

This is the original English version of the paper which was translated into Japanese for the publication of *Nanmin Kenkyu Journal [Refugee Studies Journal]* Vol. 7.

Real risk or reasonable degree of likelihood? The United Kingdom test for international protection.

Judith Gleeson
31 July 2017

The law of international protection for asylum seekers and refugees around the world is governed by international instruments, both worldwide and regional. Refugee status is declaratory, an obligation to protect which falls on all 146 countries which have ratified the UN Convention relating to the Status of Refugees (the Refugee Convention), and on all European Union Member States and members of other regional groups and instruments. This has the advantage that points of law arising from the same source documents are interpreted by courts and tribunals around the world, whose decisions on new or difficult points are available to assist Courts or Tribunals in one's own jurisdiction.

The Refugee Convention was ratified by the United Kingdom on 11 March 1954. Europe also has both the 1950 European Convention on Human Rights and Fundamental Freedoms, incorporated into United Kingdom law from 2 October 2000, by the United Kingdom's Human Rights Act 1998, and a regional set of European Union instruments, which came into effect from 2004, and which together form the Common European Asylum System (CEAS). For the purpose of this discussion, the relevant document within the CEAS is the Qualification Directive 2004/83/EC¹, recast in the rest of Europe in 2011 but maintained in United Kingdom law in its original 2004 form.

The 1951 definition of a refugee is in Article 1A(2) of the Refugee Convention:

- "1A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...
(2) ...owing to well-founded fear of being persecuted for reasons of race, religion,

¹ <http://www.asylumlawdatabase.eu/en/content/en-qualification-directive-directive-200483ec-29-april-2004>

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

In 2004, the Qualification Directive defined two statuses, refugee status and subsidiary protection, at Article 2:

“2. Definitions

For the purpose of this Directive: ...

(c) “refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it...;

(e) “person eligible for subsidiary protection” means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a *real risk of suffering serious harm* as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;”

[*Emphasis added*]

Proving refugee status

The burden of proving that a well-founded fear of persecution for a Refugee Convention reason exists is always on the applicant for protection. The standard to which the applicant must prove that fear was the subject of intense judicial scrutiny in the United Kingdom and around the world, in the late 1980s. The United Kingdom’s present approach to the standard and burden of proof in protection claims evolved in decisions of its senior Courts and Tribunals, but always with the assistance, where there was doubt, of decisions from other international courts such

as the High Court of Australia (Australia's highest court), the United States Supreme Court, and the Canadian Supreme Court.

In *Sivakumaran* in 1988², the House of Lords considered the national and international jurisprudence on the standard and burden of proof. In the leading judgment, Lord Keith of Kinkel reminded the Court that, the United Kingdom having acceded to the Refugee Convention and its Protocol, 'their provisions have for all practical purposes been incorporated into United Kingdom law', citing paragraphs 16, 73 and 165 of the 1983 Statement of Changes in Immigration Rules³, in particular paragraph 16, which said so expressly:

"16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol Relating to the Status of Refugees (Cmd. 9171 and Cmnd. 3096). Nothing in these Rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

The House of Lords rejected the Court of Appeal's assessment that the Secretary of State had erred in interpreting well-founded fear as incorporating any assessment of whether the risk which the applicant or appellant subjectively feared had an objective reality, where the person in question was not a 'person of reasonable courage' who could face his subjective fears, even if they had no basis in fact.

Brooke LJ cited with approval the 1987 observations of Stevens J in the United States Supreme Court in *Cardoza-Fonseca*⁴, in which the Court held, by a majority of 5:3 that the US Court of Appeals had been right to hold that the correct test for the grant of in-country asylum protection, as set out in statutory provisions⁵ based on the Refugee Convention, was not whether an applicant had shown a 'clear probability of persecution' (the standard of proof for resisting deportation).

The Supreme Court held in *Cardoza-Fonseca* that Congress had intended to set a higher standard of proof for deportation, but that for the grant of refugee protection, asylum applicants were only required to show either past persecution or "good reason" to fear future persecution and that the reference to fear in the US statute,

² *Sivakumaran, R (on the application of) v Secretary of State for the Home Department* [1987] UKHL 1 (<http://www.bailii.org/uk/cases/UKHL/1987/1.html>)

³ No internet version of these Rules is available.

⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (<https://supreme.justia.com/cases/federal/us/480/421/>)

⁵ US Immigration and Nationality Act 1980, sections 208(a) and 243(h)

based on the Refugee Convention, made the asylum eligibility determination turn to some extent on the applicant's subjective mental state. The majority held that the fact that the fear must be "well founded" did not transform the standard of proof to "more likely than not".

The United Kingdom House of Lords unfettered by different statutory standards of proof, as was the case in the United States, held that there was no difference in the standard of proof to be applied to non-refoulement (and hence deportation) under Article 33 of the Refugee Convention, or to refugee protection under Article 1A(2). Lord Goff of Chieveley in his judgment agreed with Lord Keith and expressed the test in the following way:

"... But once it is accepted that the Secretary of State is entitled to look not only at the facts as seen by the applicant, but also at the objective facts as ascertained by himself in relation to the country in question, he is... not asking himself whether the actual fear of the applicant is plausible and reasonable; he is asking himself the purely hypothetical question whether, if the applicant knew the true facts, and was still (in the light of those facts) afraid, his fear could be described as plausible and reasonable. ... In truth, once it is recognised that the expression "well-founded" entitles the Secretary of State to have regard to facts unknown to the applicant for refugee status, that expression cannot be read simply as "qualifying" the subjective fear of the applicant - it must, in my opinion, require that an inquiry should be made whether the subjective fear of the applicant is objectively justified. For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded."

The United Kingdom's Immigration Appeal Tribunal returned to the question in 1994 in *Kaja*⁶, but discussed whether the standard or proof for facts, in particular past events, was the same as that for future risk, or whether what had already happened should be established by the applicant to the ordinary civil standard of balance of probabilities, that is to say, that the facts of the applicant's account were more likely than not to be true. As to the risk on return, having regard to the facts established (whichever test was applied), the Tribunal recited the decision of Lord Keith and his colleagues in *Sivakumaran*, and unanimously accepted that the risk of persecution on return to the applicant's country of origin need be established only to the lower standard of real risk or reasonable degree of likelihood.

⁶ *Kaja* (Political asylum; standard of proof) (Zaire) [1994] UKIAT 11038
(<http://www.bailii.org/uk/cases/UKIAT/1994/11038.html>)

The Tribunal noted that the House of Lords in *Sivakumaran* had not purported to decide the particular point in issue before it, confining their decision to the test for future risk. The Tribunal was split on the question of the standard of proof for facts, with Judge R E Maddison dissenting: however, it is the decision of the majority that prevails. President Farmer and Vice-President Jackson, the majority in *Kaja*, in a joint judgment held that the same standard of real risk or reasonable degree of likelihood should be applied both to establishing facts, and to assessing the future risk of persecution. In their joint judgment, they considered that an intervening stage of establishing facts to the standard of balance of probabilities, before considering whether it was reasonably likely that the applicant would be persecuted on return to their country of origin, was simply an unnecessary complexity, likely to remove from an applicant much of the 'benefit of uncertainty' which *Sivakumaran* had created:

"Credibility of aspects of the evidence and the ultimate evaluation of the case

... It may be that there are parts of the evidence which on any standard are to be believed or not to be believed and some which are more likely than not, and some about which there is a doubt. The need to reach a decision on whether an appellant has made his case to a reasonable degree of likelihood arises (just as "more likely than not") only on the ultimate evaluation of the case. All the evidence and the varying degrees of belief or disbelief are then assessed.

To introduce an intervening stage of a general conclusion followed by the assessment of the risk may make the applicant's evidential hurdle even more stringent than "more likely than not". If the ultimate test is "more likely than not" the uncertainties as to the evidence would be put on the final scale. The only purpose of assessment of the facts as a basis for assessment is to exclude uncertainties. This cannot be right.

Finally, it must be remembered that much of the background may (and probably will) be evidence adduced by the Secretary of State. That evidence will probably include assessments of the state of affairs in the country concerned and, as stressed in *Sivakumaran*, evidence of facts not known to the applicant. If there is an obligation to establish "facts" as "more likely than not" it must work both ways. The practical and realistic approach is, as is evident from *Sivakumaran* and *Direk*, and, if we may say so, the general approach of the Secretary of State in asylum cases, to assess whether on all the evidence (whatever its credibility and whoever adduces it) there is a reasonable degree of likelihood of persecution."

The question whether the Immigration Appeal Tribunal's approach was right came before the Court of Appeal of England and Wales on two occasions, in 1996 in

Ravichandran and in 2000 in *Karanakaran v Secretary of State for the Home Department*⁷. The Court of Appeal reviewed the decision in *Kaja*, and also, as is the custom in the United Kingdom, any assistance to be gained from decisions of other international Courts on the question of standard of proof. The Court in *Karanakaran* also considered internal relocation, but that is not germane to our present discussion. At [59] in the judgment of Lord Justice Brooke in *Karanakaran*, he summarised the Canadian authorities as they then stood:

“59. In Canada it appears to be well settled law that an applicant must prove, on the balance of probabilities, that there is a serious possibility that he/she will face persecution for a Convention reason if sent back home, and if he/she is warned that it will be argued that internal protection is available elsewhere in his/her home country, that it would be unduly harsh for him/her to be expected to move and settle in that part (see *Rasaratnam* [1992] 1 FC 706; *Thirunavukkarasu* 109 DLR (4th) 682). We were not shown any Canadian authority which specifically addressed the issue raised in *Kaja*. In *Rasaratnam* Mahoney J said in the Federal Court of Canada that if an internal flight alternative issue was raised, the Immigration and Refugee Board had to be satisfied on the balance of probabilities that there was no serious possibility of a claimant being persecuted in the part of the country in which it found an internal flight alternative existed. In *Thirunavukkarasu*, which was decided in the same court the following year, Linden J gave practical illustrations of the sort of tests a decision-maker should apply in such a case, and in *Robinson* this court commended his approach to English decision-makers. In both these Canadian cases, however, the applicant was found to be a credible witness, so that no question arose about the appropriate way to approach any uncertainties in his evidence.”

No assistance could therefore be gained from the Canadian authorities on the *Kaja* question of evaluating the past history and the standard of proof in factual matters.

The Court of Appeal then examined the development of the doctrine of ‘real chance’ in the judgments of the High Court of Australia in *Chan* (1989), *Wu Shan Liang* (1996); *Guo* (1997) and *Abebe* (1999)⁸. In *Guo*, the majority of the High Court considered that:

“It is true that in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred, or have not occurred for particular reasons in the past, is

⁷ [2000] EWCA Civ 11 (<http://www.bailii.org/ew/cases/EWCA/Civ/2000/11.html>)

⁸ *Chan* (1989) 169 CLR 379; *Wu Shan Liang* (1996) 185 CLR 259; *Guo* (1997) 144 ALR 567 and *Abebe* (1999) 162 ALR 1.

relevant in determining the chance that the event or the reason will occur in the future. If, for example, a tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining that there is a well-founded fear of future persecution."

In *Abebe*, Chief Justice Gleeson and Justice McHugh held that:

"As *Guo* makes clear, even if the Tribunal is not affirmatively satisfied that the events deposed to by an applicant have occurred, the degree of probability of their occurrence or non-occurrence is a relevant matter in determining whether an applicant has a well-founded fear of persecution. The Tribunal 'must take into account the chance that the applicant was so [persecuted] when determining whether there is a well-founded fear of future persecution'."

Justice Drummond in *Thanh Phat Ma* [1996] in the Federal Court of Australia paraphrased the judgment of Justice Kirby in *Wu Shan Liang* in the same year in the High Court of Australia thus:

"...unless the decision-maker can dismiss as unfounded factual assertions made by the applicant, the decision-maker should be alert to the importance of considering whether the accumulation of circumstances, each of which possesses some probative cogency, is enough to show, as a matter of speculation, a real chance of persecution, even though no one circumstance, considered by itself, is sufficient to raise that prospect."

The Court of Appeal in *Karanakaran* approved both the Australian approach and that of the Immigration Appeal Tribunal in *Kaja*. The core reasoning is at [102]-[104] in the judgment of Brooke LJ:

"102. This approach does not entail the decision-maker (whether the Secretary of State or an adjudicator or the Immigration Appeal Tribunal itself) purporting to find "proved" facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen.

103. For the reasons much more fully explained in the Australian cases, when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur. Similarly, even if a decision-maker finds that there is no serious possibility of persecution for a Convention reason in the part of the country to which the Secretary of State proposes to send an asylum seeker, it must not exclude relevant matters from its consideration altogether when determining whether it would be unduly harsh to return the asylum seeker to that part, unless it considers that there is no serious possibility that those facts are as the asylum seeker contends.

104. Needless to say, as the High Court of Australia observed in *Wu Shan Liang*, when assessing the future, the decision-maker is entitled to place greater weight on one piece of information rather than another. It has to reach a well-rounded decision as to whether, in all the circumstances, there is a serious possibility of persecution for a Convention reason, or whether it would indeed be unduly harsh to return the asylum-seeker to the allegedly "safe" part of his/her country. This balancing exercise may necessarily involve giving greater weight to some considerations than to others, depending variously on the degree of confidence the decision-maker may have about them, or the seriousness of their effect on the asylum-seeker's welfare if they should, in the event, occur."

United Kingdom's international obligations under Article 3 of the ECHR

The law on standard and burden of proof should have been settled by *Karanakaran*, but in 1998⁹, the United Kingdom incorporated into its law the European Convention on Human Rights and Fundamental Freedoms 1950¹⁰ (the Human Rights Convention), which at Article 3 provided another protection route, similar to that available through Article 3 of the Convention Against Torture in other countries.

The Human Rights Act 1998 required all public bodies to have regard to the developed jurisprudence of the European Court of Human Rights in Strasbourg, a

⁹ Human Rights Act 1998, in force 2 October 2000

<http://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

¹⁰ http://www.echr.coe.int/Documents/Convention_ENG.pdf

50-year *acquis* to which the United Kingdom, as the only European common law system, had not yet contributed. Article 3 of the ECHR says simply this:

“Article 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The question then arose, to what standard should the risk of torture, or of inhuman or degrading treatment or punishment be assessed, and to what extent was the United Kingdom liable if it removed a person to a third country, where their Article 3 rights might be breached? Assistance was available from the established ECHR jurisprudence. In the starred (and therefore binding) decision of the Immigration Appeal Tribunal in *Kacaj*¹¹, the Tribunal identified the question before it as being the correct standard of proof to be applied in deciding whether to return an applicant to a country where it is alleged that his human rights, particularly under Article 3, would be breached.

The Tribunal considered the 1978 judgment of the European Court of Human Rights in *Ireland v United Kingdom*, which held that the standard of proof was the criminal standard of ‘beyond reasonable doubt’, but it distinguished a passage relied upon in *HLR v France* [1997], which came from the argument of one of the parties, not the Court’s decision.

The Tribunal did not consider that in general, the criminal standard was the right standard. Instead, it followed a line of cases beginning with the 1978 decision of the European Court of Human Rights in *Soering v United Kingdom*¹² at [91], when it considered the extra-territorial responsibility of a deporting state not to breach the unqualified Article 3 ECHR rights of the person being removed from its territory:

“91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where *substantial grounds have been shown for believing* that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the

¹¹ STARRED *Kacaj* (Article 3, Standard of Proof, Non-State Actors) Albania [2001] UKIAT 00018 (<http://www.refworld.org/pdfid/4680c86fd.pdf>)

¹² *Soering v United Kingdom* - 14038/88 [1989] ECHR 14 (<http://www.bailii.org/eu/cases/ECHR/1989/14.html>)

requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which as a direct consequence the exposure of an individual to proscribed treatment." *[Emphasis added]*

In short form, the test for Article 3 protection is whether 'substantial grounds have been shown for believing' that the host State's removal actions would induce an Article 3 breach in the receiving country. At [10], the Immigration Appeal Tribunal refused to complicate the test under Article 3 by finding it to differ from the established standard of proof for the Refugee Convention:

"10. The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. ... Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam [for the Secretary of State] is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements."

Thereafter, in United Kingdom judgments, the test has been approached as being, for Refugee Convention and human rights claims, whether there is a well-founded fear of persecution or real risk of suffering serious harm, a lower standard of proof which is well below both the criminal standard of 'beyond reasonable doubt' and the ordinary civil standard of balance of probabilities. The same standard is applied to the assessment of the applicant's past history, and to the risk if he returns now to his country of origin.

Standard of proof within the CEAS

The drafting of the Qualification Directive 2004/83/EC, and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (as amended) which incorporated it into United Kingdom law, reinforce this combined standard. At Regulation 4(4) and 4(5) of the Directive, the relevant test is set out:

“4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's *well-founded fear of persecution or real risk of suffering serious harm*, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.” [*Emphasis added*]

The test in that formulation has proved practical and usable by judges in the United Kingdom system.

Conclusion

United Kingdom Courts and Tribunals have recognised, now for many years, that an applicant for refugee protection or subsidiary protection (humanitarian protection in the United Kingdom formulation) is in a weak position from the documentary point of view. The government or the non-State actors which he fears, in his country of origin, hold most of the evidence and documents, which is not accessible to an individual, far from home, who may have left with few, if any, pieces of

corroborative evidence.

However, the risk, if it exists, is a serious one. An applicant may be tortured, seriously harmed, persecuted or even killed, by reason of something he did (or did not do), or something he is (or is perceived to be, whatever the true position). Judges and other decision makers need, therefore, to approach establishing the facts, and assessing the subjective fear and the objective reality that fear entails.

It is that combination of the seriousness of the asserted risk in the receiving state, and the inevitable difficulty for an applicant to prove his case, either to the criminal standard of beyond reasonable doubt, or the civil standard of balance of probabilities (more likely than not) which has led, not just in the United Kingdom but around the world, to an acceptance that for the decision maker in a host state to meet that State's international obligations, although the burden of proof is on the asylum applicant, the standard of proof can be no higher than whether there is, on the evidence before the decision maker, a well-founded fear of persecution or a real risk of suffering serious harm if the applicant is returned to his country of origin or former habitual residence.

The decision maker is required to give the case before him 'the most anxious scrutiny', because, as set out in the judgment of Lord Bridge of Harwich in the House of Lords in *Bugdaycay*¹³ in 1986:

"...The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

¹³ *Bugdaycay v Secretary of State for the Home Department* [1986] UKHL 3
(<http://www.bailii.org/uk/cases/UKHL/1986/3.html>)

THE ADOPTION OF THE REAL CHANCE TEST IN NEW ZEALAND

Martin Treadwell

Deputy Chair

Immigration and protection Tribunal, New Zealand

[1] Before 1991, New Zealand had little understanding or development of refugee law. The few decisions on refugee status which were made each year were made ‘over a cup of tea’ by an Inter-departmental Committee on Refugees (ICOR), with little or no guidance from anything other than the UNHCR Handbook.

[2] In 1991, however, everything changed. Refugee claims increased dramatically as a result of the conflict in the Punjab and in the aftermath of the 4 June 1989 crackdown on demonstrators in Tiananmen Square in Beijing. The government of the day in New Zealand realised that ICOR could no longer cope, either with the workflow or with the skill base required to deal with increasingly sophisticated and complex claims. As a result, it established the Refugee Status Appeals Authority (RSAA), which immediately set about developing a body of sound refugee law jurisprudence under the leadership of its Deputy Chair, Rodger Haines QC.

Getting rid of the ‘subjective’ fear requirement

[3] In its first decision, *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991), the RSAA set out the approach it intended to take in assessing and applying Article 1A(2) of the Refugee Convention. It found guidance in both the UNHCR Handbook and the decision of the New Zealand High Court in *Benipal v Minister of Foreign Affairs* (High Court Auckland, A No 878/83, 29 November 1985), in holding that the expression “a well-founded fear” denoted both subjective and objective elements to the test. As to the latter, the RSAA noted:

“In *Benipal v. Minister of Foreign Affairs* (High Court Auckland, A. No. 878/83, 29 November 1985)

Chilwell J. at p.228 of his decision observed:

‘Clearly there are subjective and objective considerations in the application of the definition to the facts. While as a matter of convenience it is useful to distinguish between the two ingredients, it can lead to error to regard them as separate and independent elements which can be considered in isolation. If fear exists, the issue whether fear is well-founded cannot be divorced from the fear itself; it is in relation to the fear that the issue of “well-founded” must be decided ...’.

Later he said:

"Well-founded" is an adjectival clause of the noun "fear". Hence it is necessary to decide the fear issue first. Only then can the basis for the fear be ascertained. When ascertained the question can be asked whether the basis is well-founded."

[4] In fact, in later years, the RSAA would come to the conclusion that there is no meaningful purpose in engaging in an enquiry into whether the claimant has a subjective fear and that it simply complicated what should be a straightforward investigation into the question whether, objectively, the person is at risk of being persecuted. See, in this regard, *Refugee Appeal No 70074* (16 September 1996), in which the RSAA emphatically removed from its jurisprudence any need for an enquiry into the existence of a subjective fear:

"[27] It is quite clear that the adjectival phrase 'well-founded' qualifies both the word 'fear' as well as the word 'persecuted' and thus decisively introduces an overriding objective test for determining refugee status.

...

[29] Experience has shown that [the RSAA's] initial formulation may have outlived its usefulness.

[31] ... [T]he test, as currently formulated, potentially places an unnecessary focus on the subjective fear of the appellant by prefacing each issue with the word 'fear'. In the result, a considerable part of the enquiry can be erroneously conducted from the standpoint of the claimant.

[32] The fallacy of this approach... is that the focus of the Convention is not on the facts as subjectively perceived by the appellant, but on the objective facts as found by the decision maker. Before the Convention criteria can be satisfied, there must be a well-founded fear of persecution. As explained by Lord Keith in *R v Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958, 992G (HL):

"... the question whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality. This inference is fortified by the reflection that the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question."

...

[37] We are of the view that the Sivakumaran decision should be followed in New Zealand on the issue of the objective component of the refugee definition. We are fortified in this view by the fact that the primacy of the objective element has also been recognized by the Supreme Court of the United States in *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L. Ed 2d 434 and by the High Court of Australia in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.”

Adopting the ‘real chance’ threshold for determining whether a fear is, objectively, well-founded

[5] However, at the same time as the RSAA was grappling with its understanding of the (then widely used) ‘subjective’ and ‘objective’ elements of a “well-founded fear”, it had no difficulty in determining where the threshold for the assessment of the objective test lay. As early as *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991), it saw *Ex Parte Sivakumaran, Chan and Cardoza-Fonseca* as laying down the foundations of the ‘real chance’ test:

“The same three leading overseas cases considered the test to be met in deciding whether a well-founded fear of persecution exists. In the *Cardoza-Fonseca* case, the Court held that it was sufficient that the evidence showed persecution as a reasonable possibility and approved of other expressions such as ‘a real chance of persecution’, ‘a reasonable chance’, ‘substantial grounds for thinking’ and ‘serious possibility’. The House of Lords in *Sivakumaran* held that the appropriate test was the demonstration of a reasonable degree of likelihood that persecution would occur. In *Chan* the majority of the High Court approved the expression ‘a real chance of persecution’ as the appropriate test, that Court having had the advantage of considering both the *Cardoza-Fonseca* and *Sivakumaran* cases. The authorities make it clear that there is little to choose between these various tests. We conclude that the real chance approach adopted in *Chan* is the appropriate test to apply in New Zealand.”

[6] In recognising that the appropriate threshold for the risk of being persecuted is “a real chance”, the RSAA was walking on solid, and well-trodden, ground. Originally proposed by Atle Grahl-Madsen a quarter of a century earlier, in *The Status of Refugees in International Law* Vol 1 (1966) 181, the threshold of a real chance was adopted by the High Court of Australia in 1989, in *Chan*, with Mason CJ holding, at 388-389:

“... I prefer the expression ‘a real chance’ because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring.”

[7] Dawson J, at 397-398, agreed:

“On the other hand, it is also clear enough that a fear can be well-founded without any certainty, or even probability, that it will be realized.

... a real chance is one that is not remote, regardless of whether it is less or more than 50 per cent."

[8] Toohey J, at 407, was also in agreement, adding:

"The test suggested by Grahl-Madsen, 'a real chance' gives effect to the language of the Convention and to its humanitarian intent. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time."

[9] McHugh J at 429, also observed:

"The decisions in *Sivakumaran* and *Cardoza-Fonseca* also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in *Cardoza-Fonseca* an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterized as "well-founded" for the purpose of the Convention and Protocol."

[10] In a decision delivered some four years after the adoption of the 'real chance' test in New Zealand (*Refugee Appeal No 523/92* (17 March 1995)), the RSAA had occasion to revisit it when faced with a strong challenge by counsel. Declining to be swayed by the force of the argument, the RSAA traversed both the history of the 'real chance' test, as already discussed here, and considered the application of the test in other jurisdictions:

"In Canada the preferred formulations are 'reasonable chance' or 'good grounds': *Adjei v Canada* (*Minister of Employment and Immigration*) [1989] 2 FC 680 (FC:CA).

The position in Europe is not straightforward and is discussed by Walter Kälin in 'Well-founded Fear of Persecution: A European Perspective', Coll & Bhabha (eds), *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (1st ed 1992) 21."

before concluding:

"In New Zealand, the 'real chance' test has been adopted by this Authority because of its clarity and simplicity of application in a determination process which is characterized by what Professor Hathaway has called 'inherent evidentiary voids': *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991) 7.

In summary, before it can be said that a fear is well-founded, there must be a real chance of persecution. There must be more than a remote chance of persecution occurring. It follows that the standard of proof is much less than fifty per cent and can be as low as a ten per cent chance. It is

undesirable, however, to express chances in terms of percentages as this can be misleading. It is preferable to enquire whether there is a real chance as opposed to one which is remote.

The standard of proof is not only a low one, experience shows that genuine refugees are well able to meet this standard, particularly given the liberal application of the benefit of the doubt in relation to the "real chance" question. Our holding that the legal burden of proof is carried by the claimant does not, in the result, impose a burden of any great weight."

[11] There have been few other cases of note which have had occasion to discuss the test – a reflection of its settled and accepted nature. A rare exception was *Refugee Appeal No 71404/99* (29 October 1999), in which the RSAA was required to consider the predicament of a citizen of Indonesia who was Chinese by race. There had been violent anti-Chinese riots in Jakarta following demonstrations which had culminated in the shooting of four students at Trisakti University in West Jakarta on 12 May 1998. The appellant emphasised the insecurity which he and other Chinese Indonesians felt as a result of the May 1998 events, occurring as they did against a background of pervasive discrimination against Chinese and a history of attacks against the Chinese community.

[12] In addressing whether, objectively, the appellant faced a real chance of being persecuted, the RSAA returned to the early consideration of the appropriate standard by Grahl-Madsen in 1961, and recorded, with approval, his contextualisation of the test as a chance that is 'real' as opposed to 'remote' or insubstantial':

"[26] Atle Grahl-Madsen in *The Status of Refugees in International Law* Vol 1 (1966) at 180 postulates the following example:

'Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote 'labour camp', or that people are arrested and detained for an indefinite period on the slightest suspicion of political non-conformity.'

[27] The question posed by this example is whether a one in ten risk, or to express the issue in percentage terms, a ten per cent chance of persecution will qualify as a 'well-founded' fear. In answering this question in the affirmative, Grahl-Madsen goes on to state at op cit 180:

'In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have [a] "well-founded fear of being persecuted" upon his eventual return. It cannot - and should not - be required that an applicant shall prove that the police have already knocked on his door.'

[28] In further addressing this risk, Grahl-Madsen at op cit 181 goes on to state: 'If the risk is not so clear for all to see as in the above-mentioned example, the determination as to whether there exists "well-founded fear" will be more difficult. But the real test is the assessment of the likelihood of the

applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his "fear" is "well-founded".

Not a substitute for the language of the Convention

[13] It must always be remembered, of course, that the Convention requires that a claimant establish a *well-founded* fear of being persecuted, and that the threshold of a real chance of it occurring is not a substitute for the language of the Convention.

[14] This point was made in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 576 (HCA), where the High Court of Australia stressed that conjecture or surmise has no part to play in determining whether a fear is well-founded, stating:

"No doubt in most, perhaps all, cases... the application of the real chance test, properly understood as the clarification of the phrase 'well-founded', leads to the same result as a direct application of that phrase... Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Einfeld J thought that the 'real chance' test invited speculation and that the tribunal had erred because it 'has shunned speculation'. If, by speculation, His Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism could be made of his use of the term. But it seems likely, having regard to the context and his Honour's conclusions concerning the tribunal's reasoning process, that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is 'well-founded' when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the tribunal and the Federal Court have used the term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

Today

[15] Today, 26 years after the RSAA was founded, its successor, the Immigration and Protection Tribunal, continues to apply the real chance test. There has been comparatively little need for the test to be revisited in the jurisprudence of either the RSAA or the Tribunal, simply because the test is workable, fair and appropriate to the specialised jurisdiction of refugee status determination. The

template for the Tribunal's decisions on refugee and protected person status continues to postulate the enquiry in the following terms:

"In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- b) If the answer is yes, is there a Convention reason for that persecution?

[16] It is helpful in closing, to reflect on the reasons why the 'real chance' threshold has endured, without change or controversy, in spite of the complex and often difficult evolution of much of the remainder of the Convention definition.

[17] The answer can perhaps best be summarised thus:

- a) As commentators have stressed over the decades, the test does no more than to discount what is remote or insubstantial. It is a test that can be comprehended and applied.
- b) In reality, few claimants could be expected to be able to 'prove' the risk to them to any civil or criminal standard because:
 - i. there are inherent difficulties in determining the likelihood of an event occurring at an indeterminate time in the future, in another country, and when the choice of whether or not that event occurs at all lies entirely in the hands of people who cannot be communicated with;
 - ii. claimants cannot be expected to wait until they have *been* persecuted, in order to provide evidence of a future risk of it;
 - iii. claimants cannot be expected to return to their home country to gather evidence;
 - iv. claimants cannot be expected to seek the assistance of family or friends to gather evidence in the home country on their behalf, if to do so would put the family or friends at risk of harm themselves; and
 - v. claimants have, statistically, low financial, emotional and physical resources – attributes which are likely to impede the thorough and comprehensive presentation of evidence.

- c) The test sits comfortably in what is a largely fact-based enquiry imposing, as it does, no bright-line threshold but rather a contextualised and case-specific assessment, relying very much on the skills and knowledge of specialist, investigative decision-makers.
- d) The low, even generous, threshold of the test appropriately recognises the gravity of the issues at stake and that “getting it wrong” in terms of a negative decision would give rise to serious breaches of the host country’s obligations at international law. It must be remembered that findings of refugee status are declaratory, not constitutive, and the *refoulement* of a genuine refugee as a consequence of an incorrect decision would be a profound breach of Article 33(1) of the Refugee Convention.

[18] The real chance test has long been noted by the superior courts in New Zealand as correctly reflecting the appropriate standard for determining whether well-foundedness under the Convention. See, for example, *Butler v Attorney General and Anor* (CA, CA181/97, 13 October 1997) and *Jiao v Refugee Status Appeals Authority and Anor* (CA, CA167/02, 31 July 2003).

[19] Finally, as to the future, it is not anticipated that the ‘real chance’ test will undergo any evolution or change in New Zealand in the short to medium term. It remains a workable and well-understood threshold. Note might be taken of the preference in some jurisdictions (South Africa for many years, for example) of the formulation of ‘a real risk’, rather than ‘a real chance’ – not because the threshold is different but because the word ‘risk’ is seen as a useful reminder of the claimant’s predicament.

Martin Treadwell
Auckland

8 July 2017

The Foundations of ‘Well-Founded Fear’: The ‘Real Chance’ Test in Australian Refugee Law

Linda Kirk

Senior Lecturer, ANU College of Law, Australian National University

Senior Member, Administrative Appeals Tribunal, Australia

Introduction

Article 1A(2) of the *Convention relating to the Status of Refugees* 1951 (the Refugee Convention) states that the term ‘refugee’ shall apply to any person who ...

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his (sic) nationality ... or country of former habitual residence ...

The opening words of Article 1A(2) ‘owing to a well-founded fear’ have required courts and tribunals around the world to give meaning to the phrase ‘well-founded fear’ and formulate relevant standards for its application to the individual circumstances and claims of asylum-seekers. To this end, international refugee law jurisprudence is replete with discussion of well-known and tested concepts of where the burden or onus of proof lies, what standard of proof should be applicable, and the distinction between the subjective and objective elements of an applicant’s claim for refugee status.

In Australia, this aspect of the Convention definition has been the subject of considerable judicial commentary. The focus of this article is on the ‘well-founded fear’ element of the refugee definition in Australian refugee law, and specifically the interpretation by the Australian courts of the burden of risk or standard of proof inherent in the ‘well-founded fear’ element of the refugee definition. The article demonstrates that the Australian courts have contributed significantly to the development of international refugee law jurisprudence in laying the foundations for the refugee definition concept of ‘well-founded fear’.

1. ‘Well-founded fear’

During the drafting of the Refugee Convention, a proposal presented by the United Kingdom first included the concept of ‘well-founded fear of persecution’ which was adopted by the

drafting committee into the draft convention.¹ The broad term ‘well-founded fear of persecution’ was incorporated into the text to demonstrate that there are many circumstances that amount to persecution, and that the notion should not therefore be further defined and thereby restricted.² The drafting history shows that there was an intense discussion during the session of the Ad Hoc Committee on Statelessness and Related Problems in relation to what the phrase ‘well-founded fear’ should mean. In particular there was consideration as to whether the phrase should be viewed as placing emphasis on subjective elements in connection with the individual’s circumstances, or instead on objective elements assessing the situation in the applicant’s country of origin.³ The words ‘well-founded’ were added in order to require that ‘a person has either been actually a victim or persecution or can show good reason why he (sic) fears persecution.’⁴

(a) Subjective and Objective Elements

Both academic writing and jurisprudence have developed different approaches to whether the term ‘well-founded fear’ refers to an objective danger of persecution, or a combination of both subjective and objective factors.⁵ The widely accepted approach recognises that ‘well-founded’ fear comprises of two elements.⁶ First, that the applicant seeking refugee status perceives themselves as in fear of persecution, in the sense of an extreme form of anxiety or trepidation in relation their safety on return to their country of origin. Secondly, this subjective perception of risk must be consistent with the available country of origin information which demonstrates objectively the risk on return for an individual in the applicant’s circumstances.⁷ The ‘combined’ or ‘bipartite’ approach, which is favoured by the UNCHR, assumes that ‘well-founded fear’ contains both subjective and objective elements, and both must be present for the required standard to be met. The *UNHCR Handbook* states:

To the element of fear – a state of mind and a subjective condition – is added the qualification ‘well-founded’. This implies that it is not only the frame of mind of the person

¹ Andreas Zimmermann, Jonas Dörschner, and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford University Press, 2011 at paragraph 173 citing Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/L.2/Rev. 1 (1950), para 1 (Oxford commentary).

² Ibid at para 173. Note that the phrase ‘well-founded fear of being persecuted’ is that which was incorporated into the Refugee Convention.

³ Ibid at para 174 citing.

⁴ Ibid at para 180 citing Ad Hoc Committee on Statelessness and Related Problems, UN Docs. E/1618 and E/AC.32/5 (1950), p. 39.

⁵ Ibid para 186.

⁶ Discussed in James Hathaway and Michelle Foster, *The Law of Refugee Status*, Cambridge University Press, 2014 (Hathaway and Foster) at 91.

⁷ Ibid.

concerned that determines his (sic) refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and objective element.⁸

By contrast, the objective approach requires only the existence of objective evidence, the subjective element being regarded as a mere additional factor.⁹

In Australia, the High Court held in the leading decision of *Chan v MIEA* that the 'combined' or 'bipartite' approach is that which is applicable in Australian law.

(b) The High Court in *Chan v Minister for Immigration and Ethnic Affairs*

Mr Chan Yee Kin, a national of the People's Republic of China (PRC), was a member of a faction of the Red Guards who lost a struggle for control of that organisation in his local area. He and members of his faction were questioned by the police and he was detained. On a number of occasions, he sought to escape from his local area and each time was captured and imprisoned. He stowed away on a ship to Australia in 1980. His claim that both he and his family before him had suffered as political dissidents in China was rejected by a delegate of the Minister, and this was upheld on appeal by Keely J in the Federal Court, and then rejected again by the Full Federal Court. In finding that Chan did not meet the definition of refugee, the Full Federal Court took into account the length of time that the applicant had been in Australia, and found that there was no evidence to suggest that the persecution feared at the time he left the PRC still had a basis in fact.¹⁰

However, nine years after Chan's arrival in Australia the High Court decided the delegate's original decision should be set aside. In *Chan v MIEA*,¹¹ the Court found that the first-instance tribunal had erred in determining that the applicant did not face a significant prospective risk of being persecuted. The Court confirmed that 'well-founded fear' has both a subjective and an objective element. Consideration must be given to the mental and emotional state of the applicant and also the objective evidence in relation to conditions in his or her country of origin. In the words of Dawson J:

The phrase "well-founded fear of being persecuted..." contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis

⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNDoc.HCR/IP/4/Eng/REV.3 (2011) (*UNHCR Handbook*) at [38].

⁹ Oxford commentary, above n1, para 188.

¹⁰ See discussion in Mary Crock, 'Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law' (1998) 10 *International Journal of Refugee Law* 49, 55ff.

¹¹ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (*Chan*).

- well-founded - for that fear.¹²

Since the High Court's decision in *Chan v MIEA*, there has been no deviation from the view that in Australian law 'well-founded fear' consists of subjective and objective elements, and that both must be satisfied for an applicant to satisfy the refugee definition. In adopting this 'combined' or 'bipartite' approach, the Court has followed most of the leading courts of the common law world, including the Canadian Supreme Court,¹³ the United States Supreme Court,¹⁴ and the Supreme Court of the United Kingdom.¹⁵

(c) The subjective element

The subjective element of 'well-founded fear' concerns the state of mind of the applicant and focuses on their perceptions regarding the risk involved in returning to their country of origin.¹⁶ Whether an applicant has a genuine fear is a question of fact. In *Firuzibakhsh v MIMA* Mansfield J expressed the view that the subjective fear should be identified by an applicant (although not necessarily expressed in the language of Article 1A(2) of the Convention) and that the decision-maker is not required to speculate about the subjective fears of an applicant for a protection visa.¹⁷

The applicant's belief does not need to have a rational basis,¹⁸ but it must be sincere and not over-stated.¹⁹ A fact-finder may be entitled to reject an assertion by an applicant of the existence of genuine fear on the basis that it is disingenuous.²⁰ For example, if an applicant voluntarily and regularly visits or returns to his or her country of origin,²¹ or where there is an entire absence of evidence for the fear, then an applicant's claim that he or she has a subjective fear of persecution may be rejected.²²

¹² *Chan* at 396. See also *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 263 per Brennan CJ, Toohey, McHugh and Gummow JJ.

¹³ *Ward v Canada (Attorney General)* [1993] 2 SCR 689 at 723 [64].

¹⁴ *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 480 US 421 at 431.

¹⁵ *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at 623.

¹⁶ *Guide to Refugee Law*, Administrative Appeals Tribunal, June 2017 (*Guide to Refugee Law*) at para 3-3.

¹⁷ *Firuzibakhsh v MIMA* [2002] FCA 982 (Mansfield J, 9 August 2002) Mansfield J, at [56].

¹⁸ John Vrachnas, Kim Boyd, Mirko Bagaric, Penny Dimopoulos, *Migration and Refugee Law Principles and Practice in Australia*, Cambridge University Press, 2005 (Vrachnas et al) at 255.

¹⁹ Oxford commentary, above n1 at para 192.

²⁰ Vrachnas et al, above n18.

²¹ However, this may not necessarily be inconsistent with the existence of a subjective fear, if, for example, the circumstances of the return were not such as to trigger the form of harm that he or she fears: see *SZQUP v MIAC* (2012) FLR 334 (Raphael FM, 4 April 2012) at [40] where the applicant's claims related to a fear of discrimination on the basis of her HIV positive status, but at the time of her visit to the Ukraine she was asymptomatic.

²² Vrachnas et al, above n18.

The emotional or subjective reactions of persons seeking refugee status to an objective threat of persecution may vary considerably dependent on a range of factors including their individual personality, background and culture.²³ As a consequence, it is sometimes difficult for a decision-maker to assess the subjective requirement of 'well-founded fear'.²⁴ This is particularly so for certain vulnerable applicants, for example children and those suffering from post-traumatic stress disorders. The Australian courts have accepted that whereas a subjective fear is necessary, it can, in the case of a child, be derived from the fear held by his or her parents. In *Chen Shi Hai v MIMA*, French J held that if it were otherwise those who may be most in need of Convention protection, including children and the intellectually disabled, would be excluded.²⁵

It is important to emphasise that the bipartite understanding of 'well-founded fear' requires an applicant to show both subjective trepidation and objective risk.²⁶ It therefore follows that if subjective fear cannot be demonstrated by the applicant, even in circumstances where there is evidence of a genuine, objective risk, their claim for refugee status must be denied.²⁷

The applicant's subjective beliefs regarding the dangers for them on return to their country are infrequently in dispute as they form the basis of their claim for protection, and therefore while the requirement of the existence of a genuine fear cannot be ignored, in most cases it is not an issue. The more contentious issue in determining refugee status is usually whether the applicant has an objective fear, and that their fear is thereby 'well-founded'.

(d) The objective element

This objective element requires that there be a rational, factual basis for the fear.²⁸ In *Chan v MIEA*, Dawson J noted that 'whilst there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear'.²⁹ The determination of whether there exists a 'well-founded fear' therefore requires an objective examination of the facts to determine whether the fear is justified.³⁰ Assessment of the objective element will usually involve consideration of general information about conditions in the applicant's country, as well as an assessment of the applicant's own claims in light of any material provided in support of

²³ Oxford commentary, above n1 at para 192. See further discussion in Hathaway and Foster, above n6 at 96.

²⁴ Hathaway and Foster, above n6 at 96.

²⁵ *Chen Shi Hai v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998), per French J at 14. Approved by Kirby J in *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [77] ff.

²⁶ Hathaway and Foster, above n6 at 93.

²⁷ *Ibid.*

²⁸ *Chan v MIEA* (1989) 169 CLR 379 per Gaudron J at 412; see also per Dawson J at 396, Toohey J at 406 and McHugh J at 429. See discussion in Guide to Refugee Law, above n16 at para 3-4.

²⁹ *Ibid* per Dawson J at 396.

³⁰ *Ibid* per McHugh J at 429.

such claims.³¹

The decision-maker is entitled to consider whether an applicant objectively has a well-founded fear of persecution before examining whether such a fear is subjectively held, or to proceed on the assumption that such a fear is held.³² However, the bipartite approach makes the existence of a subjective fear a threshold question which, if not satisfied, necessarily must result in the denial of refugee status. In *Minister for Immigration and Citizenship v SZJGV*, Crennan and Kiefel JJ stated:

[T]he Convention definition of a refugee has been held to encompass both subjective and objective elements. The subjective question is whether the applicant ... has a fear of persecution. *If that question is answered in the affirmative*, the following question, whether that fear is well-founded, is an objective one.³³

Accordingly, if the decision-maker finds on the evidence that the applicant does not have a Convention based subjective fear, there will be no need to consider whether there exists an objective basis for the claimed fear.³⁴ In *Iyer v MIMA*, the Tribunal concluded that certain return visits by the applicant to Sri Lanka from Australia were voluntary, and this supported a conclusion that the applicant did not have the necessary fear of persecution required for refugee status. The Federal Court confirmed that the Tribunal had applied the correct principles concerning the applicant's fear of persecution, and stated that it needed to go no further in its analysis of the basis of the claim. On appeal, the Full Federal Court affirmed that once the Tribunal rejects an applicant's claim that there is a subjective fear, it is not necessary to determine whether the non-existent fear is well-founded.³⁵ Conversely, if the decision-maker finds that there is no objective basis for a fear of persecution, there is no obligation to consider whether there is a subjective fear.³⁶

(e) Are both subjective and objective elements necessary?

Hathaway and Foster argue persuasively that the bipartite approach to the definition of well-founded fear 'is neither desirable as a matter of principle, nor defensible as a matter of international law.'³⁷ In their view,

³¹ Guide to Refugee Law, above n16 at para 3-4.

³² Ibid at para 3-3, citing *Emiantor v MIMA* (1998) 98 ALD 635.

³³ *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 666 [53] emphasis added.

³⁴ Guide to Refugee Law, above n16 at para 3-3. See *SZQNO v MIAC* [2012] FCA 326 per Katzmann J at [48] and *Iyer v MIMA* [2000] FCA 52 per O'Connor J, at [32]-[34].

³⁵ *Iyer v MIMA* [2000] FCA 1788.

³⁶ Guide to Refugee Law, above n16 at para 3-3 citing *SAAD v MIMIA* [2003] FCAFC 65 (Cooper, Carr and Finkelstein JJ, at [38]; *Selliah v MIMIA* [1999] FCA 615 at [40].

³⁷ Hathaway and Foster, above n6 at 92. See also James Hathaway and William Hicks, 'Is there a Subjective

[t]he concept of well-founded fear is rather inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear.³⁸

This is the approach taken in New Zealand where it is accepted that the 'adjectival phrase 'well-founded' qualifies both the word 'fear' as well as the word 'persecuted' and thus decisively introduces an overriding objective test for determining refugee status.'³⁹ This approach requires only that an applicant demonstrate a present or prospective risk of persecution in order to fulfil the objective concept of the notion 'well-founded fear'. The subjective feelings of the applicant are not relevant to this assessment, however his or her individual circumstances must still be taken into account. Whereas Australian law insists on the satisfaction of both the subjective and objective elements of 'well-founded fear' it is accurate to say that the jurisprudence recognises the primacy of the objective element in the assessment.⁴⁰

2. Burden of Risk or Standard of Proof

The overall object and purpose of the Refugee Convention is to provide protection for individuals by imposing an obligation on contracting states to ensure that individuals within their jurisdiction are not returned to countries where they would be exposed to the risk of persecution on the basis of one or more of the Convention grounds.⁴¹ The two elements of the phrase 'well-founded fear' attempt 'to circumscribe the situation where the respective risk level is high enough so as to trigger the obligation to grant international protection by the contracting party when refuge against persecution is being sought.'⁴² The 'risk-oriented focus' of the Refugee Convention is therefore central, and supports an interpretation of 'well-founded fear' as a 'forward-looking expectation of risk based on objective reasons for such fear'.⁴³

The 'threshold of concern' or the level of risk required to substantiate a claim to refugee status is not stated in the Refugee Convention itself. The drafters agreed that an individual is a refugee if he or she has a 'justifiable' claim, 'good reasons' to flee, and 'reasonable grounds' for

Element in the Refugee Convention's Requirement of 'Well-Founded Fear' (2005) 26 *Michigan Journal of International Law* 505 (Hathaway and Hicks).

³⁸ Ibid.

³⁹ Refugee Appeal No 70074 (16 September 1996) at [27]. This is consistent with the writings of Grahl-Madsen who stated '[t]he adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his (sic) claim to refugee-hood, but that his (sic) claims should be measured with a more objective yardstick.' Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. I, p. 174.

⁴⁰ Oxford commentary at para 198.

⁴¹ Ibid at para 182.

⁴² Ibid at para 183.

⁴³ Ibid para 185 citing Hathaway and Hicks, above n36 at 509.

concern.⁴⁴ It has therefore been left to the courts to provide guidance on how to identify when the necessary level of risk is satisfied.

In 1987, the United States Supreme Court⁴⁵ and the United Kingdom House of Lords⁴⁶ adopted the standard of ‘reasonable possibility’ and ‘real and substantial danger of persecution’ or ‘a reasonable degree of likelihood’ respectively, and in 1989 the Canadian Federal Court of Appeal accepted the ‘reasonable chance’ test.⁴⁷

(a) The ‘real chance’ test

In *Chan v MIEA*, the High Court considered the precedents established in these jurisdictions and determined that fear of being persecuted is objectively well-founded if the evidence establishes there is a ‘real chance’ of the applicant being persecuted.⁴⁸ Mason CJ observed that various expressions have been used to describe ‘well-founded fear’, including ‘a reasonable degree of likelihood’, ‘a real and substantial risk’, ‘a reasonable possibility’ and ‘a real chance’. His Honour saw no significant difference in these expressions, but preferred the expression ‘a real chance’ because it conveyed the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it was an expression that had been explained and applied in Australia.⁴⁹

The High Court has emphasised that, although the expression ‘real chance’ clarifies the term ‘well-founded’, it should not be used as a substitute for the language of the Convention.⁵⁰

(i) What is ‘a real chance’?

A ‘real chance’ is a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance. According to Mason CJ in *Chan v MIEA*, the expression ‘a real chance’:

... clearly conveys the notion of a substantial, as distinct from a remote chance, of

⁴⁴ See Hathaway and Foster, above n6 at 110.

⁴⁵ *INS v Cardoza-Fonseca*, 480 U.S. 421 (1987) at 449, per Stevens J.

⁴⁶ *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] AC 958 (UKHL, 1987) at 996, per Lord Templeman, 1000, per Lord Goff. The third opinion authored by Lord Keith spoke instead of a “reasonable degree of likelihood” at 994.

⁴⁷ *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680 at 683.

⁴⁸ *Chan v MIEA* (1989) 169 CLR 379 per Mason CJ at 389, Toohey J at 406-7, Dawson J at 396-8, McHugh J at 428-9. Note that Gaudron J did not adopt the ‘real chance’ test. See discussion in Guide to Refugee Law, above n16 at paras 3-4 to 3-6.

⁴⁹ *Ibid* at 389.

⁵⁰ *MIEA v Guo* (1997) 191 CLR 559 at 572-3.

persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his (sic) fear, assuming that he (sic) has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.⁵¹

Dawson J stated:

... a fear can be well-founded without any certainty, or even probability, that it will be realized. ... A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent.⁵²

and Toohey J stated:

A “real chance” ... does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial.⁵³

Similarly, according to McHugh J:

[A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. ... an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he (sic) will be ... persecuted. Obviously, a far-fetched possibility of persecution must be excluded.⁵⁴

There is no requirement that an applicant be particularly at risk of persecution above others who are also at risk, only that there can be said to be a ‘real chance’ of the applicant being persecuted.⁵⁵

(ii) When is the threshold not satisfied?

The fact that an individual’s claims of persecution may be plausible or credible is not enough to

⁵¹ *Chan v MIEA* at 389.

⁵² *Ibid* at 397-398. See also *MIEA v Guo* (1997) 191 CLR 559 at 572.

⁵³ *Ibid* at 407.

⁵⁴ *Ibid* per McHugh J at 429. see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ.

⁵⁵ Guide to Refugee Law, above n16 at para 3-6. *Ponnundur v MIMA* [2000] FCA 91 (Burchett J, 11 February 2000) at [12], cited with approval by Heydon J in *SZQDG v The Honourable Nick Nicholls, Federal Magistrate & MIAC* [2012] HCATrans 96 (Heydon J, 27 April 2012).

establish a 'real chance' of persecution.⁵⁶ In *Chan v MIEA*, Dawson J stated:

"Well-founded" must mean something more than plausible, for an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him or her, to have no foundation.⁵⁷

A fear of persecution is not 'well-founded' if it is merely assumed or if it is mere speculation.⁵⁸ In *MIEA v Guo*, the Court said:

Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.⁵⁹

3. Assessment of a 'well-founded fear'

The process of establishing whether an applicant's fear is 'well-founded' involves making findings of fact based on an assessment of the applicant's claims and relevant country information, speculation as to the reasonably foreseeable future,⁶⁰ and a finding as to whether there is a 'real chance' that persecution will occur.⁶¹ It is for the applicant to provide evidence and argument necessary to satisfy the decision-maker of the relevant facts.⁶² There is no onus on the decision-maker to make the applicant's case for him or her.⁶³ However, the decision-maker has an obligation to consider all substantial and clearly articulated claims, relying on established facts, expressly made or clearly arising from the circumstances.⁶⁴ This refers to their claims to fear harm in the reasonably foreseeable future if the applicant were to return to his or

⁵⁶ Ibid.

⁵⁷ *Chan v MIEA* at 397.

⁵⁸ Guide to Refugee Law, above n16 at para 3-6.

⁵⁹ *MIEA v Guo* (1997) 191 CLR 559 at 572; cf *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 293.

⁶⁰ *Mok Gek Bouy v MILGEA* (1993) 47 FCR 1 at 66; see also *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Brennan CJ, Toohey, McHugh and Gummow JJ at 279 where the High Court referred with approval to the 'reasonably foreseeable future' test that the Tribunal had applied in *Chen Ru Mei v MIEA* (1995) 58 FCR 96.

⁶¹ *MIEA v Wu Shan Liang* (1996) 185 CLR 259 per Kirby J at 294. See discussion in Guide to Refugee Law, above n16 at para 3-7.

⁶² *MIMA v Lay Lat* (2006) 151 FCR 214 at [76].

⁶³ *Prasad v MIEA* (1985) 6 FCR 155 at [33].

⁶⁴ Guide to Refugee Law, above n16 at para 3-7 citing *SZTOO v MIBP* [2015] FCCA 1631 (Judge Nicholls, 17 June 2015) at [27], citing *Dranichnikov v MIMA* (2003) 197 ALR 389.

her home country.⁶⁵

(a) Giving the applicant the ‘benefit of the doubt’

Assessing whether an applicant has a ‘well-founded fear of being persecuted’ for one of the Convention reasons involves questions of degree. The decision-maker is entitled to weigh the material before it and make findings before it considers whether or not an applicant’s fear of persecution on a Convention ground is ‘well-founded’.⁶⁶ According to the Australian authorities, there is no obligation to give the applicant the ‘benefit of the doubt’.⁶⁷ However, if a finding is not made with sufficient confidence, the decision-maker may need to consider the possibility that that finding is incorrect when determining whether an applicant has a well-founded fear.⁶⁸ The High Court has explained the way the ‘real chance’ test should be applied to the facts as found. The Court in *MIEA v Guo* explained that if, for example, the decision-maker finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a ‘well-founded fear’ of future persecution.⁶⁹ This is commonly known as the ‘what if I am wrong?’ approach to the ‘real chance’ test.⁷⁰

(b) ‘What if I am wrong?’ test

The ‘what if I am wrong?’ test was concisely stated by the Full Federal Court in *MIMA v Epeabaka*:

[W]hen dealing with the claims of an asylum seeker, the available evidence might not imbue findings so made with the degree of confidence that justif[ies] the conclusion that an asylum seeker does not have a well-founded fear of being persecuted . . . It is necessary to recognise the risk of error . . . and to make allowance for it . . . “Evaluation of chance . . . cannot be reduced to scientific precision. That is why it is necessary, notwithstanding particular findings, for the decision-maker in the end to return to the question: ‘What if I am

⁶⁵ Ibid.

⁶⁶ *MIEA v Guo* (1997) 191 CLR 559 at 575.

⁶⁷ Guide to Refugee Law, above n16 at para 3-10. See *SZRG v MIAC* (2013) 139 ALD 299 at [55]-[60]; *SZQMB v MIAC* [2012] FMCA 24 (Nicholls FM, 12 January 2012) at [48]-[51]. Australian decision-makers should follow the approach in *MIEA v Guo* (1997) 191 CLR 559. Note that the *UNHCR Handbook* above n8 makes reference (at [203]-[204]) to giving an applicant the benefit of the doubt in circumstances where an applicant is unable to prove aspects of his or her case but is generally credible.

⁶⁸ See *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220.

⁶⁹ *MIEA v Guo* (1997) 191 CLR 559, at 576. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at [83].

⁷⁰ Guide to Refugee Law, above n16 at para 3-10. *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Kirby J at 293.

wrong?”⁷¹

This test was further explained by the Full Federal Court in *MIMA v Rajalingam*.⁷² Justice Sackville (North J agreeing) held that there may be circumstances in which the decision-maker must take into account the possibility that alleged past events occurred, even though it finds that those events probably did not occur.⁷³

However, if a decision-maker has no real doubt that its findings as to past events are correct, it is not required to consider whether its findings might be wrong.⁷⁴ Similarly, the ‘what if I am wrong?’ approach is not engaged in circumstances where a decision-maker is unable to reach a sufficient state of satisfaction on the evidence to make any factual findings, due to a lack of detail and substance in the applicant’s claims.⁷⁵

Conclusion

Australia, like the many other contracting states to the Refugee Convention, has confronted the issues involved in its interpretation, particularly the meaning of the requirement of a ‘well-founded fear’, and has reached very similar and compatible conclusions to the UNHCR, respected academics and courts in other common law jurisdictions. When the predicament of the refugee is given primacy in determining the meaning of the concepts central to the refugee definition, it is readily apparent that applying overly strict domestic rules of evidence or civil standards of proof, such as ‘the balance of probabilities’, or ‘more likely than not’ are inappropriate.⁷⁶ This is particularly evident when taking into account the tragic, if not fatal, consequences for the applicant of a wrong assessment and their *refoulement* to persecution. It is for these reasons that the Australian approach to ‘well-founded fear’ is one which adopts a relatively low threshold of risk, reflecting the inherent uncertainties of refugee status assessment and the grave risk and consequences of error.

Linda Kirk

⁷¹ *Minister for Immigration and Multicultural Affairs v Epeabaka* (1998) 84 FCR 411 at 419–20 [18], quoting *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 293, per Kirby J.

⁷² Discussed in Guide to Refugee Law, above n16 at para 3-10. *MIMA v Rajalingam* (1999) 93 FCR 220.

⁷³ *Ibid* at 239.

⁷⁴ Guide to Refugee Law, above n16 at para 3-10. In *MIEA v Guo* (1997) 191 CLR 559, the High Court stated that the Tribunal appeared to have no real doubt that its findings as to the past and the future were correct, and held that ‘[g]iven its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong’: at 576.

⁷⁵ *Ibid*, citing *SZSMQ v MIBP* [2013] FCCA 1768 at [58]-[60].

⁷⁶ Allan Mackey, Observations on Refugee Status Determination in Japan, and some New Zealand, United Kingdom, and European Union comparisons’ Discussion Paper for Peace-building Studies, No.10, Spring 2007 at 52.

24 July 2017

