the High Court in *Chan v MIEA*. His Honour considered that the test was not whether an applicant had the relevant well founded fear at two different points in time. It was whether the applicant was outside the country of nationality owing to a *present*, well founded fear of persecution for a Convention reason; and unable, or owing to such present, well founded fear, unwilling to avail him or herself of the protection of that country.[60]

57 *Rishmawi v MIMA* (1997) 77 FCR 421 at 430.

58 (1999) 92 FCR 283 at [20]: "... if a claimant were unable for any reason to return to the country of former habitual residence, he or she was a refugee if, and only if, the reason for the claimant's absence from the country of former habitual residence was a (past) well-founded fear of persecution; it did not matter that the well-founded fear did not continue". See also supplementary reasons for judgment of 5 May 1999 at [3]. In some respects it is difficult to reconcile this view with Cooper J's own reasons for the conclusion that statelessness alone is not sufficient to attract refugee status, particularly his references to the object of the Convention, that is, "to provide sanctuary for those persons who had a well-founded fear of persecution for a Convention reason and not for any other reason": *Rishmawi v MIMA* (1997) 77 FCR 421 at 427.

59 (1999) 166 ALR 348 at [61]-[62].

60 (1999) 166 ALR 348 at [60]. See also *Diatlov v MIMA* (1999) 167 ALR 313 at [32]. This point was not expressly discussed by the Full Court in *MIMA v Savvin* (2000) 98 FCR 168, but Dowsett J's view is consistent with the Full Court's construction of Article 1A(2).